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Privacy Alert

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2020 Ballot Initiative: The California Privacy Rights and Enforcement Act

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On September 25, Alistair Mactaggart, the original author of the California Consumer Privacy Act (CCPA), announced that he was submitting a new California ballot initiative to amend and augment the CCPA. The new initiative, called the California Privacy Rights and Enforcement Act (CPREA), would create new obligations for businesses with respect to sensitive personal information; incorporate into the law requirements aimed at addressing the data protection principles of storage limitation, data minimization, and the right to accuracy; require transparency around automated decision-making and profiling; and establish a new state agency called the California Privacy Protection Agency to enforce the law. In addition, it would make a number of other miscellaneous changes to the current language of the CCPA. If the initiative were to obtain the required number of signatures to appear on the ballot and was then approved by California voters, it would become operative on January 1, 2021 and would apply to personal information collected by a business on or after January 1, 2020. [Section 30.]

The CPREA includes special provisions that address whether and how it can be amended by the California legislature. It provides that "[t]he provisions of this Act shall prevail over any conflicting legislation enacted after January 1, 2020. Any amendments to this Act or any legislation that conflicts with any provision of this Act shall be null and void upon passage of this Act by the voters. . . ." [Section 24(d).] It would allow the legislature to adopt amendments provided they "are consistent with and further the purpose and intent of this Act. . . ." [Section 24(a).] In furtherance of this, the CPREA includes a section that describes the purpose and intent of the Act. [*See* Section 3.]

Since submitting the initial CPREA proposal on September 25, Mr. Mactaggert has submitted two revised versions. This Privacy Alert summarizes version 3, submitted on October 9. Comments on version 3 can be submitted through November 8 at https://oag.ca.gov/initiatives/active-measures.

A. Sensitive Personal Information

The CPREA would give consumers the right to opt-out at any time to the use of their *sensitive personal information*[1] for *advertising and marketing*[2]. [Proposed 1798.120(c) and (g).] A business that uses sensitive personal information for advertising and marketing purposes would be required to post an easily accessible link on its homepage that enables consumers to opt-out. [Proposed 1798.135(a)(1).] In addition, a business would be required to comply with opt-out requests received through the use of technology that enables a consumer to communicate an intent to opt-out, such as browser settings, a browser extension, or a global device setting. [Proposed 1798.135(c).] A business that receives an opt-out request would be required to wait at least 12 months before requesting that the consumer opt back in to the use of his or her sensitive personal information for advertising and marketing. [Proposed 1798.120(d)(4).]

In addition, a business would be prohibited from selling a consumer's sensitive personal information without the affirmative consent of the consumer. [Proposed 1798.120(f).] The definition of a "sale" of personal information would be modified to include any disclosure or transfer of personal information by a business to a third party for monetary or other valuable consideration, "or otherwise for a commercial purpose, including but not limited to cross-context behavioral advertising[3]." However, it would continue to exclude disclosures to service providers and disclosures at the direction of the consumer. [Proposed 1798.140(ad).] Sharing of personal information by a business with a joint venture or partnership may be intended to be excluded from what constitutes a "sale" as the definition of a "business" has been modified to address joint ventures and partnerships.[4]

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[1] "Sensitive personal information" is defined as "a consumer's social security, driver's license, state identification card, or passport number; a consumer's account log-in, financial account, debit card, or credit card number in combination with any required security or access code, password, or credentials allowing access to an account; a consumer's precise geolocation; personal information revealing a consumer's racial or ethnic origin, religion, or union membership; the contents of a consumer's private communications, unless the business is the intended recipient of the communication; a consumer's biometric information; data concerning a consumer's health; data concerning a consumer's sexual orientation; or other data collected and analyzed for the purpose of identifying such information." [Proposed 1798.140(ae).]

[2] "Advertising and marketing" is defined as "a communication by a business or a person acting on the business's behalf in any medium intended to induce a consumer to buy, rent, lease, join, use, subscribe to, apply for, provide, or exchange products, goods, property, information, services, or employment." [Proposed 1798.140(a).]

[3] "Cross-context behavioral advertising" is defined as "targeting of advertising to a consumer based on a profile of the consumer including predictions derived from the consumer's personal information where such profile is related to the consumer's activity over time and across multiple businesses or across multiple, distinctly-branded websites, application, or services." [Proposed 1798.140(f).]

[4] The definition of a "business" would include "a joint venture or partnership composed of businesses in which each business has at least a 40 percent interest [provided that] the joint venture or partnership and each business that composes the joint venture or partnership shall separately be considered a single business, except that personal information in the possession of each business and disclosed to the joint venture or partnership shall not be shared with the other business." [Proposed 1798.140(d).]

B. Storage Limitation, Data Minimization, and Right to Accuracy

The CPREA would require a business in its notice at the point of collection to inform the consumer of the length of time that the business intends to retain each category of personal information. [Proposed 1798.100(a)(3).] A business would be prohibited from collecting more personal information than is reasonably necessary and retaining personal information for longer than is reasonably necessary for each specific purpose disclosed in the notice at collection. [Proposed 1798.100(a)(3) and (c).]

A business would also be required to "take reasonable steps in light of the nature of the personal information and the purposes of processing the personal information to ensure that it does not collect, retain, or share inaccurate personal information." [Proposed 1798.100(f).] A consumer would have the right to request correction of inaccurate personal information, and a business receiving a verifiable consumer request to correct such information would be required to use "commercially reasonable efforts" to correct the information. [Proposed 1798.105.5.]

C. Automated Decision-Making and Profiling

A business would be required under the CPREA to disclose in its privacy policy whether it is "profiling[5] consumers and using their personal information for purposes of determining eligibility for financial or lending services, housing, insurance, education admission, employment, or health care services." [Proposed 1798.110(c)(6).] The disclosure would need to include "meaningful information about the logic involved in using consumers' personal information for this purpose." [Id.]

D. California Privacy Protection Agency

A new state agency called the "California Privacy Protection Agency" would be created under the CPREA. [Proposed 1798.199.10 et seq.] The agency would have authority to administer, implement, and enforce the CPREA through administrative actions. Following an administrative hearing to determine whether a violation has occurred, the agency would be authorized to issue administrative fines of up to $2500 for each violation, or of up to $7500 for each intentional violation or violation involving the personal information of minors. [Proposed 1798.199.55.] The agency's powers would include the right to audit a business for compliance with the law. [Proposed 1798.199.65 and 1798.199.40(f).]

E. Miscellaneous Changes

The CPREA makes a number of miscellaneous changes to the current language of the CCPA. These include the following:

- A number of CCPA exemptions, including the exemptions that apply to medical information governed by the California Confidentiality of Medical Information Act and protected health information collected by a HIPAA covered entity or business associate, as well as the exemption for information collected as part of a clinical trial, would be subject to a new limitation. Namely, the exemptions would apply only where "the use of information [is] governed by, or subject to, the [enumerated] laws, but only with respect to the categories or types of personal information

[5] The definition of "profiling" would mean "any form of automated processing of personal information, as further defined by regulations . . . , to evaluate or predict certain personal aspects relating to a consumer, and in particular to analyze or predict aspects concerning that consumer's performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or movements." [Proposed 1798.140(z).]

which are governed by, or subject to, the applicable law or laws as those laws read on July 1, 2019." [Proposed 1798.145(c)(1).]

- The exemption that currently applies through January 1, 2021 for personal information of employees, job applicants, contractors, and certain others would be made permanent. However, the exemption would be more limited than its current form. In particular, the exemption would not apply to the right to know (including the right to access a copy of personal information held by a business), nor would it apply to requests for deletion after any applicable statutory retention obligations have passed. [*See* Proposed 1798.145(j)(3).]

- The exemption that currently applies through January 1, 2021 for personal information reflecting a B2B relationship would be made permanent and would be expanded to also apply to the right to opt-out of the sale of personal information. [*See* Proposed 1798.145(k).]

- The right to deletion and the right to opt-out of the sale of personal information would not apply where "the consumer has affirmatively consented to the business's use, disclosure, or sale of the consumer's personal information and the business has incurred significant expense in reliance on the consumer's affirmative consent . . . and compliance with the consumer's request . . . would not be commercially reasonable, provided the business complies with the consumer's request as soon as it is commercially reasonable to do so." [Proposed 1798.145(o).]

- As noted, the definition of a "sale" of personal information would be amended to include any transfer of personal information to a third party for a commercial purpose, including but not limited to cross-context behavioral advertising, unless the consumer directed the disclosure of his or her personal information to the third party or the third party qualifies as a "service provider." In addition, the definition of "business purpose" would be amended in several respects to clarify that the use of a third party to deliver advertisements targeted to a consumer based on the consumer's visit to or behavior on other third party sites would not qualify as a service provider relationship. [See Proposed 1798.140(e).]

- Currently, the definition of "personal information" excludes "publicly available information." The CPREA would revise the definition of "publicly available information" to mean "information that is lawfully made available from federal, state, or local government records or information that a business has a reasonable basis to believe is lawfully made available to the general public from widely distributed media, or by the consumer, or by a person to whom the consumer has disclosed the information if the consumer has not restricted the information to a specific audience." [Proposed 1798.140(v)(2).] The CPREA would re-insert language that had been deleted in legislative amendments to the CCPA signed into law earlier this month. Namely, it would state that "[i]nformation is not 'publicly available' if that data is used for a purpose that is not compatible with the purpose for which the data is maintained and made available in the government records unless the information is a matter of public concern." [Id.]

- The definition of "deidentified" would be amended to require a business that discloses such information to third parties to contractually require them to maintain the information in a deidentified form and not attempt to reidentify it. [Proposed 1798.140(k).]

- The definition of "research" would be amended to eliminate the restriction that the research "[n]ot be used for any commercial purpose." [Proposed 1798.140(ab).] (The definition of research is relevant only to the exception to the right of deletion found in 1798.105(d)(6).)

- Currently, a consumer's right to know (including the right to obtain a copy) extends only to personal information collected by the business within the 12-month period preceding receipt of a verifiable consumer request. Under the CPREA, this right would be extended beyond the 12-month period to all personal information the business has collected about the consumer unless providing the information "would involve a disproportionate amount of information or would be unduly burdensome." [Proposed 1798.130(a)(2)(B).] This right would apply only to information collected after January 1, 2021. The California Attorney General would be required to issue regulations to further define what would qualify as a disproportionate amount of information or an undue burden. [Proposed 1798.185(a)(9).]

- A business that receives a verifiable consumer request to delete personal information would be required to "direct all third parties who have accessed such personal information from or through the business" to also delete the consumer's personal information. [Proposed 1798.105(c)(1).]

- The law's non-discrimination provisions would be amended to allow a difference in price or rate, or in the level or quality of goods or services, only where the difference is directly related to the value of the consumer's data. [Proposed 1798.125(a)(2).] Currently, the standard only requires a "reasonable" relationship to the value of the consumer's data.

- Where a business has actual knowledge that a consumer is less than 16 years old, the business would be prohibited from collecting the personal information of that consumer without affirmative authorization. In the case of consumers who are under age 13, the consent of a parent or guardian would be required. [Proposed 1798.100(g).] If the minor, or the parent/guardian of a minor under 13, declines to provide affirmative authorization, the business would not be permitted to request consent again for at least 12 months. [Id.]