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CCPA RULES & REGULATIONS: A SUMMARY OF KEY REQUIREMENTS & SOME PRACTICAL IMPLICATIONS

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Pay Attention If You….

- Collect consumers' personal information, determine the purposes and means of the processing of consumers' personal information, do business in the State of California, and satisfy one or more of the following thresholds:

  A. Have annual gross revenues in excess of twenty-five million dollars ($25,000,000).
  B. Alone or in combination, annually buy, receive for the business' commercial purposes, sell, or share for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices.
  C. Derive 50 percent or more of your annual revenues from selling consumers' personal information.

- "Commercial purposes" means to advance a person's commercial or economic interests.
- Civil Code Section 1798.140

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Office of Attorney General Announcement

- Final Regulations Effective August 14, 2020.
- History of edits to the Regulations.
  - Second Modified Proposed Regulations (Mar. 11, 2020)
  - First Modified Proposed Regulation (Feb. 10, 2020)
  - Proposed Regulations (Original proposal October 11, 2019)
- "Non-substantive" changes in final Regulations:
  - Deleted re-notice requirement: *If the business intends seeks to use a consumer's previously collected personal information for a purpose that* ***materially different*** *than what was not previously disclosed to the consumer in the notice at collection, the business shall directly notify the consumer of this new use*. Section 999.305. Notice at Collection, Subsection (a)(5).
  - Deleted *offline notice requirement for in-person businesses*. Section 999.306. Notice of Right to Opt-Out, Subsection (b)(2).
  - Deleted *instruction for easy opt-out mechanism with minimal steps*. Section 999.315. Requests to Opt-Out, Subsection (c).
- Notice of Violation have been mailed, but, no enforcement actions as of yet.

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PENALTIES & REMEDIES

- Civil Penalties
- Private Right of Action
  - The limitations on the CCPA's private right of action are clear. Section 1798.150(a)(1) states:
    - Any [California resident] consumer whose nonencrypted and nonredacted personal information … is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information may institute a civil action.
  - Civil actions maybe be instituted for actual or statutory damages ("not less than one hundred dollars ($100) and not greater than seven hundred and fifty ($750) per consumer per incident or actual damages"), injunctive relief and other relief the court deems proper.

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§ 999.305 Notice at Collection of Personal Information

- Specific notice requirements:
  - [The notice & Privacy Policy shall] Be **reasonably accessible** to consumers with disabilities.
    - Generally recognized industry standards, such as the Web Content Accessibility Guidelines, version 2.1 of June 5, 2018, from the World Wide Consortium.
    - The business shall provide information on how a consumer with a disability may access the notice in an alternative format.
- When a business collects personal information over the telephone or in person, it may provide the **notice orally**.
- When a business collects personal information from a mobile device for a purpose that the consumer would not reasonably expect, it shall provide a **just-in-time notice** containing a summary of the categories of personal information being collected and a link to the full notice.
- The notice at collection of employment-related information may include a link to, or paper copy of, a business's privacy policies for job applicants, employees, or contractors in lieu of a link or web address to the business's privacy policy for consumers.

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§ 999.308. Privacy Policy

- Specific requirements:
  - A mobile application may include a link to the privacy policy in the application's settings menu.
  - Be available in an additional a format that allows a consumer to print it out as a separate document.
  - Provide instructions on how an authorized agent can make a request on the consumer's behalf.

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§ 999.308. Privacy Policy

- General requirements:
  - Identify the categories of consumers' personal information the business has collected about consumers in the preceding 12 months.
  - Identify the categories of personal information, if any, that the business has disclosed for a business purpose or sold to third parties for a business or commercial purpose in the preceding 12 months.
    - Service Providers – will discuss on later slide.
    - Third Parties.
    - "Business purpose" means: the use of personal information for the business' or a service provider's 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.
  - For each category of personal information identified, provide the categories of third parties to whom the information was disclosed or sold.

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§ 999.312. Methods for Submitting Requests to Know and Requests to Delete

- A business shall consider the methods by which it primarily interacts with consumers when determining which methods to provide for submitting requests to know and requests to delete.
- Online businesses.
  - A business that operates exclusively online and has a direct relationship with a consumer shall only be required to provide an email address for submitting requests to know.
- All other businesses shall provide two or more designated methods for submitting requests to know, including, at a minimum, a toll-free telephone number.
  - Other acceptable methods for submitting these requests include, but are not limited to, a designated email address, a form submitted in person, and a form submitted through the mail.

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§ 999.313. Responding to Requests to Know and Requests to Delete

- In responding to a request to know, a business is not required to search for personal information if all the following conditions are met:
  a. The business does not maintain the personal information in a searchable or reasonably accessible format;
  b. The business maintains the personal information solely for legal or compliance purposes;
  c. The business does not sell the personal information and does not use it for any commercial purpose; and
  d. The business describes to the consumer the categories of records that may contain personal information that it did not search because it meets the conditions stated above.

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§ 999.313. Responding to Requests to Know and Requests to Delete

- For requests to delete, if a business cannot verify the identity of the requestor, the business may deny the request to delete. The business shall inform the requestor that their identity cannot be verified. If the business sells personal information and the consumer has not already made a request to opt out, the business shall ask the consumer if they would like to opt out of the sale of their personal information.
- In responding to a request to delete, a business shall inform the consumer whether or not it has complied with the consumer's request.
- If the business complies with the consumer's request, the business shall inform the consumer that it will maintain a record of the request as allowed by Civil Code section 1798.105, subdivision (d). A business may retain a record of the request for the purpose of ensuring that the consumer's personal information remains deleted from the business's records.

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§ 999.314. Service Providers

Definition:

- An entity that "processes information on behalf of a business and to which the business discloses a consumer's personal information for a business purpose pursuant to a written contract, provided that the contract prohibits the entity receiving the information from retaining, using, or disclosing the personal information for any purpose other than for the specific purpose of performing the services specified in the contract for the business."

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§ 999.314. Service Providers – Some Scenarios

- **A business that provides services to a person or organization that is not a business**, and that would otherwise meet the requirements and obligations of a "service provider" under the CCPA and these regulations, shall be deemed a service provider for purposes of the CCPA and these regulations.

- To the extent that a business directs a second business to collect personal information directly from a consumer on the first business's behalf, and the second business would otherwise meet the requirements and obligations of a "service provider", **the second business shall be deemed a service provider of the first business for purposes of the CCPA and these regulations**.

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§ 999.314. Service Providers – Some Requirements

- A service provider shall not retain, use, or disclose personal information obtained in the course of providing services except:
  1) To perform the services specified in the written contract with the business that provided the personal information;
  2) To retain and employ another service provider as a subcontractor, where the subcontractor meets the requirements for a service provider under the CCPA and these regulations;
  3) For internal use by the service provider to build or improve the quality of its services, provided that the use does not include building or modifying household or consumer profiles, or cleaning or augmenting data acquired from another source;
  4) To detect data security incidents, or protect against fraudulent or illegal activity; or
  5) For the purposes enumerated in Civil Code section 1798.145, subsections (a)(1) through (a)(4).

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Additional Guidelines in Regulations

- Training & Record-Keeping
  - Information maintained for record-keeping purposes shall not be used for any other purpose except as reasonably necessary for the business to review and modify its processes for compliance with the CCPA and these regulations. Information maintained for record-keeping purposes shall not be shared with any third party.
- Household Information
  - Individual verification unless the household has a password-protected account with the business.
  - Parental consent for consumers under 13.
- Authorized Agents
- Verification guidelines
  - **Reasonable high degree of certainty** requirement for requests to know specific pieces of personal information.
  - Matching at least three pieces of personal information provided by the consumer with personal information maintained by the business. Plus a declaration under penalty of perjury.

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Practical Implications & Challenges

- Are companies ready?
  - Many legal departments are still facing challenges and many businesses are not yet where they need to be in terms of compliance.
  - Waiting game – how aggressive will the AG's office be with enforcement?
- Misunderstandings or Confusion
  - How far of a reach does the CCPA have? Is Notice or a Privacy Policy enough? How do I treat non-compliant requests from consumers? How do I verify a consumer's request?
  - Are we selling information if we are sharing with affiliates? What about third-party cookies?
  - Do we need to amend every single service provider contract? What if they don't sign?
  - How do I calculate the value of consumer data?
- Training of the business/privacy manager and staff.

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Who Put the Cookie in the Cookie Jar?

- Certain cookies may qualify as “personal information” under the CCPA, since the CCPA defines “unique personal identifiers,” to include “cookies” that are used to “recognize a . . . device that is linked to a consumer or family, over time and across different services.”

- The purpose of the cookie banner under the CCPA is to allow an opt out where the cookies collect personal information that is sold to a third party. The CCPA does not require a cookie banner when a company uses first party session cookies, and does not require a company to provide an opt-out option for essential cookies, even those placed by third parties on behalf of the business (i.e., service providers).

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A Special Note on Cookies

Verify that the contract fits the definition of a "service provider." If the analytics cookies are necessary for the efficient operation of the website, and if a website verifies that its contract with the analytics cookie provider qualifies as a "service provider," the cookie can be placed without offering consumers the ability to opt-out or toggle the cookie off.

Ask for consent. The CCPA excepts from the definition of "sale" the situation where a "consumer uses or directs the business to intentionally disclose personal information." As a result, if a website deploys a cookie banner, and a consumer agrees or "opts-in" to the use of analytics cookies, the website arguably has not "sold" information to the company that provides the analytics cookie. Note that if the consumer agrees to the deployment of the analytics cookie, nothing within the CCPA would require the website to present them with an automatic ability to opt-out (i.e., toggle off) the cookie.

Disclose the sale of information and offer opt-out. If an analytics vendor does not fit the definition of a "service provider," and opt-in consent is not obtained, a website could disclose within its privacy policy that it is "selling" information to an analytics cookie provider.

- Note, however, that if a company sells personal information, the CCPA requires that the company provide a "Do Not Sell My Personal Information" link on its homepage, and honor requests to opt-out from such sales. One way to communicate this request is to adopt a cookie management tool that provides consumers with the ability to "toggle off" the analytics cookie.

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