



Hogan
Lovells

California Consumer Privacy Act: What you need to know *now*

July 24, 2018

Introductions



Mark Brennan

Partner, Washington, D.C.

Mark Brennan leads an integrated technology practice that spans privacy, communications, and consumer protection issues. He advises on connected devices, artificial intelligence, cloud offerings, tech policy, and other cutting-edge challenges and is also well-known for his victories on Telephone Consumer Protection Act issues. Mark also leads Hogan Lovells' U.S. LGBT+ affinity group and is a chair of the firm's Pride+ global ally network.



Bret Cohen

Partner, Washington, D.C.

Bret Cohen helps technology and brick-and-mortar businesses comply with privacy, cybersecurity, Internet, and consumer protection laws. He also represents companies in litigation and government investigations in these areas. As a lawyer and technologist, Bret has a knack for translating legal standards into practical technical requirements that are easy for clients to use.



Harriet Pearson

Partner, Washington, D.C. and New York

Drawing on her longstanding experience as one of the United States' first chief privacy officers, since joining Hogan Lovells in 2012 Harriet Pearson has been advising companies and boards on global regulatory compliance, cyber and data risk governance, and breach investigations and enforcement. An engineer prior to studying law, Harriet graduated with honors from the UCLA School of Law and Princeton University.



Tim Tobin

Partner, Washington, D.C.

Tim Tobin has focused on privacy, data security, and cybersecurity law since the beginning of his legal career more than 15 years ago. Whether in marketing and advertising, contracting and deals, the development of new products and technologies, cross-border data sharing, or within the workplace, he helps clients understand their obligations to protect data and advises on how they can lawfully collect, use, and share personal information.

Today's agenda

1 How did we get here?

2 Who and what are covered by the CCPA?

3 What does the CCPA require?

4 How does the CCPA compare to the GDPR?

5 What questions are businesses asking about CCPA?

How did we get here?

- **Years of sustained regulatory/policy focus**
- **Escalating mainstream privacy/security headlines**
- **Congressional repeal of broadband privacy rules**
- **Global privacy and security trends**

How did we get here?

- **Californians for Consumer Privacy ballot initiative**
 - Burdensome obligations
 - Extremely limited ability to fix/revise if passed
 - Collected enough signatures to be on the November 2018 ballot

How did we get here?

- **Rushed response from the CA legislature**
 - Assembly Bill 375
 - Text first published on June 21
 - Signed into law on June 28

Who must comply with the CCPA?

- **Businesses**

- For-profit business entities that (1) collect consumer personal information, (2) determine the purposes and means of processing such information, (3) do business in California, (4) and meet at least one of the following criteria: (a) annual gross revenue >\$25M, (b) annually buy, sell, receive, or share for commercial purposes the personal information of $\geq 50k$ consumers, households, or devices, or (c) derive $\geq 50\%$ of annual revenue from selling consumer personal information

- **Service providers**

- For-profit business entities that process information on behalf of a business
- Use of personal information received from the business must be limited by contract

- **Third parties**

- Any person other than the business that collected the personal information or a person who receives personal information from a business pursuant to certain contractual limitations

What types of data are covered by the CCPA?

- **Consumer personal information**

- **Consumers**

- Natural persons who are residents of California

- **Personal information**

- “[I]nformation that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household,” such as:
 - Identifiers
 - Commercial information (purchase histories, consuming tendencies)
 - Internet or other electronic network activity (browsing history, search history, interactions with apps, websites, or advertisements, etc.)
 - Geolocation data
 - Inferences drawn from other personal information to create a consumer profile describing preferences, characteristics, behavior, etc.

What core activities are covered by the CCPA?

- **Collection of personal information**
 - “[B]uying, renting, gathering, obtaining, receiving, or accessing any personal information pertaining to a consumer by any means”
- **Sale of personal information**
 - “[S]elling, 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”
- **Disclosure of personal information for business purposes**
 - Providing personal information to another person for “operational purposes, or other notified purposes, provided that the use of personal information shall be reasonably necessary and proportionate to achieve the operational purpose for which the personal information was collected or processed or for another operational purpose that is compatible with the context in which the personal information was collected”

What are the key requirements of the CCPA?

- **Public disclosures (website/privacy policy)**
 - Description of CCPA rights; categories of personal information that are collected, sold, or disclosed for business purposes in the preceding 12 months
- **Just-in-time disclosures (at or before the time information is collected)**
 - Categories of personal information to be collected; purposes for which personal information will be used
- **Access rights**
 - Consumers entitled to receive: person-specific details about his/her personal information that has been collected, sold, or disclosed for business purposes, as well as the “specific pieces of personal information” that the business has collected
- **Deletion rights**
 - Upon consumer request, businesses must delete a consumer’s personal information unless certain exceptions apply

What are the key requirements of the CCPA? (cont.)

- **The right to opt out of the sale of personal information**
 - Consumers have the right to opt out of a business’s sale of their personal information
 - Businesses must place a “Do Not Sell My Personal Information” button/link on their homepages to facilitate this right
- **Opt-in consent for the sale of minors’ (under 16) personal information**
 - Businesses cannot sell personal information of a consumer under the age of 16 without affirmative consent
- **Limitations on third parties’ subsequent sale of personal information**
 - Third parties that receive personal information through a sale cannot sell that information unless the consumer has received notice and had an opportunity to opt out of the sale

What are the key requirements of the CCPA? (cont.)

- **Anti-discrimination**

- Business are prohibited from ‘discriminating’ against a consumer who exercises rights under the CCPA
- Discrimination includes offering different prices, qualities of goods, or levels of service (or suggesting that such will occur if CCPA rights are exercised)
- Business are permitted to offer different prices or levels of service if the difference is “reasonably related to the value provided to the consumer by the consumer’s data”

- **Financial incentives**

- Businesses are permitted to offer “financial incentives” for the collection, sale, or deletion of personal information

How is the CCPA enforced?

- **California Attorney General enforcement**
 - Businesses have 30 days to cure alleged violations
 - Civil penalties of up to \$7,500 per intentional violation
- **Data breach private right of action**
 - Consumers whose nonencrypted or nonredacted personal information is subject to unauthorized access, exfiltration, theft, or disclosure as a result of a business's violation of its duty to implement and maintain reasonable security procedures may bring a private action seeking actual damages or statutory damages between \$100 and \$750 per incident
 - This right only applies to a limited set of personal information (e.g., social security number, financial account number and passcode, medical information)
 - A consumer must provide notice of his or her action to the AG, who can prosecute the violation, allow the private action to proceed, or inform the consumer that he or she shall not proceed with the action
- **California AG may issue rules on an array of CCPA matters**

How does the CCPA compare to the GDPR?

Topic area	EU General Data Protection Regulation	California Consumer Privacy Act
Scope	Applies to a “controller” or “processor”: <ul style="list-style-type: none"> Established in the EU Established outside of the EU, and either (1) offering goods/services to EU; or (2) monitoring behavior in EU 	<ul style="list-style-type: none"> A for-profit “business” that does business in CA and meets revenue / volume thresholds for California resident data A business is defined similarly to an EU “controller” Are “service providers” (“processors”) directly liable? Likely
Definition of personal data/information	<ul style="list-style-type: none"> Any data relating to an identified or identifiable <i>natural person</i> 	<ul style="list-style-type: none"> Data “that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular <i>consumer or household</i>”
Lawful processing requirements	<ul style="list-style-type: none"> Must have a valid legal basis for all processing of personal data 	<ul style="list-style-type: none"> N/A, but “business purposes” are specified as presumptively valid
Notice requirements	<ul style="list-style-type: none"> Must provide data subjects with detailed notice about the collection, use, disclosure of personal data, as well as retention period, individual rights, information about lawful bases for processing, identity of controller/DPO/representative, etc. 	<ul style="list-style-type: none"> Must disclose certain information about the collection, sale, and disclosure of personal information in privacy policy/on website Must provide just-in-time disclosures at or before the collection of personal information “Do Not Sell My Personal Information” button

How does the CCPA compare to the GDPR? (cont.)

Topic area	EU General Data Protection Regulation	California Consumer Privacy Act
Right to access	<ul style="list-style-type: none"> • Must provide data subjects with “access to [their] personal data,” as well as specific details about processing (e.g., purposes of processing, sources of information, etc.) • Exceptions: (a) can verify identity, (b) manifestly unfounded or excessive requests, (c) adversely affects the rights and freedoms of others 	<ul style="list-style-type: none"> • Must provide consumers with details about collection, sale, and disclosure of their personal information (e.g., categories of personal information sold to different categories of third parties), as well as “specific pieces of personal information” • Exceptions: (a) can verify identity, (b) manifestly unfounded or excessive requests
Right to data portability	<ul style="list-style-type: none"> • Where basis for processing is consent or legitimate interests, data subjects have the right to receive personal data <u>they have provided to the controller</u> “in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance” 	<ul style="list-style-type: none"> • If a business responds to a request <u>to access</u> personal information via electronic means, “the information shall be in a portable and, to the extent technically feasible, in a readily useable format that allows the consumer to transmit the information to another entity without hindrance”
Right to delete information	<ul style="list-style-type: none"> • Data subjects have a right to have their personal data deleted where (a) “no longer necessary,” (b) they withdraw consent, (c) processing is unlawful, or (d) if processing is based on legitimate interests, there are no “overriding legitimate grounds” • Exceptions: (i) continued lawful basis for processing, (ii) exercising right of expression, (iii) compliance with EU law, (iv) establishment / exercise / defense of legal claims, (v) public health exception, (vi) archiving / research exception 	<ul style="list-style-type: none"> • Consumers have a generally applicable right to have their personal information deleted • Exceptions: (i) complete a transaction / perform a contract, (ii) detect / protect against / prosecute security incidents or illegal activity, (iii) debug and fix errors, (iv) exercise free speech or other legal rights, (v) research exception, (vi) “solely internal uses that are reasonably aligned” with consumer expectations, (vii) compliance with law
Right to object	<ul style="list-style-type: none"> • Data subjects have a right to object to the broader processing of their personal data in certain circumstances 	<ul style="list-style-type: none"> • Consumers have a right to opt out of the “sale” of their personal information; greater control over data-sharing

How does the CCPA compare to the GDPR? (cont.)

Topic area	EU General Data Protection Regulation	California Consumer Privacy Act
Time for responding to individual rights requests	<ul style="list-style-type: none"> • “Without undue delay” and in any event within one month • Can be extended by two months “where necessary” 	<ul style="list-style-type: none"> • Within 45 days of receiving a verifiable request • Can be extended by 45 days “when reasonably necessary” – or “up to 90 additional days where necessary”?
Cross-border transfer requirements	<ul style="list-style-type: none"> • Transfers of personal data outside of the EU must comply with safeguard requirements (e.g., Privacy Shield, SCCs) 	<ul style="list-style-type: none"> • N/A
Fines	<ul style="list-style-type: none"> • Infringements may result in administrative fines up to €20 million or 4% of total worldwide annual turnover, whichever is greater • Private right of action for actual damages 	<ul style="list-style-type: none"> • The California Attorney General may impose civil penalties of up to \$7,500 per intentional violation. There is no cap on the total amount of the penalty • Private right of action for data breaches (\$100-\$750) • But 30 day cure period (for AG or private actions)

What questions are businesses asking about CCPA?

1. Will the law be amended? Should we wait for the outcome of that process?
2. The law does not go into effect until January 2020. Why should I worry about this now?
3. What are some specific compliance steps on which my company should focus?
4. If my company or its data is regulated by one of the sector-specific laws listed as providing an exception, do we still need to comply with the CCPA?
5. How might the CCPA disrupt my data-sharing relationships, such as with respect to the use of third-party cookies?

What questions are businesses asking about CCPA? (cont.)

6. How do we reconcile the CCPA provisions for minors with our COPPA compliance?
7. Do employers need to comply for their employee data?
8. Can you provide some additional insights on the impact of the anti-discrimination provision?
9. How should my company address seemingly irreconcilable conflicts in the CCPA?
10. What about requirements that in certain situations are likely impossible to meet?

Questions and answers



Key Hogan Lovells CCPA contacts



Mark Brennan
Partner, Washington, D.C.
+1 202 637 6409
mark.brennan@hoganlovells.com



Melissa Bianchi
Partner, Washington, D.C.
+1 202 637 3653
melissa.bianchi@hoganlovells.com



Bret Cohen
Partner, Washington, D.C.
+1 202 637 8867
bret.cohen@hoganlovells.com



Scott Loughlin
Partner, Washington, D.C.
+1 202 637 5565
scott.loughlin@hoganlovells.com



Michael Maddigan
Partner, Los Angeles
+1 310 785 4727
michael.maddigan@hoganlovells.com



Harriet Pearson
Partner, Washington, D.C. and
New York
+1 202 637 5477, Washington, D.C.
+1 212 918 5548, New York
harriet.pearson@hoganlovells.com



Edith Ramirez
Partner, Washington, D.C. and
Los Angeles
+1 202 637 5509, Washington, D.C.
+1 310 785 4600 Los Angeles
edith.ramirez@hoganlovells.com



Timothy Tobin
Partner, Washington, D.C.
+1 202 637 6833
tim.tobin@hoganlovells.com



Marcy Wilder
Partner, Washington, D.C.
+1 202 637 5729
marcy.wilder@hoganlovells.com



W. James Denvil
Senior Associate, Washington, D.C.
+1 202 637 5521
w.james.denvil@hoganlovells.com



Britanie Hall
Senior Associate, Washington, D.C.
+1 202 637 3669
britanie.hall@hoganlovells.com



Ryan Woo
Associate, Washington, D.C.
+1 202 637 4993
ryan.woo@hoganlovells.com



www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing.. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.