

CCPA Insight: The Attorney General Responded To 1,411 Public Comments During The Rulemaking Process. Here Are Four Things You Should Know.

On June 1, 2020, California's Office of the Attorney General ("OAG") provided more than just its final proposed regulations for implementing the California Consumer Privacy Act ("CCPA") to the California Office of Administrative Law. The OAG's submission also included a 59-page Final Statement of Reasons ("SoR") detailing the OAG's reasons for the changes it made to the original draft regulations, and the SoR incorporated several appendices listing the OAG's responses to no less than 1,411 comments received from the public during the rulemaking process¹. While the SoR won't have the force of law, it provides a window into how the OAG, which is responsible for enforcing the CCPA, views some of the act's most significant requirements. Here are three of the many key takeaways for companies that meet the CCPA's definition of a covered "business." on July 1, 2020.

1. The requirement to provide notice to consumers of collection of personal information is separate from the obligation to post a comprehensive privacy policy.

The CCPA requires both notices at collection and a privacy policy (among other things), and the OAG takes the distinction between those two requirements seriously. As the OAG points out in one response, "[n]othing in Section 1798.130 (of the CCPA) indicates that the online privacy policy constitutes notice at collection."² The notice must appear "at or before the point of collection," and a link to the privacy policy at the bottom of a website won't necessarily satisfy that requirement, at least with respect to any personal information collected automatically at the instant the site loads in a visitor's browser. Even if a business discloses such collection in its privacy policy, "this does not absolve the business from complying with its statutory requirements to separately provide a notice at collection."³

The OAG's stance confirms that, while the CCPA doesn't explicitly require a cookie banner, businesses should consider using some form of pop-up notice on their website in order to satisfy the requirement of notice "at or before" the point of collection. For example if a business determines that data automatically collected through the use of cookies on its site includes personal information, it might consider deploying a simple pop-up that says something like "PRIVACY NOTICE: This site automatically collects data from your browser that

1 <https://oag.ca.gov/privacy/ccpa/regs-package-oal>.

2 SoR at Appendix A, Response 105, <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-fsor-appendix-a.pdf>.

3 *Id.*

may include personal information” and contains links to both the full site-specific notice at collection (describing the categories collected and the purposes for which they’ll be used) and the business’s comprehensive privacy policy.

2. A business that “sells” personal information should place the required “Do Not Sell” button with care.

The SoR highlights the importance of making sure the “Do Not Sell My Personal Information” button is “clear and conspicuous” on the website of a business that “sells” personal information (as broadly defined under the CCPA). In Appendix A, Response 267, the OAG emphasizes this separate requirement as a critical piece of the CCPA.⁴ Indeed, it appears that the OAG will focus at least part of initial enforcement efforts on placement of the button.⁵ If a business employs a pop-up banner as its website notice at collection, and some of the data addressed in that notice is to be “sold” (for example, for purposes of cross-site behavioral advertising), the business should consider embedding the “Do Not Sell” button (in addition to links to the full collection notice and privacy policy), in the pop-up, as well as a permanent place on the website’s homepage.

In its first set of modified regulations, the OAG provided a sample uniform opt-out logo as required under CCPA Section 1798.185(a)(4)(C). This uniform button was meant to be used by “by all businesses to promote consumer awareness of the opportunity to opt-out of the sale of personal information.” However, in the second set of modified regulations, this uniform button was deleted following criticism that it was confusing. In Appendix C, Response 84, the OAG stated it deleted the proposed regulation “to further develop and evaluate” a uniform opt-out logo or button⁶. For now, there is no indication when such a uniform logo or button will be established, but businesses should focus on clarity and ease of use in designing their own button.

3. Even if a business doesn’t “sell” personal information, it must still disclose consumers’ right to “opt-out” of sales.

The right to opt-out of “sales” of personal information is one of the most powerful rights afforded to consumers under the CCPA. The SoR emphasizes the importance of this right in the context of the CCPA, and outlines several understandings as to the right to opt out.

First, the SoR clarifies that every company that meets the CCPA’s definition of a “business” must give notice of the right to opt out, regardless of whether the company sells personal information. Per the OAG, the consumer deserves notice of the right from every business.

4 SoR at Appendix A, Response 267, <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-fsor-appendix-a.pdf>.

5 <https://oag.ca.gov/news/press-releases/attorney-general-becerra-issues-statement-day-one-ccpa-enforcement-know-your>.

6 SoR at Appendix C, Response 311, <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-fsor-appendix-c.pdf>.

The CCPA “requires a business to disclose certain information in the required notices and privacy policy.”⁷ Even if your business is not a “seller,” and therefore need not offer an opt-out mechanism such as the “Do Not Sell” button, the OAG makes clear that the text of the CCPA requires “description of consumers’ rights, even when a business does not have to comply with the consumer’s request.”⁸ Because “CCPA-mandated disclosures are required even if the business is not required to comply with the consumers’ exercise of their rights,” every covered business must outline the various consumer rights, including the right to opt out.⁹

4. The Attorney General will (someday, maybe) clarify some key CCPA definitions, including the definition of “sale” of personal information.

The OAG’s first modified regulations proposed a new section clarifying certain definitions within the CCPA. Among these definitions, the OAG provided some guidance on when certain types of data, such as IP addresses, constitute “personal information.” The second set of modifications issued in March 2020 deleted this provision following complaints that the rule would improperly narrow the statutory definition. However, in Appendix E, Response 9, the OAG stated “[f]urther analysis is required on this issue.”¹⁰ The OAG further indicates it may take a closer look at whether certain other definitions, including “business,” “business purpose,” and “sale” require further clarification or regulation.

Considering the significant uncertainty that remains about when a disclosure of personal information amounts to a “sale,” any clarification of that term would be welcome. For now, businesses that give third parties access to personal information without explicit direction from the consumer and without imposing the CCPA’s “service provider” restrictions should carefully evaluate each of those third party relationships and identify the forms of consideration being given and received, including benefits or services received from the third party. If the business receives something of value as part of that relationship, but believes the sharing of personal information with the third party nevertheless does not constitute a sale, it should be prepared to explain, at a minimum, how its receipt of that value is not conditioned on the data sharing.

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7 SoR at Appendix A, Response 264, <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-fsor-appendix-a.pdf>.

8 SoR at Appendix A, Response 311, <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-fsor-appendix-a.pdf>.

9 SoR at Appendix A, Response 264, <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-fsor-appendix-a.pdf>.

10 SoR at Appendix E, Response 9, <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-fsor-appendix-e.pdf>.