

SPOTLIGHT ON

California Consumer Privacy Act of 2018

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California Consumer Privacy Act Overview

Scope of Businesses. The California Consumer Privacy Act (the “CCPA”) is a broad, wide-reaching consumer privacy law passed in 2018, which took effect January 1, 2020, with enforcement beginning on July 1, 2020. It is considered the most comprehensive state law governing consumer privacy and data in the United States. The law applies to any business that operates in the State of California, collects consumer personal information, and determines the purposes and means of processing the consumer’s personal information.¹ In the context of the CCPA, a consumer is defined as any natural person who is a California resident. If a business collects information on California residents, it must also meet one of the three following thresholds to come into the law’s scope:

1. Possesses the personal information of 50,000 or more California resident consumers, households, or devices;
2. Has annual worldwide gross revenues above \$25 million; or
3. Earns more than half of its gross annual revenue from selling California residents’ personal information.²

Scope of Privacy Rights. The goal of the CCPA is to provide California residents certain rights over their personal information, consequently strengthening the right to privacy. These are the relevant rights provided for:

- **Right to Know**—The personal information that is being collected, used, shared, or sold. The information must include the categories and specific pieces of information;
- **Right to Delete**—Ability to delete personal information held by a business and any of its service providers;
- **Right to Opt-out**—Ability to opt out of the sale of personal information by a business;

¹ Catherine Anderson, Scott Bloomberg and Brittan Heller, *CCPA: Q&As for Investment Advisers and Private Fund Managers*, Foley Hoag LLP (2019), <https://www.jdsupra.com/legalnews/ccpa-q-as-for-investment-advisers-and-84093/> (last visited August 28, 2020).

² Susan Huntington, Peter Bilfield and Kritika Bharadwaj, *California Consumer Privacy Act: Compliance Best Practices*, Day Pitney LLP (2019), <https://www.daypitney.com/insights/publications/2019/11/20-ca-consumer-privacy-compliance-best-practices> (last visited August 28, 2020).

- **Right to Non-discrimination**—Specifically the right not to be discriminated against when a consumer exercises his or her privacy right.³

Personal information is defined as any information 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. This definition is more expansive than other privacy laws in the United States.⁴ The CCPA has been compared to Europe’s General Data Protection Regulations (“GDPR”) in its scope and goals of consumer privacy. However, the CCPA does not require an “opt in” from consumers for the sale or use of personal information (unlike GDPR).⁵ Instead, the CCPA requires specific privacy notices and the ability to opt out of the sale or use of personal information. Any business that is subject to the CCPA must:

1. Provide notification to consumers before or at the point of data collection;
2. Make disclosures about the information that it collects and the rights held by consumers under the CCPA; and
3. Create procedures and compliance programs to ensure the consumers’ rights under the CCPA are fulfilled.⁶

Application to Investment Advisers

Investment advisers located in California are not the only advisers subject to the regulations of the CCPA. Any adviser meeting the thresholds described above and with California residents as clients is subject to the CCPA. The threshold most likely to bring an investment adviser under the scope of the CCPA is having gross revenues in excess of \$25 million (although the other two are possible). The \$25 million is in reference to worldwide revenues, not just revenues made in California.⁷ Therefore, investment advisers in other states still need to consider if they fall within the scope of the law and what the CCPA may require from them.

³ Catherine Anderson, Scott Bloomberg and Brittan Heller, *CCPA: Q&As for Investment Advisers and Private Fund Managers*, Foley Hoag LLP (2019), <https://www.jdsupra.com/legalnews/ccpa-q-as-for-investment-advisers-and-84093/> (last visited August 28, 2020).

⁴ Debra Franzese, Maureen Hurley, et al., *Overview of the California Consumer Privacy Act*, Seward & Kissel LLP (2019), <https://www.sewkis.com/publications/overview-of-the-california-consumer-privacy-act/> (last visited August 28, 2020).

⁵ Jina Choi, Kristen Matthews, et al., *CCPA Checklist for Investment Advisers*, Morrison & Foerster LLP (2020), <https://www.mofo.com/resources/insights/200203-ccpa-checklist-for-investment-advisers.pdf?#zoom=100> (last visited August 28, 2020).

⁶ Catherine Anderson, Scott Bloomberg and Brittan Heller, *CCPA: Q&As for Investment Advisers and Private Fund Managers*, Foley Hoag LLP (2019), <https://www.jdsupra.com/legalnews/ccpa-q-as-for-investment-advisers-and-84093/> (last visited August 28, 2020).

⁷ Wendy Cohen, David Dickstein, et al., *What Private Fund Advisers and Regulated Entities Should Do About the California Consumer Privacy Act*, Katten Muchin Rosenman LLP (2019), <https://katten.com/what-private-fund-advisers-and-regulated-entities-should-do-about-the-california-consumer-privacy-act> (last visited August 28, 2020).

An investment adviser registered with the SEC is subject to the Gramm-Leach-Bliley Act (the “GLBA”). Under the GLBA, investment advisers must employ protections on non-public personally identifiable financial information, which is defined as information about a consumer in connection with providing a financial product or service to that consumer.⁸ These protections required by the GLBA have been deemed appropriate to constitute an exemption from the CCPA. For firms registered with the SEC and in compliance with the GLBA requirements, the CCPA currently changes little in terms of business practice and compliance. It is important to note that, if the adviser collects information not protected by the GLBA, such as web page visitor activity, then the exemption does not apply, and the firm must comply with the CCPA.⁹ If your firm must comply with the CCPA, there are certain steps the firm can take to ensure compliance.

Compliance Actions Expected of Investment Advisers

Once an investment advisory firm has determined that it falls within the scope of the CCPA, steps should be taken in preparation to meet the regulatory requirements. To begin, even though not required by the SEC or state securities regulators, advisers should launch a data mapping program to gather and analyze the personal information data they collect. While not required, the SEC’s Office of Compliance Inspections and Examinations has suggested data mapping as a best practice for cybersecurity.¹⁰

Additionally, investment advisers should take the following steps:

- Train personnel responsible for collecting, using, or maintaining personal information in the CCPA and associated compliance procedures;
- Identify California consumers and the information collected about those consumers;
- Categorize the information collected from California consumers into the categories defined by the CCPA;
- Determine any personal information flowing out of the investment adviser, including the purpose of each data flow and if that personal information is being sold;
- Establish internal written procedures specifically for consumers that wish to practice the rights provided to them by the CCPA, such as methods to request or delete information and to verify consumer identity;
- Prepare a privacy notice for current and prospective investors;

⁸ Susan Huntington, Peter Bilfield and Kritika Bharadwaj, *California Consumer Privacy Act: Compliance Best Practices*, Day Pitney LLP (2019), <https://www.daypitney.com/insights/publications/2019/11/20-ca-consumer-privacy-compliance-best-practices> (last visited August 28, 2020).

⁹ Debra Franzese, Maureen Hurley, et al., *Overview of the California Consumer Privacy Act*, Seward & Kissel LLP (2019), <https://www.sewkis.com/publications/overview-of-the-california-consumer-privacy-act/> (last visited August 28, 2020).

¹⁰ Michelle L. Jacko, *The California Consumer Privacy Act (CCPA): What You Should Do Now to Prepare*, Jacko Law Group PC (2019), <https://www.jackolg.com/tip-The-California-Consumer-Privacy-Act-CCPA-What-You-Should-Do-Now-to-Prepare> (last visited August 28, 2020).

- Add addendums where necessary to service provider agreements, especially if the CCPA directly affects the relationship; and¹¹
- Make sure data security procedures and online privacy notices are updated and consistent with CCPA requirements.¹²

It is important that disclosures are made clearly and easily available to consumers, including the method to exercise opt-out rights. When requests are made by a consumer to the business, information must be delivered free of charge within 45 days of the verified request.¹³ The civil penalties for violations of the law can range from \$2,500 for non-intentional violations to \$7,500 for intentional violations. The CCPA currently allows businesses the opportunity to fix any violation of the law within 30 days of being notified of the violation without penalty.¹⁴

Enforcement Actions

Since the CCPA enforcement began on July 1, 2020, the State of California has sent out initial compliance notice letters to multiple allegedly non-compliant businesses. These letters, sent from Attorney General Xavier Becerra’s office, remain confidential and allow the companies the opportunity to remedy the non-compliance within 30 days or risk facing lawsuits from the state.¹⁵ Although the letters are confidential, some details were provided by Supervising Deputy Attorney General Stacey Schesser in a keynote session to the International Association of Privacy Professionals. The main points disclosed were that the letters were sent to companies in multiple industries and sectors, the focus was primarily on companies that operate online in some capacity, and that a “Do Not Sell” button or link should be added to any company’s website that sells data. Also, in choosing which companies to target, the Attorney General’s office relied in part on direct consumer complaints and complaints made on social media.¹⁶ The Supervising Deputy Attorney General offered the following points of guidance for businesses subject to the CCPA:

¹¹ Jina Choi, Kristen Matthews, et al., *CCPA Checklist for Investment Advisers*, Morrison & Foerster LLP (2020), <https://www.mofo.com/resources/insights/200203-ccpa-checklist-for-investment-advisers.pdf?#zoom=100> (last visited August 28, 2020).

¹² Susan Huntington, Peter Bilfield and Kritika Bharadwaj, *California Consumer Privacy Act: Compliance Best Practices*, Day Pitney LLP (2019), <https://www.daypitney.com/insights/publications/2019/11/20-ca-consumer-privacy-compliance-best-practices> (last visited August 28, 2020).

¹³ Mark Diamond, *Quick Overview: Understanding the California Consumer Privacy Act (CCPA)*, Association of Corporate Counsel (2019), <https://www.acc.com/resource-library/quick-overview-understanding-california-consumer-privacy-act-ccpa#> (last visited August 28, 2020).

¹⁴ Frances Forte, Daniel Lopez, et al., *California Consumer Privacy Act Guide*, Jones Day, 25-27 (2020), <https://www.jonesday.com/en/insights/2019/01/california-consumer-privacy-act-guide> (last visited August 28, 2020).

¹⁵ Samuel F. Cullari and Alexis Cocco, *CCPA enforcement letter sent; Supervising Deputy Attorney General offers insight*, Reed Smith LLP (2020), <https://www.technologylawdispatch.com/2020/07/privacy-data-protection/ccpa-enforcement-letters-sent-supervising-deputy-attorney-general-offers-insight/> (last visited September 10, 2020).

¹⁶ Jeewon Serrato, Andreas Kaltsounis, et al., *California AG Begins CCPA Enforcement*, BakerHostetler (2020), <https://www.bakerdatacounsel.com/ccpa/california-ag-begins-ccpa-enforcement/> (last visited September 10, 2020).

- Previous enforcement actions will in part reveal the priorities for the Office of the Attorney General;
- The protection of minors and other vulnerable populations' data is a focus for enforcement actions;
- Companies that handle data affecting a large number of California consumers are a focus for enforcement actions; and
- Companies that collect sensitive data that can cause actual harm if mishandled are an additional focus for enforcement actions.¹⁷

Takeaways

The California Consumer Privacy Act may be the first of many individual state privacy laws.¹⁸ The lack of a single federal law will likely pressure states to follow California's lead and pass their own consumer privacy laws, which will cause a rapidly changing regulatory environment. This regulatory environment should lead investment advisers to consider their data collection and management practices, even if not directly under the scope of the CCPA, and start considering nationwide data privacy procedures that cover clients in all states.¹⁹ The additional work may seem unnecessary now but could be very useful as data privacy becomes a focus of lawmakers around the country (and potentially around the world). Currently, investment advisers should identify if they have California residents as clients and, therefore, subject to the CCPA. If subject to the CCPA, investment advisers should focus on updating their data privacy notices and procedures to comply with the law. Even if they fall out of the scope of the CCPA, investment advisers should begin focusing on data privacy moving forward, using the CCPA as a benchmark for the likely changing regulatory environment.

¹⁷ Samuel F. Cullari and Alexis Cocco, *CCPA enforcement letter sent; Supervising Deputy Attorney General offers insight*, Reed Smith LLP (2020), <https://www.technologylawdispatch.com/2020/07/privacy-data-protection/ccpa-enforcement-letters-sent-supervising-deputy-attorney-general-offers-insight/> (last visited September 10, 2020).

¹⁸ Jahan Raissi, *The California Consumer Privacy Act Exemption Important to Investment Advisers*, Shartsis Friese LLP (2019), <https://www.sflaw.com/blog-post/the-california-consumer-privacy-act-exemption-important-to-investment-advisers/> (last visited August 28, 2020).

¹⁹ Susan Huntington, Peter Bilfield and Kritika Bharadwaj, *California Consumer Privacy Act: Compliance Best Practices*, Day Pitney LLP (2019), <https://www.daypitney.com/insights/publications/2019/11/20-ca-consumer-privacy-compliance-best-practices> (last visited August 28, 2020).