

# Buchalter

## The California Consumer Privacy Act of 2018 (CCPA) What it means for the Financial Services Industry

Presented by  
Melissa Richards  
Of Counsel  
(415) 227-3543 or [MRichards@Buchalter.com](mailto:MRichards@Buchalter.com)

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# The California Consumer Privacy Act of 2018 (CCPA)

## What it means for the Financial Services Industry

**INTENT OF CCPA** - To give consumers more privacy rights and transparency concerning their personal information and how it is being used by commercial enterprises.

### **BACKGROUND**

- On June 28, 2018, the California Legislature unanimously passed and the Governor signed AB 375 (Chau), Chapter 55 Statutes of 2018, now known as the CCPA, in a record 7 days to avoid a more expansive measure heading for the November 2018 ballot. The Governor signed another bill amending AB 375 in September, 2018.
- The CCPA is currently the most sweeping consumer financial privacy law in the United States and guarantees consumers certain rights and protections with respect to the collection and sale of their personal information (as defined).
- The CCPA is scheduled to take effect January 1, 2020. The CA Attorney General is granted administrative (rulemaking) and enforcement authority over CCPA. Enforcement to begin July 1, 2020.
- The 2019 CA Legislature is considering various bills that would clarify or make technical changes only to the CCPA. Proponents of the 2018 ballot measure threaten to reintroduce if the Legislature enacts provisions that would materially alter CCPA or reduce the consumer protections afforded.

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### EXEMPTIONS

- The CCPA grants limited exemption for Personal Information governed by certain federal statutes including GLB Act (and its California counterpart, the Consumer Financial Privacy Act), FCRA, HIPAA, and the Driver's Privacy Protection Act. *The CCPA does exempt persons covered under GLB Act and CA CFPA. Financial services industry must comply with CCPA, GLB Act and CA FPA concurrently.*
- Compliance with federal, state and local laws. **For regulated financial services companies, compliance includes record retention requirements generally and for regulatory examinations, auditing and consumer complaint/inquiry responses.**
- De-identified or aggregated consumer information (see Slide 4).
- Collecting or selling a consumer's PI ***if every aspect of that commercial conduct takes place wholly outside of California*** - consumer was outside CA when the PI was collected, no part of the sale of the PI occurred in CA, and no PI collecting while the consumer was in CA is sold.

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### SCOPE OF COVERAGE

#### CONSUMER

- Any natural person who is a California resident or who is “domiciled” in California but “outside the State for a temporary or transitory purpose.” Excludes those who are residing in California temporarily or for transitory purposes.
- ***SB 25 (2019) - Proposed “Consumer” definition exclusion for employer/employee + relationships.***

SB 25 (2019) would exclude from the definition of “consumer” natural persons whose personal information (PI) has been collected by a business in the course of receiving a job application, as well as information collected and maintained on employees, contractors and agents. To maintain the proposed exemption, PI could only be used for purposes compatible with the context of that person’s activities for the business as a job applicant, employee, contractor or agent of the business.

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### PERSONAL INFORMATION

- Information that a covered commercial enterprise collects about a consumer. Includes information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked to a Consumer.
- PI includes unique identifiers, biometrics, geolocation data, browsing and search information, and “inferences drawn” from the PI that are used to create a profile about a consumer.
- PI also includes publicly available information if it is used for a purpose that is not compatible with the purpose for which the information was made available in government records (see Slide 5).
- **Exclusion:** De-identified or aggregate information, or information that is publicly available from government records (federal, state, local) is excluded from the definition of “Personal Information” (see Slide 6).

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### **AB 874 (2019) proposes to expand the definition of exempted “publicly available” information.**

- The CCPA includes in its PI definition some publicly available information if it is used for a purpose that is not compatible with the purpose for which the information was made available in government records. This existing definition may require businesses to guess as to why a public entity made certain information publicly available before using it for a commercial purpose.
- AB 874 would ensure “publicly available” information includes any information that is lawfully made available from government records.

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### **AB 873 (2019) proposes alternate definition of “De-identified information” and refinement of PI definition.**

- This bill would revise the PI definition to include information that is “reasonably” capable of being associated with a particular consumer or household.
- This bill would also change the definition of “de-identified” to instead mean information that does not identify, and is not reasonably linked, directly or indirectly, to a particular consumer, provided that the business makes no attempt to re-identify the information, contractually prohibits recipients of the data from trying to re-identify it, and publicly commits to maintaining and using the data in a de-identified form only.

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### **CONSUMER'S RIGHTS UNDER THE CCPA ARE:**

- **THE RIGHT TO KNOW** - Covered businesses must inform on a CCPA webpage (a) what PI and categories of PI are being collected, sold or disclosed during the previous 12 months, (b) whether PI is sold or disclosed and to whom. Note: 12-month "lookback" period begins July 1, 2019. Covered businesses must:
  - At or before the point of collection, inform consumers of the categories of PI collected (and purpose(s) of use), sold and disclosed;
  - Make methods available for consumers to submit a request for PI;
  - In response to a consumer's verified request, disclose and deliver the PI "free of charge" within 45 days. Maximum 2 verified requests per 12-month period; and
  - Inform categories of third parties receiving exempted business purpose disclosures.



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### **CONSUMER'S RIGHTS UNDER THE CCPA ARE:**

- **THE RIGHT TO BE FORGOTTEN** - Consumers have the right to request the deletion of PI held by a covered business (subject to certain exceptions like the need to comply with legal obligations) (see Slide 8).
  - Covered businesses must disclose the right to delete on its website and in its privacy policy, and honor verified consumer requests to delete the PI from its records and the records of its service providers.
- **THE RIGHT TO OPT-OUT/OPT-IN** - Consumers have the right to prohibit the sale of their PI ("opt out") and to authorize the sale as to individuals 16 years old or younger ("opt in"). Covered businesses must:
  - 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 the sale of their PI.
  - Respect the consumer's opt out decision for 12 months before requesting the consumer to authorize the sale of their PI again.
  - Ensure all individuals responsible for handling consumer inquiries about the business' privacy practices be informed of the right to opt out and how to direct consumers to exercise the right.

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Note: If a covered business receives a consumer's request to delete their PI, it must direct its service providers to delete the PI from their records unless necessary to maintain to complete the transaction for which the PI was collected, provide a good or service requested by the consumer, or reasonably anticipated within the context of a business' ongoing business relationship with the consumer, or otherwise perform a contract between the business and the consumer.

- **RIGHT TO BE FREE FROM DISCRIMINATION** - for consumers exercising any of their CCPA rights, they have the right to not be charged different prices or rates, provided different services, or denied goods or services. Certain exceptions apply, and covered businesses may offer financial incentives to collect, sell or not delete PI.
  - AB 846 (2019) would ensure customer loyalty programs could continue to be offered to consumers provided they are not unjust, unreasonable, coercive or usurious in nature.

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- PRIVATE RIGHT OF ACTION - the right to file suit for damages in event of a PI data breach and the covered business did not encrypt or redact the PI, and the covered business failed to maintain reasonable security measures.
  - Limited Opportunity to Cure - consumers must provide written notice of specific violation before filing suit. Defendant then has 30 days to cure (to the consumer's satisfaction).
  - \*\* No notice required for actual pecuniary damages that can be definitively ascertained and carry a quantifiable monetary value.
  - Statutory damages of \$100 - \$750 per consumer, per incident, or actual damages (whichever is higher);
  - Injunctive or declaratory relief;
  - Any other relief the court finds is appropriate.

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- A consumer's rights under CCPA arise if a Covered Business Collects the consumer's PI, or if its Sells or discloses the PI for a Business Purpose.
- "Covered Business" = any company that does business in California and meets any one of the following standards:
  - Gross revenue over \$25 million.
  - Collects or shares PI annually from 50,000 consumers, households or devices.
  - Derives 50% of annual revenue from sale of personal information.
  - An entity that controls/controlled by a covered business.

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- Collecting data includes buying, renting, gathering, obtaining, receiving, or accessing any consumer PI by any means, including receiving information from the consumer (actively or passively) or obtaining it by observing the consumer's behavior.
- Selling means selling, renting, releasing, disclosing, disseminating, making available, transferring or otherwise communicating orally, in writing, or by electronic or other means, a consumer's PI from one covered business to another business or a third party.

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- Business Purpose means the use for the covered business or service provider's operational purposes or for other notified purposes. This can include maintaining or servicing accounts, providing customer service, processing or fulfilling orders and transactions (including processing payments), verifying customer information, providing financing, advertising or marketing services, providing analytic services, auditing, and data and cybersecurity services.

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### **More on GLB Act and CA Financial Information Privacy Act**

- The definitions of personally identifiable information and non-public financial information speak only to non-public information about a consumer that is obtained (a) through inquiry or application by a consumer for a financial product or service, or (b) when providing a financial product or service to that consumer. This type of information is by definition, much narrower than CCPA Personal Information.
- GLB Act and CA FIPA are disclosure statutes giving consumers the right to opt-out/opt in, respectively, of certain sharing and joint marketing arrangements with non-affiliated third parties. The list of sharing exemptions is plentiful.
- Neither statute limits the amount or content of information that may be collected by a covered institution, including responding to (verified) consumer requests for information after the delivery of required disclosures.

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### Enforcement

- Primary enforcement is with the California Attorney General, which can assess a penalty of not more than \$2,500 for each violation or \$7,500 for each intentional violation.
- AG must provide written notice of the violation along with a 30-day period to cure the non-compliance.
- A covered business is not liable for CCPA violations of service providers or other entities that receive PI from the company under specific contract restrictions, so long as the company did not have "actual knowledge...or reason to believe...that the person intends to commit such a violation."
- The CA AG also has administrative rule making authority. Proposed rulemaking to implement CCPA is expected in Fall 2018.



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### COMPLIANCE STEPS

- Inventory of Personal Information collected, sources and purposes. Important to identify, capture and map all PI that falls within the scope of GLB Act and CA FIPA.
- Inventory of Personal Information disclosed, recipients, and purpose. Following recommendation #1, identify, capture and map GLB Act and CA FIPA authorized disclosures and sharing activities.
- Inventory of all "Sales." Build out consumer "opt-out" functions and procedures if engaging in sales.
- Updating website (see previous slides) and establish a toll-free telephone number for consumers to exercise their rights.

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### **COMPLIANCE STEPS, CONT'D.**

- Adopt CCPA Privacy Policies & Procedures, integrated with the institution's GLB Act and CA FIPA policy and procedures.
- Employee training. Ensure all individuals responsible for handling consumer inquiries about the business' privacy practices be informed of the right to opt out and how to direct consumers to exercise the right.
- Preparing for Deletion Requests. Determine deletion methods and develop legal positions on scope of deletion right as applied to the covered business. Also develop communication for consumers explaining legal reason(s) why the request will not be honored.
- Automated and technical solutions. Assess and update compliance automation systems; document compliance.

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## Melissa Richards Of Counsel

(415) 227-3543 or [MRichards@Buchalter.com](mailto:MRichards@Buchalter.com)

Melissa Richards, CMB is a California licensed attorney with a national practice specializing in federal and multistate compliance, licensing and enterprise risk management for the financial services industry. Her clients are engaged in residential and commercial mortgage, fintech, licensed non-depository and depository institution consumer and commercial lending, either directly or in supporting vendor roles. Ms. Richards has both outside counsel experience as well as general counsel experience. From 2012-2018, Ms. Richards served as the Chief Legal & Risk Officer of a mid-size independent mortgage company ranked as one of Scotsman Guide's Top 15 Mortgage Lenders in 2018-2019.

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