MAYER | BROWN

May 1, 2019

Legal Update

The California Consumer Privacy Act: Key Takeaways for Insurers and Insurance Regulators

One of the greatest legal and compliance risks facing the insurance industry today is the ever-evolving landscape of privacy and data security laws. The California Consumer Privacy Act ("CCPA") is widely regarded as the most sweeping privacy law in the United States and will impact how insurers collect, store, sell and process the personal information of California consumers. Other states are likely to soon follow suit—there are currently at least 11 other states with pending privacy legislation that incorporate CCPA-like concepts and requirements.

In this Legal Update, we examine the history of the CCPA, its key provisions, its current legislative status (let's just say, "it's complicated") and practical takeaways for insurers and insurance regulators. Spoiler Alert: Insurers should not be delaying compliance efforts. Recent experience with the General Data Protection Regulation ("GDPR") of the European Union ("EU") has demonstrated that it takes time and forethought to prepare for compliance with broad changes to privacy regulation. Despite the remaining uncertainties in the law, insurers should be ramping up for CCPA compliance now. Likewise, state insurance regulators should take note as compliance with state privacy regimes may end up within their purview.

History of the CCPA

In 2017, California privacy advocates, responding to the Cambridge Analytica scandal and the GDPR, introduced a ballot initiative called "The Consumer Right to Privacy Act of 2018." Given the ballot measure's sweeping reforms and the challenge of amending laws passed in California through direct ballot initiatives, the California legislature agreed to pass very similar legislation in exchange for the ballot initiative's withdrawal. The CCPA was passed unanimously on the last day to withdraw a ballot measure and signed by Governor Jerry Brown the same day. Almost immediately the legislation, which was drafted and passed in haste, drew criticism from both the business community and the California attorney general. The California legislature is working to address criticisms of the CCPA in this legislative session, in advance of the law's January 1, 2020 effective date.

Key Elements of the CCPA

TO WHOM AND WHAT DOES IT APPLY?

The CCPA applies to "businesses" that "collect, or determine the purposes and means of processing," the "personal information" of a California "consumer."

Subject "businesses" include any legal entity that is organized or operated for the profit or financial benefit of its shareholders or owners that meets one of the below thresholds (Cal. Civ. Code §1798.140(c)(1)) or who controls or is controlled by a business meeting this definition and that shares common branding with the business (Cal. Civ. Code §1798.140(c)(2)).

1. **Gross revenue threshold.** Annual gross revenue in excess of $25 million;
2. **Collection threshold.** Annually buys, receives, sells or shares the personal information of 50,000 or more consumers, households or devices; or
3. **Sales threshold.** Derives 50 percent or more of annual revenues from selling consumer personal information.

A "consumer" is any natural person who is a California resident (Cal. Civ. Code §1798.140(g)). As currently drafted, this includes California resident employees. Insurers that are used to viewing "consumers" through the lens of the Gramm-Leach-Bliley Act ("GLBA") and the Insurance Information and Privacy Protection Act ("IIPPA") will note that an individual does not need to seek or obtain a product or service from the business, or enter into a transaction with the business, to qualify as a consumer under the CCPA.

Personal information under the CCPA, as currently drafted, is much broader than under other privacy laws. Under the CCPA, personal information includes 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" (Cal. Civ. Code §1798.140(g)), including but not limited to:

- Identifiers such as real name, alias, postal address, unique personal identifier, online identifier Internet Protocol address, email address, account name, social security number, driver's license number, passport number or "other similar identifiers";
- Any categories of personal information already described under California law;
- Characteristics of protected classifications under California or federal law (e.g., race, religion, sexual orientation, gender identity, gender expression and age);
- Commercial information, including records of personal property, products or services purchased, obtained or considered or other purchasing or consuming histories or tendencies;
- Biometric information;
- "Internet or other electronic network activity information," including, but not limited to, "browsing history, search history, and information regarding a consumer's interaction with an Internet Web site, application, or advertisement";
- Geolocation data;
- Audio, electronic, visual, thermal, olfactory or similar information;
- Professional or employment-related information;
- Education information (as defined in the Family Education Rights and Privacy Act); and
- "Inferences drawn from any of the information identified" above "to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes."

WHAT DOES IT REQUIRE?

The CCPA creates a series of consumer rights that come with corresponding business obligations.

Right to Know. The CCPA gives consumers the right to request the categories and specific pieces of personal information collected, sold or disclosed (Cal. Civ. Code §1798.100(a)(c)). Correspondingly, a business must (1) at or before the point of collection, inform consumers about the categories of personal information collected and purposes of use (Cal. Civ. Code §1798.100(b)); (2) make methods available for consumers to submit a request for personal information (Cal. Civ. Code §1798.130(1)); and (3) in response to a consumer request, disclose and deliver the personal information "free of charge" within 45 days (Cal. Civ. Code §1798.130(2)).

Right to Opt Out. The CCPA gives consumers the right to opt out of a sale of their personal information to a third party (Cal. Civ. Code §1798.120(a)). Correspondingly, a business must (1) provide a clear link on its homepage and in its privacy policy titled "Do Not Sell My Personal Information" that sends the consumer to a website to opt out of sale of their personal information (Cal Civ. Code §1798.135(a)(1)), (2) respect the decision to opt out for at least 12 months before requesting that the consumer authorize the sale of personal information again (Cal. Civ. Code §1798.135(a)(4)), and (3) ensure all individuals responsible for handling consumer inquiries about the business's privacy practices be informed of the right to opt out and how to direct consumers to exercise the right (Cal. Civ. Code §1798.135(a)(3)).

Right to Delete. The CCPA gives consumers the right to request that a business delete personal information it has collected about the consumer (Cal. Civ. Code §1798.105(a)). Correspondingly, businesses must (1) disclose the right to delete on its website and in its privacy policy (Cal. Civ. Code §1798.105(b)) and (2) subject to applicable exceptions, delete the consumer's personal information from its records and direct any service provider to delete the consumer's personal information from their records (Cal. Civ. Code §1798.105(d)).

The CCPA also prohibits businesses from discriminating against any consumer for exercising their rights under the new law, including denying a consumer goods or services, charging a different price for a good or service or providing a lower quality of goods or services (Cal. Civ. Code §1798.125(a)).

EXEMPTIONS

The CCPA has some notable exemptions that impact the insurance industry, including:

Health Information. The CCPA exempts "medical information" governed by the Confidentiality of Medical Information Act and "protected health information" collected by a covered entity or business associate under the Health Insurance Portability and Accountability Act ("HIPAA"). It also exempts health care providers and covered entities governed by HIPAA, to the extent the provider or covered entity maintains patient information in the same manner as medical information/protected health information (Cal. Civ. Code §1798.145(c)).

GLBA. The CCPA exempts personal information collected, processed, sold or disclosed pursuant to the federal GLBA and implementing regulations. This exemption does not apply to the provisions granting consumers a private right of action (Cal. Civ. Code §1798.145(e)).

Driver's Privacy Protection Act. The CCPA exempts personal information collected, processed, sold or disclosed pursuant to the Driver's Privacy Protection Act. This

exemption does not apply to the provisions granting consumers a private right of action (Cal. Civ. Code §1798.145(f)).

Insurers should note that these exemptions are only partial. Despite being entities subject to GLBA, insurers remain subject to the CCPA if they engage in information collection, processing and sale activities outside of the GLBA, which they almost certainly do. The CCPA defines personal information and consumer much more broadly than the GLBA. For example, insurers that are tracking web page visitors, IP addresses, browsing history and/or collecting geolocation data, to name just a few, need to analyze the CCPA's requirements.

Importantly, the GLBA exemption does not apply to the private right of action provided under the CCPA. The private right of action allows consumers to seek statutory damages if the consumer's information "is subject to an unauthorized access, exfiltration, theft, or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices" (Cal. Civ. Code §1798.150). Accordingly, despite exemptions, insurers are still subject under the CCPA to potentially significant damages if they experience a data breach.

Proposed Amendments

California lawmakers began amending the CCPA almost immediately after its passage. As it currently stands there are over 30 proposed amendments making their way through the California legislature. These amendments include revisions and clarifications to the definition of personal information—for example, Assembly Bill 25 excludes information collected in the course of employment. Senate Bill 561 expands the consumer private right of action beyond simply data breaches to violations of the CCPA and removes the ability for violators to "cure" before the attorney general can hold them accountable through an enforcement action.

One amendment, Assembly Bill 981 ("AB 981"), is particularly relevant to the insurance industry. The amendment would exempt insurance companies, agents and support organizations that are subject to the IIPPA from the CCPA, except for the limited private right of action for data breaches or for any business activity not subject to IIPPA. However, AB 981 would incorporate specific CCPA concepts into the IIPPA, including mirroring CCPA definitions for personal information; granting a limited "right to know," "right to opt out" and "right to delete"; and requiring insurers to provide certain disclosures and privacy notices. Importantly, the bill seeks to retain the California Insurance Commissioner as the single enforcer/regulator for any privacy-related violations by insurers.

AB 981 is supported by a coalition of insurance companies and brokers and opposed by consumer groups such as Consumer Watchdog and Californians for Consumer Privacy, the group which originally backed the ballot initiative that led to the CCPA. AB 981 advocates contend that the CCPA will impose overlapping privacy protection regimes on the insurance industry, which will create regulatory conflicts and duplicative and confusing notices and disclosures, creating uncertainty for consumers. Opponents contend that efforts to incorporate CCPA-like protections into the IIPPA fall short, that there is no need for an exemption for an entire industry when the CCPA itself could be amended to address any conflicts and that insurers are accustomed to following multiple statutory schemes. The bill has passed in the Assembly Insurance Committee and the Assembly Privacy and Consumer Protection Committee and will next advance to the Assembly's Appropriations Committee before being voted on by the full Assembly and potentially advancing to the California Senate for consideration.

Effective Date/Enforcement

The CCPA goes into effect on January 1, 2020. However, the "drop dead" date on compliance remains a moving target. Enforcement actions by the California attorney general will be barred until six months after the publication of the final regulations (which are yet unpublished) or July 1, 2020, whichever is earlier. As currently drafted, the CCPA will be primarily enforced by the attorney general with only a limited private right of action for data breaches of non-encrypted/non-redacted information resulting from a business's failure to implement reasonable security procedures and practices. (Cal. Civ. Code 1798.150(a).) As noted above, amendments are currently pending to expand the private right of action and eliminate businesses' ability to cure violations identified by the attorney general.

Key Takeaways for Insurers

Notwithstanding AB 981, and despite the other remaining uncertainties, the core elements of the CCPA are unlikely to change and will impact the insurance industry. Insurers that wait for the law to be fully amended to begin compliance efforts may find themselves scrambling to meet deadlines, particularly if an expanded right of private action goes into effect on January 1, 2020. There are concrete steps that insurers can take now to prepare themselves for CCPA compliance that can be refined as the law takes its final form.

- **Perform Data Classification/Mapping for CCPA Expanded Definition of Personal Information.** Insurers will need to survey systems and processes considering the CCPA's expanded definition of what information is considered "personal" to determine what information they collect, how it is used and what may or may not be subject to exemption.
- **Update Privacy Policies and Notices.** The CCPA requires transparency regarding the rights conferred under it and about the categories of personal information collected and how they are used.
- **Determine Whether You Are Selling (or Disclosing "For Money or Other Valuable Consideration") Personal Information, and, if so, Build Opt-In/Opt-Out Functions and Procedures.** The CCPA allows consumers to opt out of the sale of their personal information. Insurers will need to provide a function on their website to allow for this and develop procedures for handling opt-out requests.
- **Identify Third Parties and Update/Supplement Contracts. The** CCPA allows businesses to share personal information with service providers (a defined term) without this being considered a sale (from which a consumer could opt out). However, for the other party to qualify as a service provider, the written agreement between the parties must contain certain provisions. Insurers will need to analyze the data flow in their third-party relationships and amend written agreements accordingly.
- **Review Incident Response Plan.** The CCPA includes a private right of action in the event of a data breach, but individuals must first notify the business of the alleged violation and provide 30 days to cure (it is unclear how a data breach can be "cured"). Although proposed amendments are likely to amend the private right of action, insurers may wish to revisit their incident response plan to ensure it emphasizes rapid detection, containment and mitigation.
- **Develop Policies and Procedures for Governance Program.** The new information rights will necessitate new, or changes to existing, internal privacy programs. Insurers should consider designating a role with responsibility for CCPA compliance and oversight. Insurers will need to have processes in place to receive and track consumer requests regarding personal

information. Insurers may wish to consider workforce training, particularly for workers who will be handling individual requests.

Key Takeaways for Regulators

As the law is currently written, the California attorney general remains the primary enforcer of the CCPA. However, multiple pending amendments to the CCPA are designed to change this, including AB 981, which would make the California insurance commissioner the primary enforcer of CCPA-like requirements with respect to insurance institutions. As other states follow in California's footsteps, insurance regulators may find themselves at the forefront of privacy protection.

For more information about this topic, please contact the author, Stephanie Duchene.

Stephanie Duchene
+1 213 229 5176
sduchene@mayerbrown.com