

Second Summer Webinar: California's CCPA and Education Working Group

Date: July 31, 2018

Time: 3:30pm - 5:00pm

Note: Chatham House Rules Apply

Speaker #1: Ariel Johnson @ Common Sense Media

California Consumer Privacy Act

- o **Fall 2017:** Privacy Initiative filed in CA to be put on the ballot
 - Lead proponent of the initiative was Alastair Mactaggart
 - Privacy initiative that was filed proposed to provide for:
 - o The right for consumers know what categories of information is collected about them and who it is sold/shared to
 - o The right for consumers to tell companies to stop selling or sharing information about them
 - o The private right of action/ lawsuits and the ability for the AG to enforce
 - Fines up to \$7,500 per violation
 - o The establishment of a consumer privacy fund
 - Parts of the initiative were written broadly and parts were written prescriptively
 - o For example: the right to say no to the selling or sharing of information required that there had to be a button that said “do not sell my information”
- o Initiative was introduced in the fall and went through signature gathering process to qualify for the ballot
 - By **May 2018:** 600,000 signatures (only needed 380,000)
- o Although there was a lot of support, there was so opposition from:
 - Industry because they thought it was too broad and were extremely afraid of the private right of action
 - (or at least neutral feeling) from privacy advocates because they did not feel like it went far enough and did not provide enough rights to people
 - Legislature opposed because they felt that it was their job to legislate such a complicated topic like privacy
 - Members of the legislature struck a deal with the Mactaggart that if they were able to get a bill passed by the initiative deadline, he would pull the initiative from consideration
 - o **June 22, 2018:** legislature introduces bill AB 375; California Consumer Privacy Act
 - Was introduced on a Thursday/ Friday and was amended on Monday.
 - o **June 28, 2018:** Bill passes House and Senate unanimously and the Governor signed the bill into law. The initiative was then withdrawn.

- **CCPA Now Includes:**
 - The first broadly applicable consumer privacy law that is not sectorally focused (not focused on financial information, health information, or children (although there is special protection for children)) **Law goes into effect January 1, 2020**
 - Notice and transparency rights
 - Access, portability, and deletion rights
 - Right to say no to the sale of information
 - Mandatory opt in for under 16 years of age for the sale of information
 - Guarantees equal service and price, whether or not people are exercising their privacy rights
- When the legislature passed the law there were some compromises made between law and the initiative
 - Law v. Initiative
 - Law gave up some of the private rights of action but consumers gained more substantive consumer rights
 - Access to information (both carry rights to port that)
 - Initiative: right to access categories of information
 - Law: right to access specific information
 - Law provided the right to delete information
 - Law provided opt-in consent for kids under 16 (this was not apart of the initiative)
 - Both have the right to say no to sale of information but applied differently
 - Initiative:
 - Broadly defined – sharing for no benefit was considered a sale
 - Required that companies specifically say which businesses and third parties they sold information to
 - The law
 - There has to be consideration for there to be a sale under the law
 - You only get categories of companies that your information is sold to and those companies are prohibited from further sale unless they give notice and opt-in/out opportunity
 - The big difference:
 - The law provides a more narrow private right of action with respect to data breaches
 - More narrow swath of information covered than is covered otherwise
- Common sense is a co-sponsor of the law,
 - Kids are the most tracked generation and we need to make informed decisions regarding the who, what, where and why data is being collected and how it appears online
 - Recent polling via survey monkey
 - 9 in 10 parents and teens think it is important that sites clearly label what data is collected and how it is being used

- This is something that the law does
- 77% of parents say that it is very important for sites to ask permission before selling or sharing information
 - For kids under 16 the law would do this
 - For parents there is an opt-out
- What is happening next?
 - Mactaggart with Senator Hertzberg and Representative Chau (two out of the three legislative sponsors) gave a speech
 - Mactaggart vows to continue to fight for continues privacy protection
 - Some sectors have vowed to limit the reach of the law
 - SB 1121 Cleanup bill (should occur in August that will be a technical clean up, including typos and repetitive language)
 - The law provides for AG rule making
 - Required to provide more regulation and guidance on
 - Price discrimination
 - How to provide various notice rights
 - May offer more rules if they so choose
 - Likely to see other CA Bills addressing components of the law
 - Likely to see other State Bills addressing consumer privacy
 - Maybe even a federal framework

Speaker # 2: Emily S. Tabatbai @ Orrick Herring & Sutcliffe

CCPA and Kids: How does the CCPA apply to children and students?

Who does the CCPA apply to?

- Any business that
 - has annual gross revenues over \$25M
 - buys, receives, sells or shares (for commercial purposes) the personal information of 50,000+ CA consumers, households or devices; or
 - derives >50% of its revenues from selling consumers' personal information
- * There is still great debate with regard what this means to differing types of businesses
- **Business** = for profit legal entity that
 - Does business in CA
 - Collects CA consumers' "personal information" and that, alone or jointly with others, "determines the purpose and means of the processing of the consumer's personal information"
 - This language is potentially intended to be similar to the concept of a controller and processor similar to the GDPR
 - This include brick and mortar data collection in addition to online collection
- **Consumer** = natural person who is a CA resident however identified, including by any unique identifier
- **Personal Information**

- Defined extremely broadly – trying to capture as much information possible, including information that corporations have historically tried to argue not to be personally identifiable information just because it is associated with an individual's account
 - Typically identifiable information such as:
 - Name
 - SSN
 - Biometric data
 - Geolocation
 - DL#
 - Passport #
 - Tracking data and unique identifiers
 - IP address
 - Cookies
 - Beacons
 - Pixel tags
 - Mobile ad identifiers and similar technology
 - Customer numbers
 - Unique pseudonyms
 - “probabilistic identifiers” that can be used to identify a particular consumer or device
 - Any other persistent identifiers that can be used to recognize a consumer, family or device over time and across services
 - Behavioral and profiling data
 - Browsing history, search history, and information regarding a consumer's interactions with a website, application or advertisement
 - Purchasing history, including products or services that were obtained, purchased or considered, or purchasing tendencies, and
 - Inferences drawn from the foregoing to create a profile reflecting the consumer's preferences, characteristics, psychological trends, predispositions and attitudes
 - Professional and personal background data
 - Professional or employment related information
 - Education information and characteristics of protected classifications under CA or federal law
 - Sensory data
 - Audio
 - Electronic
 - Visual
 - Thermal
 - Olfactory or similar information
- CCPA Requirements (in brief)
 - A business must

- **Disclose** the categories and specific pieces of personal information it collects; the source of the personal information; the categories of 3rd parties with whom the business discloses the personal information for business purposes and for non-business purposes
- **Provide access** to personal information in a format for portability
- **Delete personal information** upon request and instruct service providers to delete, subject to exceptions
- **Honor opt-out requests** to prevent future data sales to 3rd parties (“do not sell my personal information”), subject to exceptions
- Business vs. service provider obligations
 - Many CCPA provisions apply to business and do not directly to service providers
 - **Service provider** - not defined clearly by the statute but there several provisions that refer to the concept of a service provider
 - **Technical definition of service provider:**
 - Entity that processes personal information on behalf of a business, for a business purpose, pursuant to a written contract that prohibits service provider from retaining, using or disclosing the personal information for any purpose (particularly for a commercial purpose) other than for the specific purpose of performing the services specified by the contract.
 - “business purposes” are enumerated
 - Service providers are not directly obligated to consumer rights
 - The business is – when the business gets deletion request they must then pass that on to service provider who can then respond
 - **Deletion requests.** Business must direct its service providers to also delete information subject to consumer request
 - Similarly, business giving the formation to a service provider is excluded from the definition of “sell” because they are performing business services on the business’ behalf
 - **No opt-out right for service provider disclosures.** It is not a sale when a business discloses personal information to a service provider, as long as such disclosures described in the privacy policy

How does the CCPA apply to children?:

- CCPA generally applies to consumers of all ages – all of the provisions and obligations discussed above are therefore apply regardless of the consumers age
 - The definition of personal information **includes** education information
 - Defined as: any information that is not publicly available personally identifiable information as defined in FERPA
 - However, FERPA does not define anything as personally identifiable information

- it can be assumed that the statute intended to cover the type of information that is found in student records that are covered by FERPA
- **Child's right to opt in:**
 - CCPA 1798.120: a business shall not sell the personally identifiable information of a consumer to a third party for non-business purpose unless
 - **Minor under 13**, the child's parent or guardian has affirmatively authorized the sale of information
 - **Minor under 16**, the child consumer has affirmatively authorized the sale of information
 - Ambiguous as to whether it includes 16 year old or only under 16
 - There must be actual knowledge of the child's age. The business cannot willfully disregard the age of the child
 - How will the business be able to identify the child's age?
 - Age screening?
 - One provision that refers to having a separate CA homepage that just applies to CA users – this might be something that CA companies may want to do in order to more easily identify children under the age of 16
 - CA only website that does not have any third party trackers until the user identifies as being older than 16, then this could be a way to avoid the collection and sale of personal information for children under the age of 16
 - What does affirmative authorization mean for children ages 13 to 16?
 - COPPA verifiable parental consent standard?
 - Really high bar
 - Affirmative authorization a lesser standard than verifiable?
 - There are a lot of open ended questions regarding website visitors under the age of 16 and there will hopefully be more guidance from the AG on the topic

Speaker # 3: Sara Kloeck @ Software and Information Industry Association

COPPA, FERPA, and CCPA

- AB 375, 1973.175 – where there is a conflict in the law the most privacy protective law will control
- CCPA Key Components (similar with FERPA and COPPA)
 - Notice and transparency rights
 - FERPA:
 - School must annually notify parents or eligible students (those in college over the age of 18) of various rights including
 - information regarding the inspect review
 - the right to seek to amend the records
 - how the school defines school official
 - how the school defines legitimate education interest
 - FERPA's School Official Exception

- Performs an institutional service or function for which the agency or institution would otherwise use employees;
- is under the direct control of the agency or institution with respect to the use and maintenance of education records;
- is subject to the requirements of section 99.33(a) governing the use and redisclosure of personally identifiable information from education records, and
- meets the criteria specified in the school's for the LEA's Annual Notification of FERPA rights for being a school official with a legitimate education interest in the education records
- COPPA
 - Applies to online services directed to children under the age of 13
 - Requires companies to provide “direct notice” before collecting information from kids which must include several things including information on the specific personal information the company wants to collect and how it might be disclosed to others.
 - Requires companies to obtain “verifiable parental consent” before collecting personal information.
 - Acceptable methods for obtaining consent include
 - A signed consent form
 - Dialing a 1-800 number
 - Answering a series of knowledge-based challenge questions
 - Verifying a picture of a driver's license and comparing that a second photo using facial recognition technology (recently approved by the FTC)
 - Allows schools (section M of the COPPA FAQ) to act as a parents agent and can consent to the collection of kids' information on a parents behalf but the ability to consent its limited to the educational context – solely for the use and benefits of the school, and for no commercial purpose
- CCPA
 - A lot is undefined and there are a lot of things that need to be defined better.
 - As the AG or additional legislation provides more technical guidance it will become clearer how EdTech companies that work with school can provide notice or how general tech companies need to provide notice and consent
 - Still unclear whether COPPA and CCPA can be read in harmony or whether there needs to be whole

separate consents – this should be cleared up by the AG or legislation

- Children or either parents will have to provide opt-in consent for the selling of their data
 - *Difference from COPPA*: COPPA requires consent for the collection and CCPA requires consent for the sale
- Access, Portability, and Deletion Rights
 - FERPA
 - Access
 - School must provide parent/ eligible student access and the ability to inspect and review education records within 45 days of the request for access
 - Parents/ eligible student may ask the school to amend the education record by writing to an appropriate school official, clearly identify which part of the record they want changed, and specify why it should be changed. If the school decides not to amend the record, the school will notify the parent/eligible student of the decision and their right to request a hearing
 - There are no deletion rights under FERPA
 - Portability
 - Specific exception in FERPA that allows schools to disclose education records to another school if a student seeks or intends to enroll, or if the student has already enrolled (section 99.31(a)(2))
 - This is a gray area in CCPA while interacting with FERPA
 - COPPA
 - Access
 - Parents must be able to review the personal information collected from child, revoke their consent, and refuse the further collection of personal information
 - Deletion
 - Companies must delete a child’s personal information if requested by a parent
 - CCPA
 - Would edtech companies have to grant access directly to parents?
 - This is one of the areas that needs to be clarified
 - More information needed
 - How to define “most privacy protective law”
 - Business versus service provider definitions in CCPA
 - Service providers are defined as providing services to businesses and service providers cannot be EdTech providers providing services to schools or cloud computing services to the DMV

- Does the consumer have access to deletion rights for service providers not providing a service to a business? Clarity is necessary
- Deletion rights under COPPA and CCPA in the schools
 - FTC considering some possible guidance on deletion rights in schools
 - Workshop was held in December and waiting more clarity and may help clear up CCPA
- Relationship between SOPIPA and CCPA

Speaker #4 Mark Williams @ Fagen, Friedman, & Fulfroost

Contracting Implications of the CCPA

- The CCPA provides new rights and duties for both consumers and businesses, have to look at two things
 - (1) How CCPA interacts with existing state law such as AB1584 and SOPIPA
 - (2) Does CCPA have an unexpected consequence of improving the contracting environment for school districts?
 - Potentially, yes
 - **AB1584**: contracts between school districts and digital providers to protect privacy of student data. The focus of the law is managing the data relationship between school districts and the vendor, not individual consumers and a vendor and not individual students within the district and a vendor (with exceptions)
 - In contrast, CCPA is not focused on school districts but individuals
 - The statute states that the person making the request must be a natural person and therefore not a school district
 - CCPA will have little impact on existing digital contracts with school districts.
 - Individual apps may make things more complicated, acquired by teachers or school sites
 - It is a fragmented market – expensive to contract with all the individual apps
 - SOPIPA
 - Provides a safety net for educators and school districts
 - So if they do not have a contract with the vendor there is still the safety net
 - The bad news is that it serves as an institutional break to further penetration by a normal contracting process – educators will default to SOPIPA
 - This is where the CCPA turns things upside down
 - 1798.175 – the CCPA is suppose to be a supplement to SOPIPA
 - This means that educational app developers are going to have to

expand their interaction to include with directed consumer interaction to include deletion rights

- What is the impact of CCPA?
 - There may be a migration of apps and app models to an AB 1584 model – this will provide a more coherent model for apps and districts to adopt, instead of using the CCPA model
 - This will benefit the data relationship in a school district because it's a comprehensive management of a the data relationship. This is a formalization of district contracting practices

Q&A

Question 1: why should anyone not from CA care about the CCPA?

Answer: (Emily) At a high level the law applies very broadly to businesses which are collecting the personal information of CA consumers. This means if you are a website operating in MA and only have writers and operations in MA but a sufficient number of CA consumers, you may be captured under the definition of the statute, particularly if you are using behavioral advertising trackers in order to raise revenue through advertising and affiliate links. Similarly, anyone operating a business in Europe but is directing their sales and services to the United States, in particular CA consumers, there is a threshold of 50,000 more consumer information being collected and annual gross revenue numbers – it just matters that you have CA consumers getting your services and that you are deriving revenue from their business. There is an exception under the CCPA that excludes business information that takes place entirely outside of CA – the consumer has to be outside of CA when they do business and they have to stop collecting information once they have returned to CA. There is still a question regarding enforcement upon entities outside of CA or outside of the U.S.

Question 2: why should anyone not from CA care about the CCPA, with regard to rumors of a federal law?

Answer: (Sara) Thinking about the GDPR application has had affects that the CCPA could follow with regard to subsequent laws in other states or at a federal level. Understanding CCPA will allow a foundational vocabulary ready to adapt to new laws popping up and being able to comply before you are caught off guard.

Question 3: Will the CCPA require EdTech vendors to get consent from each parent before a student can use their EdTech tools in the classroom in the K-12 environment, even if the student data collected by the vendor is only collected or used for the purpose of delivering the relevant product?

Answer: (Sara) This is something that is of discussion with regard on how to get meaningful parental consent from parents in the classroom. It is difficult to know whether the parents are getting the proper level of information with regard to what they are giving consent on. EdTech companies generally do not have a history of interacting with the parents directly because it has been generally a school to vendor relationship. Depending on an interpretation of the CCPA this may change. It would also require EdTech companies to collect way more information and may exclude schools from the equation.

(Emily) If the EdTech company is not collecting or selling the data to a third party or non-business purpose but only operating for the purpose of providing educational services then the CCPA consent requirement does not kick in. CCPA should not impose additional consent obligations other than SOPIPA and AB1584 where the EdTech operator is providing services directly to the child in the classroom and is not using or selling the students information for behavioral advertising purposes etc etc.

(Mark) AB1584 and School Office Exception could avoid the whole dilemma, but generally agree with Emily.

Question 4: Who is considered a consumer in the K 12 environment?

Answer: (Ariel) This is a debate going on outside of the K 12 environment but is something that should be construed as very broadly and would include students, children, parents, depending on the site it may include a teacher. Right now, we interpret it broadly. It is still being discussed whether the law applies to employees.

(Sara) The law is not a K12, higher education, or education specific law so that it applies to for profit businesses with minimum thresholds. At the heart it is a business to consumer relationship. Definitions need to be further defined but as of right now it is broadly construed.

Question 5: Does this law affect how non-profit organizations can collect student records (for example attendance, course test score data, etc) with minimal PII without names or address but some birthday, race, IEP status, etc? Does the law apply to nonprofits working with minors/ education?

Answer: (Emily) The statute applies mainly to for-profit entities. Service providers are defined as for-profit entities. But there is another definition for third party – anyone who is not the business that collects the information or a natural person to whom the business has disclosed the information for a business purpose. Therefore, it is not quite clear that non-profits would fall into

the statute. The goal of the statute is to protect information from being disclosed to a third party, this would be considered to include non-profit third parties. It would be interesting to see how a school (a nonprofit) who interacts with a nonprofit EdTech company and how the law would apply. Under the CCPA there is a research component that may be applicable depending on how the nonprofit is using the information. There needs to be more clarification on the piece.

(Ariel) In agreement with Emily, non-profits are not directly included but could be classified as a third party depending on the situation that arises. This would be something that needs to be addressed in a rulemaking or a technical amendment.

Question 6: If the CCPA does not cover a school since the school is not a business, and an EdTech vendor is a service provider to a school, then the school service providers presumably are not covered by the law if they are processing data on the school's behalf, thoughts?

Answer: (Mark) AB 1584 there would be an explicit inclusion and protection just by their data processing.

Question 7: Is the CCPA's actual knowledge standard the same or different from COPPA's? If it is different how will that affect data collection from online or mobile services that kids under 16 might use?

Answer: (Ariel) it is different because COPPA actual knowledge has been interpreted strictly, you have to be given a birth-date and know that they are a minor. Other circumstantial information such as a picture with a child and a birthday cake with 6 candles may not be considered actual knowledge. CCPA's willful disregard seems to be in the middle between actual knowledge and reasonably should know.

(Emily) Under COPPA, if your content is directed at children (if its cartoonish etc) in whole or in part, then the site is required to presume that everyone is a child until proven otherwise, requiring an age screen. It will therefore be interesting to see how to interpret CCPA's willful disregard – will it be obliged to presume that their visitors are minors? Will they be required to have an age screen? The way it is written right now companies cannot willfully disregard or they will be classified as having actual knowledge. So it may be interpreted as meaning that there may be an investigative factor for companies to screen if they have minor visitors.

Question 8: Are there preemption arguments under COPPA at least for age groups its regulations? And what are your thoughts on the patchwork of consent ages?

Answer: (Emily) There is an argument for the conflict of laws but COPPA does not preempt if the subsequent regulation (CCPA) is stricter or provide more protection.

(Sara) This is something that is not known, COPPA is under the age of 13, so there is no preemption for under 13-16 year old. On the general how does COPPA and CCPA interact on the preemption world is unknown.

(Ariel) People often raise COPPA preemption – but COPPA raises inconsistent regulations and CCPA is not inconsistent with under 13-year-old regulation. States may do more to protect teens if they want, they may not do less. But there is not enough case law yet.

Question 9: Does the law apply to school EdTech service providers and how would it differ if instead of processing data under the control of the school the EdTech is processing under the control of the teacher?

Answer: (Sara) Under FERPA, if a teacher is signing a contract with an EdTech company, it would be seen as the same as a principal or superintendent signing a contract. However, there is no clarity on the definitions so there is no way to say for sure how they are defined under the law. If for some reason EdTech companies are defined as a business and consumers are granted direct rights then it may allow 17 year olds to delete their grants from the data system.

(Emily) There is a reasonable argument that when the EdTech company is contracting with the school, the school is not a business and therefore providing a service for a non business and not covered by CCPA but it would be held to the regulations of AB1584. There is a good argument that CCPA could apply to a situation where the teacher is not reaching out but the teacher is allowing the students to use the EdTech in the classroom. The Edtech provider is acting as a controller, collecting information directly from the child and they are using it for their own purposes, maybe pursuant to SOPIPA they are using it for a limit number of circumstances.

(Sara) Think about this situation in college highlights more CCPA coverage and something that EdTech companies have to consider when deploying technology.

Question 10: Does CCPA apply to/ affect higher education differently?

Answer: (Sara) The distinction applies in the surrounding laws that apply to the different age groups. Financial laws and state laws can apply to the different education groups. But the CCPA is not an education law, so it is applied broadly.

(Emily) In the higher Ed context there are more likelihood of EdTech contracting directly with the students and circumventing the school system. This is way more likely than K12. In the K12 context, there are surrounding laws that also protect the minor students. When you get to higher ed a lot of the state laws go away and FERPA transfers a lot of the rights to the students. As a general rule, providers providing services to higher Ed and K12 should be aware that their actions may be subject to the CCPA.