

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1824 (Valencia)
Version: March 19, 2024
Hearing Date: June 4, 2024
Fiscal: Yes
Urgency: No
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SUBJECT

California Consumer Privacy Act of 2018: opt-out right: mergers

DIGEST

This bill requires a business that assumes control of all or some part of a transferor business that includes the transfer of a consumer's personal information to comply with a consumer's direction to the transferor pursuant to the California Consumer Privacy Act (CCPA).

EXECUTIVE SUMMARY

The California Consumer Privacy Act of 2018 (CCPA) grants consumers certain rights with regard to their personal information, including enhanced notice, access, and disclosure; the right to deletion; the right to restrict the sale or sharing of information; and protection from discrimination for exercising these rights. (Civ. Code § 1798.100 et seq.) It places attendant obligations on businesses to respect those rights. In the November 3, 2020 election, voters approved Proposition 24, which established the California Privacy Rights Act of 2020 (CPRA). The CPRA amends the CCPA, limits further amendment, and creates the California Privacy Protection Agency (PPA).

In response to privacy concerns related to tech-industry mergers, this bill requires a business that assumes control of all or some part of a transferor business that includes the transfer of a consumer's personal information to comply with a consumer's direction to the transferor pursuant to the right to opt out of the sale or sharing of personal information pursuant to the California Consumer Privacy Act (CCPA).

This bill is author-sponsored. It is supported by Oakland Privacy and Protection of the Educational Rights of Kids (PERK) Advocacy. The Committee received no timely opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the CCPA, which grants consumers certain rights with regard to their personal information, including enhanced notice, access, and disclosure; the right to deletion; the right to restrict the sale of information; and protection from discrimination for exercising these rights. It places attendant obligations on businesses to respect those rights. (Civ. Code § 1798.100 et seq.)
- 2) Provides a consumer the right, at any time, to direct a business that sells or shares personal information about the consumer to third parties not to sell or share the consumer's personal information. It requires such a business to provide notice to consumers, as specified, that this information may be sold or shared and that consumers have the right to opt out of that selling and sharing. (Civ. Code § 1798.120.)
- 3) Provides that the obligations imposed by the CCPA shall not restrict a business's ability to carry out certain conduct, including complying with federal, state, or local laws or to cooperate with law enforcement. This also includes cooperating with a government agency's request for emergency access to a consumer's personal information if a natural person is at risk or danger of death or serious physical injury where certain circumstances are met. (Civ. Code § 1798.145(a).)
- 4) Defines "personal information" as information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. The CCPA provides a nonexclusive series of categories of information deemed to be personal information, including identifiers, biometric information, and geolocation data. (Civ. Code § 1798.140(v).) The CCPA defines and provides additional protections for sensitive personal information, as defined, that reveals specified personal information about consumers. (Civ. Code § 1798.140(ae).)
- 5) Establishes the CPRA, which amends the CCPA and creates the PPA, which is charged with implementing these privacy laws, promulgating regulations, and carrying out enforcement actions. (Civ. Code § 798.100 et seq.; Proposition 24 (2020).)
- 6) Permits amendment of the CPRA by a majority vote of each house of the Legislature and the signature of the Governor, provided such amendments are consistent with and further the purpose and intent of this act as set forth therein. (Proposition 24 § 25 (2020).)

This bill provides that a business to which another business transfers the personal information of a consumer as an asset that is part of a merger, acquisition, bankruptcy, or other transaction in which the transferee assumes control of all of, or part of, the transferor shall comply with a consumer's direction to the transferor made pursuant to this subdivision. It includes a finding that this furthers the purposes of the CPRA.

COMMENTS

1. California's landmark privacy protection law

As stated, the CCPA grants consumers certain rights with regard to their personal information, as defined. With passage of the CPRA in 2020, the CCPA got an overhaul. Consumers are afforded the right to receive notice from businesses at the point of collection of personal information and the right to access that information at any time. The CCPA also grants a consumer the right to request that a business delete any personal information about the consumer the business has collected from the consumer. However, a business is not required to comply with such a request to delete if it is necessary for the business to maintain the consumer's personal information in order to carry out certain obligations or other conduct. (Civ. Code § 1798.105(d).)

The CCPA provides adult consumers the right, at any time, "to direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information. This right may be referred to as the right to opt-out." Changes made by the CPRA extend this to opting out of the "sharing" of the personal information as well. A business is thereafter prohibited from selling (or sharing) that information unless consent is subsequently provided. A business that sells or shares personal information to third parties is required to notify consumers that this information may be sold and that they have the right to opt out of such sales. (Civ. Code § 1798.120(b).) The CPRA added a new category of information, sensitive information, which includes data such as precise geolocation and genetic information. Consumers are additionally empowered to limit businesses' use of such information.

2. Protecting the integrity of consumer opt outs

According to the author:

Companies increasingly want to collect raw personal data, some companies have even built entire business models around the collection and sale of consumer data. Data is desirable because it provides granular information about its users and allows companies to deploy targeted advertising, understand product desirability, and grow profits, to name a few reasons. Therefore, there is a need to ensure consumers understand how the collection of their personal information is being used. AB 1824 will protect consumers' rights to privacy when there are mergers that take

place by requiring the merging business to notify newly acquired consumers of their right to opt-out of the sale or sharing of their data.

This bill is motivated in part by privacy concerns that arose out of the acquisition of WhatsApp by Facebook (now Meta). According to a ProPublica report:

Deploying an army of content reviewers is just one of the ways that Facebook Inc. has compromised the privacy of WhatsApp users. Together, the company's actions have left WhatsApp — the largest messaging app in the world, with two billion users — far less private than its users likely understand or expect. A ProPublica investigation, drawing on data, documents and dozens of interviews with current and former employees and contractors, reveals how, since purchasing WhatsApp in 2014, Facebook has quietly undermined its sweeping security assurances in multiple ways. (Two articles this summer noted the existence of WhatsApp's moderators but focused on their working conditions and pay rather than their effect on users' privacy. This article is the first to reveal the details and extent of the company's ability to scrutinize messages and user data — and to examine what the company does with that information.)

Many of the assertions by content moderators working for WhatsApp are echoed by a confidential whistleblower complaint filed last year with the U.S. Securities and Exchange Commission. The complaint, which ProPublica obtained, details WhatsApp's extensive use of outside contractors, artificial intelligence systems and account information to examine user messages, images and videos. It alleges that the company's claims of protecting users' privacy are false. "We haven't seen this complaint," the company spokesperson said. The SEC has taken no public action on it; an agency spokesperson declined to comment.

Facebook Inc. has also downplayed how much data it collects from WhatsApp users, what it does with it and how much it shares with law enforcement authorities.¹

This bill amends the "right to opt-out" of the sale or sharing of personal information by clarifying that a business to which another business transfers the personal information of a consumer as an asset that is part of a merger, acquisition, bankruptcy, or other transaction in which the transferee assumes

¹ Peter Elkind, Jack Gillum & Craig Silverman, *How Facebook Undermines Privacy Protections for Its 2 Billion WhatsApp Users* (September 7, 2021) ProPublica, <https://www.propublica.org/article/how-facebook-undermines-privacy-protections-for-its-2-billion-whatsapp-users> [as of May 23, 2024].

control of all of, or part of, the transferor is required to comply with a consumer's direction to the original business pursuant to the opt-out right.

When a consumer exercises their right under the CCPA to restrict the sharing or selling of their personal information, they are seeking to protect their information and to keep it from being used in unknown ways by other entities. Therefore, the consumer likely expects that protection and limitation to continue regardless of whether the relevant business changes hands. This bill clarifies the law to ensure that consumers' expectations are met.

Writing in support, Oakland Privacy states:

While theoretically an opt-out request should be seamlessly transferred from the original business where it was filed to the new merged entity, that may not necessarily happen in the hubbub of a merger transaction. Even an administrative delay as existing opt-outs are transferred may result in unwanted sales or shares of data as the new entity acquires and processes the consumer/user records of the acquired entity.

This is especially the case if the merger partner is an aggressive seller or sharer of consumer information which is not unlikely in a major technology or retail merger. While this may be understandable, the direct outcome of administrative delay is that the user/consumer's privacy rights are disregarded for some period of time and they are unable to receive the protections they are entitled to under law.

Similarly, when two businesses combine, a consumer/user may have different statuses with both of them: in one case a higher trust level with company A which resulted in not filing an opt-out request or even explicitly opting-in to some sales or transfers and in the case of company B, a much lower trust level and an opt-out request.

When company A and company B merge, these requests would have to be synthesized and that should not result in the least privacy-friendly untrusted company B voiding or disregarding an opt-out request. Market examples of this might include airline mergers that impact frequent flyer advantage plans, supermarket mergers affecting pricing discount plans, the Amazon/Robota merger, and Facebook's acquisition of WhatsApp.

Mergers and acquisitions can be a time of enhanced privacy risks, especially when the merging companies are large, national or even multi-national in scope. The transfer of large databases can raise security risks of a breach or a hack, and the integration of differing privacy policies can

result in reduced protections for users/consumers in the merged entity. The International Association of Privacy Professionals (IAPP) outlines the demands that large mergers can place on in-house privacy counsels. By requiring a second look at existing customer opt-out requests during merger implementation, AB 1824 protect user/consumers and their privacy rights during these complex transactions.

3. Furthering the purpose and intent of the CPRA

Section 25 of the CPRA requires any amendments thereto to be “consistent with and further the purpose and intent of this act as set forth in Section 3.” Section 3 declares that “it is the purpose and intent of the people of the State of California to further protect consumers’ rights, including the constitutional right of privacy.” It then lays out a series of guiding principles. These include various consumer rights such as:

- consumers should know who is collecting their personal information;
- consumers should have control over how their personal information is used; and
- consumers should benefit from businesses’ use of their personal information.

Section 3 also includes a series of responsibilities that businesses should have. These include:

- businesses should specifically and clearly inform consumers about how they use personal information; and
- businesses should only collect consumers’ personal information for specific, explicit, and legitimate disclosed purposes.

Section 3 also lays out various guiding principles about how the law should be implemented.

This bill clarifies the opt-out right to ensure consumers’ rights are being respected. This allows for a fuller realization of the benefits intended by the law. Therefore, as it explicitly states, this bill “furthers the purposes and intent of the California Privacy Rights Act of 2020.”

SUPPORT

Oakland Privacy
Protection of the Educational Rights of Kids - Advocacy

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation:

SB 1223 (Becker, 2024) includes “neural data,” as defined, within the definition of “sensitive personal information” for purposes of the CCPA. SB 1223 is currently pending referral in the Assembly.

AB 2877 (Bauer-Kahan, 2024) requires members of the PPA board to have qualifications, experience, and skills in the area of consumer rights. AB 2877 is currently pending referral in the Senate.

AB 3048 (Lowenthal, 2024) requires that internet browsers include an opt-out preference signal allowing consumers interacting with businesses online to automatically exercise their right to opt-out of the selling and sharing of their personal information. AB 3048 is currently pending referral in the Senate.

Prior Legislation:

AB 947 (Gabriel, Ch. 551, Stats. 2023) included personal information that reveals a consumer’s citizenship or immigration status in the definition of “sensitive personal information” for purposes of the CCPA.

AB 1194 (Wendy Carrillo, Ch. 567, Stats. 2023) provided stronger privacy protections pursuant to the CCPA where the consumer information contains information related to accessing, procuring, or searching for services regarding contraception, pregnancy care, and perinatal care, including abortion services.

AB 1546 (Gabriel, 2023) would have extended the statute of limitations for actions brought by the Attorney General to enforce the CCPA to five years after the accrual of the cause of action. AB 1546 was held in the Senate Appropriations Committee.

AB 254 (Bauer-Kahan, Ch. 254, Stats. 2023) includes “reproductive or sexual health application information” in the definition of “medical information” and the businesses that offer reproductive or sexual health digital services to consumers in the definition of a provider of health care for purposes of the Confidentiality of Medical Information Act (CMIA).

AB 2089 (Bauer-Kahan, Ch. 690, Stats. 2022) includes mental health application information in the definition of “medical information” and the businesses that offer mental health digital services to consumers in the definition of a provider of health care for purposes of the CMIA.

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AB 694 (Assembly Committee on Privacy and Consumer Protection, Ch. 525, Stats. 2021) made nonsubstantive and conforming changes to the CCPA to clean up the language amended in by the CPRA.

AB 375 (Chau, Ch. 55, Stats. 2018) established the CCPA.

PRIOR VOTES:

Assembly Floor (Ayes 73, Noes 0)

Assembly Appropriations Committee (Ayes 14, Noes 0)

Assembly Privacy and Consumer Protection Committee (Ayes 11, Noes 0)
