Data Privacy and Cybersecurity

Attorney General's Office Makes New Revisions to CCPA Draft Regulations

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On Wednesday, March 11, 2020, the Office of Attorney General Xavier Becerra published its second modifications to the proposed regulations for the California Consumer Privacy Act of 2018 (CCPA), which were last modified on February 7, 2020, and originally published on October 11, 2019. According to the attorney general, after the first modifications were published, his office received "around 100" public comments. These modifications were made in response to those comments and to clarify and conform the previously proposed regulations.

The deadline to submit written comments regarding these new modifications is Friday, March 27, 2020, at 5:00 pm.

While the second set of modification includes a number of technical changes, below are some of the more significant changes, which we anticipate will have an impact on businesses as they work towards preparing for the July 1, 2020, enforcement deadline:

- **Struck Guidance Interpreting the term "Personal Information."** Many businesses had welcomed the guidance from the attorney general, which memorialized what was a plain reading of the CCPA. That is, that the term "personal information" in the CCPA only applied to information that was linked in some manner to an individual. The example the attorney general gave in his first modifications to the proposed regulation was that website visitor IP addresses, which could not be linked to any particular consumer or household, would not be "personal information." Striking this guidance without any further explanation leaves businesses left to guess whether the guidance was struck because the attorney general believed the guidance unnecessary given that it supported a plain reading of the statute or because the attorney general believed the guidance was incorrect in the first instance.

- **Employee Notice of Collection.** The second modifications make an important change related to the notice of collection to be given to employees. The first modifications introduced the concept that businesses "may include" a link to "or paper copy of" their privacy policies in the notices of collection provided to employees. This kind of permissive regulation with different options as to how a business could proceed would have led to a confusing mix of approaches and would have likely resulted in duplicative information being given to an employee. The second modifications now are clear that the notice of collection to employees need not "provide a link to the business's privacy policy," which also can be read to exclude the need for a business to provide a paper copy as well. This second modification thus provides some clarity for businesses when it comes to distributing information to their current, former or prospective employees.

- **Removed Opt-Out Button or Logo.** In February, the attorney general unveiled the much-anticipated opt-out button and logo design. However, just as quickly as it was introduced—and rules around it provided—the second modifications have struck the proposed logo and button. While it is unclear precisely what made the attorney general remove this portion of the regulation, we do anticipate that a standard logo and button will be introduced in the future. That likely means that there will be at least one additional round of modifications to the proposed regulations before being finalized. The timing of when that next modification might come is of interest given that the July 1, 2020, deadline is fast approaching.

- **Once Again Changed Privacy Policy Notice Requirements.** Just as with the opt-out logo, the second modifications represent some whiplash with respect to the required content for privacy policies. For example, in the first modifications, the attorney general struck the requirement that "for each category of personal information collected," businesses provide "the sources from which that information was collected." This information—the source from which information is collected—is something that businesses have to disclose as part of the right to know under Section 1798.110 of the CCPA and is not technically required to appear in a privacy policy under the plain language of the CCPA itself. However, in the second modifications, the obligation to include source information has been reintroduced. The new proposed modification provides that businesses must provide the "categories of sources" from which personal information is obtained. This formulation is an improvement from the original formulation, which tied source information to particular categories of information. However, it remains outside the plain language requirements of the CCPA.

  Similarly, the second modifications would require the disclosure of "the business or commercial purpose for collecting or selling personal information" in privacy policies. This too would be a requirement beyond the plain text of the CCPA, which requires only the disclosure of "the purposes for which the categories of personal information shall be used." *See* Cal. Civ. Code § 1798.100(b). While under the CCPA consumers can request pursuant to a right to know "the business or commercial purpose for collecting or selling personal information," Cal. Civ. Code §1798.110(a),(b), the requirement to include that information in a privacy policy is yet another instance of the attorney general imposing requirements on businesses that are beyond the plain language of the CCPA.

  Finally, for any businesses that have "actual knowledge" of the fact that they sell the personal information of minors under age 16, the regulations would also require a description of how a business complies with the attorney general's regulations related to minors. This is another new requirement imposed by the attorney general beyond the CCPA.

- **Clarified Business Response to Request to Know Regarding Sensitive Information.** The original proposed regulations and first modifications protected sensitive consumer information by instructing businesses not to disclose that information in response to a right to know. For example, the proposed regulation would prohibit the disclosure of Social Security numbers or financial account information. Now, in the second modifications, the attorney general has imposed yet another obligation on businesses: that in lieu of providing the actual information, the business must tell the consumer "with sufficient particularity" the type of information collected. As an example of sufficient particularity, the second modifications provide that a business can disclose that it has "unique biometric data including a fingerprint scan."

- **Conformed the Definition of Service Provider to CCPA.** One of the more common complaints we heard about the originally proposed regulations and first modifications was that the restrictions on service provider use of information was contrary to the scope of authority granted to service providers under the CCPA. Finally, in the second modifications, the attorney general has made an effort to bring those proposed regulations closer to the permissions of the CCPA. With the second modifications, service providers are no longer entirely bounded to the "services specified in the[ir] written contract with the business that provided the personal information." Instead, there is recognition that service providers may obtain personal information directly on behalf of a business or from a business and that the service provider is able to process and maintain personal information "in compliance with the written contract," which itself may not necessarily "specify" a laundry list of particular services. The second modifications thus represent a move closer to the CCPA for service providers.

- **Removed Requirement that Privacy Controls Not Be Designed with Pre-selected Settings.** Perhaps realizing the technical burden that would have been imposed by the first modifications, which required that privacy controls could not be pre-selected, the second modifications have removed that prohibition. Now, businesses need not engage in what could have been a costly and time-consuming effort to change their privacy control default settings; pre-selected settings are not prohibited.

- **Change to Record Keeping Requirement.** One final, important, change in the second modifications is that the attorney general broadened the universe of companies that may have to compile certain metrics regarding the number of CCPA requests that they receive. Up until the second modifications a business that bought, sold, shared or received for commercial purposes 10,000,000 or more consumer records in a year had to compile and disclose the number of requests under the CCPA that the business received. The second modifications, however, introduce an expansion of the universe of businesses subject to that request. Now, any business that "knows *or reasonably should know*" that it hits the 10,000,000 consumer threshold must compile and make available the reports. This is an apparent attempt to prevent companies from ostrich-syndrome and intentionally not knowing, or simply never knowing in the first place, the volume of consumer information that they are handling.

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