

CCPA Housekeeping Reminders

Businesses should prepare now for privacy policy updates.

December 17, 2020

Background

2020 was a busy year on the global data privacy front, and marks the first full year of the California Consumer Privacy Act (CCPA). Businesses that posted their CCPA Privacy Policy in January 2020 will need to complete their annual update in January 2021.

This Briefing details that required update and other developments regarding the CCPA.

Privacy Policy Updates

The CCPA includes a plethora of prescriptive disclosure requirements for Privacy Policies, some of which must be updated at least once every 12 months.

Many businesses updated their Privacy Policies in January 2020, to coincide with the CCPA's coming into force, so for those businesses, this annual update is just around the corner.

The CCPA requires businesses to review and update disclosures so that they accurately reflect the previous 12 months in relation to the categories of personal information that a business has:

- Collected
- Disclosed for a business purpose
- Sold

If a business has changed its data privacy practices, it should consider whether those changes are material, and if so what obligations to notify and obtain consent from individuals might arise in relation to those changes.

Once a business has a renewed Privacy Policy ready, the business should post it with a new last updated date. Those businesses whose Privacy Policies have a last updated date more than 12 months old risk attracting the attention of California's Attorney General.

User Rights Requests Metrics Reporting

The CCPA Regulations (as reflected in the latest version, detailed below) include requirements for businesses that buy, receive, sell, or share the personal information of 10 million or more California residents in a calendar year to report certain metrics either in the Privacy Policy or elsewhere online with a link in their Privacy Policy. These businesses must publish, by July 1, 2021, the below metrics for each category of request received by the business, i.e., requests: (i) to know; (ii) to delete; and (iii) if applicable, to opt out of sale:

- Total requests received
- Total requests complied with *in whole*
- Total requests complied with *in part*
- Total requests denied
- Average number of days (median or mean) within which the business substantively responded to requests
- Optional: Requests denied in whole or in part because the request was not verifiable, was not made by a consumer, called for information exempt from disclosure, or was denied on other grounds

The obligation relates to the previous calendar year, therefore, while the deadline to publish the first metrics is July 1, 2021, the applicable calendar year is 2020. Therefore, businesses to which the obligation applies are advised to be prepared and to be compiling their 2020 metrics early, as well as determining how they will display those metrics. Given that these metrics must be publicly available, they are likely to generate some interest from regulators, consumers, and privacy enthusiasts. Further, for some businesses, these metrics may be sensitive, for example if the business has received a surprisingly large volume of requests or has denied a large proportion of requests. Therefore, particularly depending on the nature of the business, Latham recommends businesses consider this issue now, in order to plan for publication and any subsequent attention.

Fourth Set of Modifications to the CCPA Regulations

On December 10, 2020, the Office of the Attorney General (OAG) published a fourth set of proposed modifications to the CCPA Regulations. The OAG previously published a third set of proposed modifications on October 12, 2020, and received around 20 comments in response. This fourth set of proposed modifications responds to the comments and/or clarifies and conforms the proposed regulations to existing law and is likely to be the final version.

The fourth set of modifications includes minor revisions (including some grammar modifications) and substantive modifications. The latter are as follows:

- Most significantly, the OAG has reintroduced certain parameters regarding methods for individuals to opt out of sale that were in earlier drafts of the Regulations, namely that a business' opt-out method:
 - Be “easy for consumers to execute” and “require minimal steps”
 - Not be designed or have the “substantial effect of subverting or impairing a consumer’s choice to opt out”

In addition, the OAG has included the following five new illustrative examples:

1. A business' process for an individual to submit a request to opt *out* should not involve more steps than its process for an individual to opt (back) *in* after having previously opted *out*. The number of steps to opt out is measured from when the consumer clicks on the “Do Not Sell My Personal Information” link to completion of the request and the number of steps to opt (back) *in* is measured from the first indication by the individual to the business of their interest to opt in to completion of the request.
 2. A business should not use confusing language, such as double-negatives (e.g., “Don’t Not Sell My Personal Information”) for the opt out.
 3. Except as permitted by the CCPA Regulations, a business should not require individuals to click through or listen to reasons why they should not submit a request to opt out before confirming their request.
 4. The process for submitting a request to opt out should not require the individual to provide personal information not necessary to implement the request.
 5. Upon clicking the “Do Not Sell My Personal Information” link, the business should not require the individual to search or scroll through the text of a privacy policy or similar document or webpage to locate the mechanism for submitting the opt out request.
- For businesses that collect personal information from consumers offline that they subsequently sell, the OAG added a requirement to provide consumers the following via an offline method:
 - Notice of their right to opt out
 - Instructions on how to submit a request to opt out

The OAG has also provided the following two illustrative examples of how businesses may provide such opt-out information:

1. A business that sells personal information collected from individuals in a brick-and-mortar store may inform individuals of their right to opt out by directing them to where the opt-out information can be found online, by either of the following methods:
 - a. On the paper forms they use to collect the personal information
 - b. By posting signage in the area where the personal information is collected
 2. A business that sells personal information that it collects over the phone may inform individuals of their right to opt out orally during the call when the information is collected.
- The OAG also reintroduced the concept of a universal opt-out button (to take individuals to the webpage to which the individual would be directed if they clicked on the business' "Do Not Sell My Personal Information" link). This opt-out button is *in addition to* posting the notice of the right to opt out and the "Do Not Sell My Personal Information" link, but not a replacement. The OAG provides specific instructions on where the button must be placed, the size of the button, and the link to which the button must take consumers.
 - Lastly, regarding a consumer's use of authorized agents, the OAG confirmed that consumer-signed permission is required, and that businesses may require the consumer to directly verify (a) their identity and (b) that the agent has their permission to submit a request.

The OAG is accepting written comments regarding the fourth set of proposed modifications to the CCPA Regulations until 5:00 p.m. PT on December 28, 2020.

Latham & Watkins will continue to monitor these issues.

Contacts

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