

Surfin' CCPA: Riding the Wave of the California Consumer Privacy Act

Timothy Nagle	U.S. Bank National Association Senior Vice President, Associate General Counsel and Chief Privacy Officer Minneapolis, Minnesota
Kathryn Wood	DecoPac, Inc. In-House Counsel Anoka, Minnesota
Robert Cattanach	Dorsey & Whitney LLP Partner Minneapolis, Minnesota cattanach.robert@dorsey.com (612) 340-2873
Joseph Lynyak	Dorsey & Whitney LLP Partner Washington, DC lynyak.joseph@dorsey.com (202) 442-3515
Jamie Nafziger	Dorsey & Whitney LLP Partner Minneapolis, Minnesota nafziger.jamie@dorsey.com (612) 343-7922

Handouts

1. PowerPoint Presentation

Resources available on Dorsey.com

Dorsey & Whitney LLP eUpdate: *Breathing Room? California Legislature Passes Two Major Amendments to California Consumer Privacy Act (CCPA)* (September 16, 2019)

Link: <https://www.dorsey.com/newsresources/publications/client-alerts/2019/09/california-legislature-passes-two-major-amendments>

Dorsey & Whitney LLP eUpdate: *CCPA Requires "Reasonable Security": but You Can't have Reasonable Security Without Proper Vulnerability Management* (September 12, 2019)

Link: <https://www.dorsey.com/newsresources/publications/client-alerts/2019/09/ccpa-requires-reasonable-security>

Materials are Available on www.dorsey.com at
<https://www.dorsey.com/newsresources/events/event/2019/11/corporate-counsel-symposium-2019-materials>

Dorsey & Whitney LLP eUpdate: *AB 25 Passes the California Assembly – and Excludes Employee Information from Coverage under the California Consumer Privacy Act* (May 31, 2019)

Link: <https://www.dorsey.com/newsresources/publications/client-alerts/2019/05/ab-25-passes-the-california-assembly>

Dorsey & Whitney LLP eUpdate: *National Financial Institutions—Developing A Project Plan To Comply With The California Consumer Privacy Act* (June 28, 2019)

Link: <https://www.dorsey.com/newsresources/publications/client-alerts/2019/06/national-financial-institutions-ccpa>

Dorsey & Whitney LLP eUpdate: *Nevada’s New Privacy Law – Beating California in the Backstretch*, (June 7, 2019)

Link: <https://www.dorsey.com/newsresources/publications/client-alerts/2019/06/nevadas-new-privacy-law>

Dorsey Blogs

TMCA Blog at <https://thetmca.com/> for legal developments in the world of Trademarks, Copyrights, Advertising.

Computer Fraud / Data Protection Blog at <https://computerfraud.us/> for cutting edge legal issues relating to trends in cybercrime, protection of computer data, data breaches and more.

Visit **Dorsey.com** to check out Dorsey’s **Online Screening Tool** to determine your compliance status with California’s Consumer Privacy Act (CCPA). To launch Dorsey’s **Online Screening Tool** go to: <https://www.dorsey.com/services/ccpa>

Surfin' CCPA: Riding the Wave of the California Consumer Privacy Act

Timothy Nagle, Senior Vice President, Associate General Counsel and Chief Privacy Officer, U.S. Bank National Association

Kathryn Wood, In-House Counsel, DecoPac, Inc.

**Robert Cattanach, Joseph Lynyak and Jamie Nafziger,
Dorsey & Whitney LLP**

Wednesday, November 6, 2019

1

Overview

- **What's so aggro about CCPA?**
- **Who needs to care?**
- **What rights?**
- **Epic – to do list**
- **How do we bail? Exceptions**
- **Amendments**
- **Regulations**
- **Wipe out - CCPA II**
- **Hang loose – lightning round!**

Initial Question: Why Do We Care?

- **It's the Statutory Damages - and Coverage!!!!**
 - Unlike other state privacy laws CCPA now includes statutory damages for certain data breaches
 - California takes broad view of jurisdiction for any non-California company that does virtually any amount of business with California residents
 - Internet business counts
 - Non-California businesses will have to adopt a project plan approach to compliance when CCPA becomes effective

Background

- Up until adoption of CCPA: violating privacy was viewed through prism of data security breaches
 - But courts had consistently determined that *actual* damages required to be shown following security breach
 - CCPA establishes statutory damages for specified data breaches
 - Similar to TCPA statutory damages approach
 - Coverage likely includes most medium and larger businesses that conduct internet business with residents of California

Liability

- **Actions brought by Attorney General**
 - \$7,500 per intentional violation
 - \$2,500 for unintentional violations
 - 30-day cure period provided
- **Actions brought by private parties**
 - Actual damages
 - Statutory damages between \$100 and \$750 per “incident” for data theft or data security breaches
 - Identification criteria somewhat narrower than general definition of personal information in CCPA
 - Sole defense appears to be maintenance of reasonable security protocols
 - How standards will be determined is unclear

Coverage

- **A business is broadly defined**
 - Sole proprietorship or corporate entity of any type that
 - Collects consumer’s personal information, whether alone or jointly with others
 - Does business in California
 - Definition includes affiliated entities based upon a 50% ownership or control factor
 - **And** satisfies one or more of three primary thresholds

Coverage

- **Business thresholds**
 - Annual gross revenues in excess of \$25,000,000
 - Alone or in combination with others, business annually buys, receives for business' commercial purposes, sells, or shares for commercial purposes, alone or in combination, personal information of 50,000 or more consumers, households, or devices, or
 - Derives 50 percent or more of annual revenues from selling consumers' personal information
- **Question: Are these thresholds based upon California-related business or U.S or global business operations?**
 - Probably global (or at least, national) revenue
 - Other two categories unclear

Note: Affiliated companies that are controlled and have same branding are aggregated for coverage purposes

CORPORATE COUNSEL SYMPOSIUM—2019

7

Legal Rights Created

- **CCPA includes several requirements of EU's General Data Protection Regulation ("GDPR")**
- **5 legal rights for California consumers:**
 - Right to
 - Know what personal information is being collected
 - Know whether personal information is sold or disclosed and to whom
 - Say "no" to "sale" of personal information
 - Require that certain personal information must be deleted, and
 - Equal service and price, whether or not privacy rights under CCPA are exercised
- **Title 1.18.5 to California Civil Code**
 - Section 1798.100 *et seq.*

CORPORATE COUNSEL SYMPOSIUM—2019

8

Risk-Based Approach – To Do List

Security operations improvements in anticipation of class actions

Security policies and execution

Opt-out/opt-in planning (buttons, separate websites/apps)

Children under 16

Data mapping

Update privacy policy for website/apps; include Nevada

Risk-Based Approach – To Do List (Part 2)

Employee privacy policy

Vendor agreements

Plan/develop technology and procedures re access requests

Plan/develop technology and procedures re deletion requests

Employee/contractor training

Cyber insurance review

CCPA Compliance Journeys

- U.S. Bank
- DecoPac

Coverage—A Non-Inclusive List of What Constitutes Personal Information

- **Personal identifiers**
 - A real name
 - An alias
 - A postal address
 - A unique personal identifier
 - An online identifier (Internet Protocol address)
 - An email address
 - An account name
 - A social security number
 - A driver's license number
 - A passport number, or
 - other similar identifiers
- **Commercial information**
 - Shareholder information
- **Biometric information**
- **Internet or other electronic network activity information**
- **Geolocation data**
- **Audio, electronic, visual, thermal, olfactory, or similar information**
- **Professional or employment-related information**
- **Education information**
- **Inferences drawn from any personal information used to create a profile about a consumer**
- **Any categories of personal information described in subdivision (e) of Section 1798.80 of the California Civil Code**
- **Characteristics of protected classifications under California or federal law**

Partial Exemptions

- CCPA provides *partial* exemption for specific industry groups—
 - Financial institutions subject to Gramm-Leach-Bliley applies and/or California Financial Information Privacy Act applies (Section 4050 of California Financial Code)
 - Health Care Providers
- Scope of partial exemptions remain to be interpreted by California AG

Business Purpose Exception

- “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 personal information by the business to another business or a third party for monetary or other valuable consideration”
- Advantage
 - Avoid opt-out (Do Not Sell My Personal Information)
- Requirements
 - One of seven activities listed in CCPA 1798.140(d)
 - Notice (privacy policy)
 - Service provider does not further collect, sell, or use personal information except as necessary to perform business purpose (data processing agreement)

Compliance Challenges

- Discussion

Compliance Challenges, continued

- **CCPA's "lighter touch" may turn out to be a curse**
 - No similar requirement to Article 30 – record of processing
 - No requirement for Data Protection Officer (DPO)
 - No *action-forcing* requirements similar to GDPR
 - Temptation of 'paper' compliance may create false feeling of comfort
- **Even GDPR compliant companies still have work to do**
- **Non-GDPR compliant companies substantially unprepared**
- **Subject Access Requests**
 - If Subject Access Requests = GDPR's, businesses in for a shock
 - "Reasonable" steps to verify identity of requestor remain untested

October 2019 Amendments

- **Business-to-Business**
 - Delay implementation of some provisions for one year
 - Only as to due diligence regarding, or providing or receiving product or service
 - Not advertising
 - Still subject to right to opt-out and price discrimination restrictions
 - Still subject to private right of action
- **Employment**
 - Delay implementation of some provisions for one year
 - Still need to give privacy notice
 - Still subject to private right of action
- **Data broker**

California AG: Draft Regulations

- **October 11: California AG proposed regulations for public comment**
 - Notification process to California “consumers” of rights under CCPA
 - Processing of “verifiable consumer requests”
 - Verification of identify for consumer requests
 - Special rules for minors’ PI
 - Determining value to comply with anti-discrimination provisions of CCPA
- **Criticism**
 - Expanded notice and timing requirements
 - Standards for compliance
 - Absence of guidance on scope of exemptions
 - Do-Not-Track
 - Children’s privacy – adding to Children’s Online Privacy Protection Act (COPPA)

CCPA II?

- **Californians for Consumer Privacy - new initiative on November 2020 ballot to strengthen CCPA**
- **Provisions would include**
 - Creating new state agency for enforcement
 - Triple penalties for violation of children’s privacy
 - Create new rights for class of data termed “sensitive personal information”
 - Opt-in
 - Require expanded business disclosures for uses of and retention of PI
 - Disclose information from over 12 months back
 - Disclose if profiling
 - Financial, insurance, health care, housing, education admissions, denial of employment
 - Definition of household
 - 100,000 instead of 50,000

Implementation

- **CCPA effective January 1, 2020**
 - California AG must issue final regulations by July 1, 2020
 - No enforcement by California AG until final regulations issued
 - **But** private right of action for statutory damages becomes effective on January 1, 2020
- **Affected parties can request interpretative guidance from California AG**

Lightning Round – Gnarly!

- Ambiguities
- Federal law
- Preemption
- Other states to watch
- Tips

Surfin' CCPA: Riding the Wave of the California Consumer Privacy Act

- Thank you!
- Time to kick out and get ready for CCPA tsunami

Timothy Nagle, Senior Vice President, Associate General Counsel and Chief Privacy Officer, U.S. Bank National Association

Kathryn Wood, In-House Counsel, DecoPac, Inc.

**Robert Cattnach, Joseph Lynyak and Jamie Nafziger,
Dorsey & Whitney LLP**