The CCPA Regulations Are Now Final, But They're Not Exactly What The Attorney General Proposed

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As we outlined in a previous *Privacy.Minded.* post[1], California's Office of the Attorney General ("OAG") submitted its final proposed regulations[2] for implementing the California Consumer Privacy Act ("CCPA") to the California Office of Administrative Law ("OAL") on June 1, 2020. The OAL made some changes to the proposed regulations, and on August 14 approved the final regulations and provided them to the secretary of state. The regulations, like the text of the CCPA itself, are now enforceable, and the OAG has detailed the OAL's changes in an Addendum to its Final Statements of Reasons.[3]

Most of the OAL's changes are fairly mundane, global grammatical changes, but covered business should consider the effect some of the changes present. Here are a few of the important takeaways for companies that meet the CCPA's definition of a covered "business" as of July 1, 2020.

1. The OAL Withdrew Four Provisions For "Additional Consideration."

The OAL withdrew four provisions from the CCPA regulations, one of which applies to the "Notice of Collection" requirement, and three of which apply to the "Right to Opt-Out" of sales of personal information. The OAL did not explain why these provisions needed further clarification, or when it expects to reintegrate these provisions into the regulations, if at all. The OAL's withdrawal removes several obligations that the OAG's Draft Regulations would have placed on covered businesses. At first glance, the last-minute removal of these provisions appears to run counter to the goals of the OAG's rulemaking, as it removes some significant rights given to consumers. Yet, when evaluated in relation to the CCPA itself, the OAL has, for the most part, simply clarified some rights and obligations imposed under the CCPA.

Draft Regulation Section 999.305 (a)(5) concerned a business's obligation to provide consumers with notice at collection. Before its removal, the provision prohibited a business from using a consumer's personal information for a materially different purpose than disclosed in the notice of collection unless it obtained explicit consent from the consumer. Now that this provision has been removed "for additional consideration," there is no legal obligation that a business obtain consent for every single new use of data previously collected. But, the statutory requirement that businesses "shall not . . . use personal information collected for additional purposes without providing the consumer with notice consistent with this section" still applies. This means the business must still provide notice of new uses of previously collected data that are materially different than the uses disclosed at the time of collection, but explicit consent to the new use from the consumer is not required.

Draft Regulation Section 999.306(b)(2) added to a business's obligation to provide notice to consumers about

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1 http://www.sycr.com/CCPA-Insight-The-Attorney-General-Responded-To-1411-Public-Comments-During-The-Rulemaking-Process-Here-Are-Four-Things-You-Should-Know-08-07-2020/
2 https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/oal-sub-final-text-of-regs.pdf
3 https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/addendum-fsor.pdf

their right to opt of the "sale" of their personal information. Under this Draft Regulation, any business that substantially interacts with consumers offline, or would otherwise not be able to provide a notice of the right online, had to provide a notice to the consumer by an offline method. By removing this provision, the OAL allows a predominantly offline business flexibility in how that notice is provided. However, notice must still be given in some form, as outlined in the OAL-approved version of Section 999.306(b)(2), which requires a business without a website to "establish, document, and comply with another method by which it informs consumers of their right to opt-out."

Draft Regulation Section 999.326(c) permitted a business to deny a request from an authorized agent in which the agent does not submit proof they are authorized to act on the consumer's behalf. The OAL's removal of this provision does not appear to substantively change a business's ability to refuse such requests, as other Final Regulations maintain similar requirements.[4]

The OAL's removal of Draft Regulation Section 999.315(c) arguably provides a big boon to covered businesses at the expense of consumers. The Draft Regulation allowed consumers further rights regarding requests to opt-out of the "sale" of their personal information. It required that a business's method for submitting requests to opt out be easy for consumers and require minimal steps. Further, a business would have been be prohibited from using "a method that is designed with the purpose or has the substantial effect of subverting or impairing a consumer's decision to opt-out." Now, a business must provide notice of the right, and a business that sells personal information must provide the opt-out mechanism, but a business appears to have some leeway in how the mechanism is designed, which may have a big impact on the effectiveness of the right to opt-out. But, a business should account for consumer expectations in designing an opt-out mechanism, as the right to opt-out is still high on the list of the OAG's enforcement priorities, and the OAG may apply greater scrutiny to businesses that employ unnecessarily complex opt-out mechanisms.

2. Some Grammatical Changes Have More Impact Than First Appears.

In addition to the withdrawn provisions, the OAL makes a litany of global grammatical changes, adjusting certain terms or phrases for the sake of uniformity. Among these changes were the replacing of the word "minor" in the Draft Regulations with the term "consumer." The only explanation given for this change is that it was made "to align with the statute." Yet this raises a host of questions for the future, as the CCPA itself uses the phrase "minor consumer" in discussing various rights of children under the CCPA.

Other changes include removal of the option to use "Do Not Sell My Info" as the required opt-out button on a business's website, leaving "Do Not Sell My Personal Information" as the only approved language. Business who have already deployed "Do Not Sell My Info" at the bottom of their website or in pop-up banners should take note. The OAL also reorganized Section 999.317, Subsection (g), relating to the disclosure of consumer request metrics for businesses handling a large amount of consumer data.

3. This Is It For Changes To The CCPA, Until It Isn't.

With the OAL's approval of the Regulations, the CCPA and all its implementing requirements are now final. But the OAG retains wide latitude to make further regulations, new bills to amend the CCPA are still winding their

4 *See, e.g.*, § 999.515(f) ("A business may deny a request from an authorized agent if the agent cannot provide to the business the consumer's signed permission demonstrating that they have been authorized by the consumer to act on the consumer's behalf. User-enabled global privacy controls, such as a browser plug-in 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 shall be considered a request directly from the consumer, not through an authorized agent.")

way through the legislature, and as we previously reported, California voters will have an opportunity to enact significant changes to the CCPA via a new ballot initiative in November. At *Privacy.Minded.*, it's our pleasure to continue monitoring all of these developments for you.[5]

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5 http://www.sycr.com/PrivacyMinded---California-Voters-Are-Poised-To-Re-Write-The-CCPA-Before-Its-First-Anniversary-07-13-2020/