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Proposed Regulations to Implement CCPA Webinar Q&A

WEBINAR Q&A | October 23, 2019

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On October 23, 2019, Pepper attorneys Sharon R. Klein and Alex C. Nisenbaum hosted a webinar (available at https://www.pepperlaw.com/events/webinars/proposed-regulations-to-implement-ccpa-2019-10-23/) to discuss the proposed regulations implementing the California Consumer Privacy Act (CCPA) and how businesses should respond in advance of the January 1 effective date. There were a number of questions from the audience that Pepper addressed after the webinar was completed. Please see the answers below.

1. Is selling an accounts receivable that contains personal information (PI) considered selling PI?

Under the CCPA, "sale" is broadly defined as "selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in

writing, or by electronic or other means, a consumer's personal information by the business to another business or a third party for monetary or other valuable consideration." However, under the CCPA, a business does not "sell" personal information if the business transfers personal information to a third party as an asset that is part of a merger, acquisition, bankruptcy or other transaction in which the third party assumes control of all or part of the business. Thus, while the personal information in the accounts receivable is not the purpose of the sale, disclosing the information for "other valuable consideration" may be considered a sale depending on whether the accounts receivable is an "asset."

2. **Are we supposed to run the notice through a Flesch Readability Scale testing?**

   Neither the CCPA nor the proposed regulations require a Flesch Readability Scale testing for notices. The proposed regulations only require notices to be (1) in plain, straightforward language, avoiding technical or legal jargon; (2) noticeable and readable, including on smaller screens if applicable; (3) available in languages in which the business ordinarily provides contracts disclaimers, sale announcements, and other information to consumers; (4) accessible to consumers with disabilities; and (5) visible or accessible where consumers will see the notice before any personal information is collected. With regards to accessibility, you should also be aware that California state and federal courts require compliance with the Americans with Disabilities Act (at least with respect to websites tethered to a brick-and-mortar location) and the state-law equivalent known as the Unruh Act.

3. **Just to clarify, a mortgage lender that does not sell consumer information would still be required to have the opt out for the sale of consumer data on its website?**

   The proposed regulations appear to require a link in a business's privacy policy even if the business does not "sell" personal information under the CCPA. The proposed regulations require a *business* to post a clear and conspicuous link titled "Do Not Sell My Personal Information" or "Do Not Sell My Info" on its *website or mobile application*, while requiring a *business that sells personal information* to post the link on its *website homepage or the download or landing page of its mobile application*.

   Additionally, while the proposed regulations exempt businesses that do not sell personal information from providing notice of a right to opt out of the sale of personal information, the proposed regulations do not exempt these businesses from providing

methods for submitting requests to opt out. Thus, businesses that do not sell personal information should still provide an opt-out notice with two or more designated methods for submitting requests to opt out, including, at a minimum, an interactive webform accessible via a clear and conspicuous link titled "Do Not Sell My Personal Information" or "Do Not Sell My Info" on the business's website or mobile application.

4. As of today, which business are covered by CCPA? I know size of entity has changed.

The proposed regulations have not changed the definition of "business" under the CCPA. Covered businesses are for-profit businesses that (1) do business in California; (2) collect personal information of California residents (or have this information collected on their behalf); (3) jointly or alone determine the purposes and means of the processing of that information; and (4) satisfy one or more of the following thresholds:

(a) have annual gross revenues in excess of $25 million dollars

(b) annually buy, sell or receive or share for commercial purposes the personal information of 50,000 or more consumers, households or devices

(c) derive 50 percent or more of their annual revenues from selling consumers' personal information.

Entities that are controlled or control a covered business and share common branding with the business are also covered.

5. Can you elaborate on the definition of "sale" and when a disclosure is or is not a "sale" under CCPA?

"Sale" is broadly defined as "selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer's personal information by the business to another business or a third party for monetary or other valuable consideration." Thus, even if there was no disclosure of personal information for money, any disclosure for any kind of valuable gain, including passing personal information through cookies, is considered a sale.

However, the CCPA excludes certain disclosures from the definition of "sale." These disclosures are those that occurred (1) at the direction of the consumer; (2) to inform another business that the consumer has opted out of the sale of their information; (3) with a service provider if the service provider's retention, use or disclosure of the personal information is restricted by a written contract containing specific CCPA-mandated language regarding the service provider's further collection, use or disclosure of the personal information; and (4) as part of a merger, acquisition, bankruptcy or other transaction in which a third party assumes control of all or part of the business.

6. Does the CCPA apply to employee data?

The CCPA applies to "consumers," which is defined as California residents. This would include employees, job applicants and independent contractors who reside in California. However, the recently passed amendments exempt from most CCPA provisions personal information that is collected by a business about job applicants, employees, owners, directors, officers and contractors, provided that the information is collected and used by the business solely within the context of that employment or contractor relationship. The amendments similarly exempt personal information used for emergency contact purposes and the administration of employment benefits. However, these exemptions only apply until January 1, 2021, and the CCPA still requires businesses to provide employees, job applicants and independent contractors with information on the categories of personal information the business collects about them. Additionally, employees, job applicants and independent contractors may sue under the CCPA's private right of action in the event of a data breach. We have drafted articles on the amendments and the employee, job applicant and independent contractor notice requirement, which you may find online at https://www.pepperlaw.com/publications/latest-california-consumer-privacy-act-amendments-impact-business-compliance-initiatives-2019-09-16/ and https://www.pepperlaw.com/publications/deadline-looms-for-employers-to-provide-ccpa-notices-2019-10-28/, respectively.