

California - Cookies & Similar Technologies

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1. GOVERNING TEXTS

1.1. Legislation

The California Consumer Privacy Act of 2018 (as amended) ('CCPA') creates consumer rights related to the collection, deletion, and sharing of personal information, including via cookies.

After publishing several versions of the Proposed CCPA Regulations, the California Attorney General ('AG') has finalised the California Consumer Privacy Regulations ('the Regulations'). The purpose of the Regulations is to establish procedures to facilitate consumer rights under the CCPA and guide businesses with regard to compliance practices. Pursuant to the CCPA, the AG has been tasked with the bulk of enforcement responsibilities.



1.2. Regulatory Authority Guidance

The AG has not issued any guidance yet. A business or third party may seek the opinion of the AG for guidance on how to comply with the provisions of the CCPA (§1798.155(a) of the CCPA).

2. DEFINITIONS

Cookies & similar technologies: There is no definition of 'cookies' in the CCPA. However, cookies are included within the CCPA's definition of unique personal identifiers. In particular, §1798.140(x) of the CCPA defines 'unique identifier' or 'unique personal identifier' as 'a persistent identifier that can be used to recognize a consumer, a family, or a device that is linked to a consumer or family, over time and across different services, including, but not limited to, a device identifier; an Internet Protocol address; cookies, beacons, pixel tags, mobile ad identifiers, or similar technology; customer number, unique pseudonym, or user alias; telephone numbers, or other forms of persistent or probabilistic identifiers that can be used to identify a particular consumer or device. For purposes of this subdivision, 'family' means a custodial parent or guardian and any minor children over which the parent or guardian has custody.'

Consent: There is no definition of 'consent' in the CCPA or the Regulations. However, §999.301(a) of the Regulations defines 'affirmative authorization' as 'an action that demonstrates the intentional decision by the consumer to opt-in to the sale of personal information.' It is further specified that '[w]ithin the context of a parent or guardian acting on behalf of a child under 13 years of age, [affirmative authorization] means that the parent or guardian has provided consent to the sale of the child's personal information in accordance with the methods set forth in [§999.330 of the Regulations]. For consumers 13 years and older, it is demonstrated through a two-step process whereby the consumer shall first, clearly request to opt-in and then second, separately confirm their choice to opt-in.'

Personal information: Information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household (§1798.140(o) of the CCPA).

Sell/sale: Selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer's personal information by the business to another business or a third party for monetary or other valuable con-

sideration (§1798.140(t)(1) of the CCPA).

3. CONSENT & COOKIE POLICY

The CCPA does not require the use of cookies to be disclosed by a cookie banner. Furthermore, the CCPA does not require companies to obtain consent from consumers prior to the use of cookies. Companies are, however, required to disclose the use of cookies in their privacy policies.

Although companies are not required to obtain consent before placing cookies, companies may choose to obtain consent before using third-party cookies for anything other than a 'business purpose,' such as for behavioural advertising purposes. By obtaining consent from consumers before placing cookies by, for example, displaying a cookie banner that requires a consumer to affirmatively consent to the placement of cookies, a company may help mitigate some risk.

4. COOKIES & THIRD PARTIES

§1798.120 of the CCPA states that if a business 'sells' personal information to third parties, then the business 'shall provide notice to consumers [...] that this information may be sold and that consumers have the 'right to opt-out' of the sale of their personal information.' A distinction is made between 'service providers' and 'third parties' within the CCPA.

The CCPA's broad definition of 'personal information' (see section 2 above) includes a non-exhaustive list of types of data that are encompassed in the definition of 'personal information,' including 'unique personal identifier[s].' The definition of 'unique personal identifier' (see section 2 above) includes 'cookies.' Based on the definitions of 'personal information' and 'unique personal identifier,' the information collected by cookies may be considered 'personal information' under the CCPA. Therefore, a business must determine if it is 'selling' personal information if it allows a third party to collect information from consumers using cookies.

The CCPA's broad definition of a 'sale' can, and likely does, encompass situations where a company allows a third party to gather information from consumers through the use of cookies.

However, it is important to note that there are two types of potential uses of third-party cookies; one that involves the use by 'service providers,' and another that would constitute a 'sale' of personal information to a 'third party.'

The use of cookies on a website by a 'service provider' is generally not deemed a 'sale' of personal information, as long as the information collected by the 'service provider' is necessary to perform a 'business purpose' and the business and 'service provider' have entered into an appropriate agreement that contains certain provisions.

In this context, §1798.140(d) of the CCPA sets forth certain actions that would be deemed a 'business purpose,' namely:

- auditing interactions with consumers;
- security purposes;
- debugging/repair;
- certain short-term uses;
- performing services such as maintaining or servicing accounts, providing customer service, processing payments, providing certain advertising and marketing services, providing analytical services;
- internal research for tech development; and
- quality and safety maintenance and verification.

In addition, for a company to be deemed a 'service provider,' the company and the business must have a written agreement between them that contains certain clauses set forth in the CCPA and the Regulations. Specifically, a 'service provider' must agree not to retain, use, or disclose personal information obtained in the course of providing services, except:

- to perform the services specified in the agreement;
- to retain and employ another service provider as a subcontractor (provided the subcontractor also enters into an appropriate service provider agreement);
- for internal use by the service provider to build or improve the quality of its own services;
- to detect security incidents or protect against fraudulent or illegal activity;
- to comply with applicable laws;
- to comply with a civil, criminal, or regulatory inquiry, investigation or summons;
- to cooperate with law enforcement agencies concerning conduct that the business, service provider, or other, reasonably and in good faith, believes may violate applicable laws; or
- to exercise or defend legal claims.

If a business allows a 'third party' to plant and/or collect personal information from cookies for a 'commercial purpose,' the business must allow the consumer the option to opt-out of the use of such third party cookies and the collection and use of personal information by the third party, as this would likely constitute a 'sale' of personal information to the third party. A 'commercial purpose' is 

defined broadly in §1798.140(f) of the CCPA as: 'To advance a commercial or economic interest, such as by inducing another person to buy, rent, lease, join, subscribe to, provide, or exchanger products, goods, property, information, or services, or enabling or effecting, directly or indirectly, a commercial transaction.' There is much vagueness surrounding the exact meaning of 'sale' and 'commercial purpose' in the CCPA, and it is likely that the definitions will not be clarified for some time.

In the event that a business allows a service provider or third party to track consumers using cookies or gather information using cookies from the business website, this must be disclosed to consumers (usually in the website's privacy policy), and the categories of service providers and third parties with whom personal information is shared must be disclosed to a consumer in response to a verifiable request.

In addition, a business that 'sells' personal information to a third party, through the use of cookies or otherwise, must provide a conspicuous notice to allow a consumer to opt-out of the same and must respond to a consumer request to opt-out.

5. COOKIE RETENTION

Not applicable.

6. OTHERS

The Regulations require businesses to recognise global privacy controls, 'such as a browser plugin or privacy setting, device setting, or other mechanism, that communicate or signal the consumer's choice to opt-out of the sale of their personal information' as a valid request to opt-out pursuant to the CCPA. As such, based on the Regulations, businesses will be required to recognise 'Do Not Track' signals from browsers.

7. PENALTIES

Pursuant to §1798.155 of the CCPA, any business, service provider, or other person that violates the CCPA shall be subject to an injunction and a civil penalty of no more than \$2,500 for each violation, or \$7,500 for each intentional violation. Prior to the imposition of such penalties, however, the business will be afforded 30 days to correct any alleged non-compliance. 

