

# Cybersecurity, Privacy & Data Protection Alert

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## The Significance to Businesses of the California Legislature's Last-Minute Revisions to the 2018 California Consumer Privacy Act

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### Key Points

- The California Legislature passed SB 1121 to revise certain sections of the CCPA – the nation's strictest privacy protection statute which provides Californians with a right to learn what personal information certain businesses collect about them, to stop the sale of their personal information to third parties and to sue over data breaches if companies fail to adequately protect their information. The Governor has until September 30 to sign the bill.
- Key changes in SB 1121 include (1) extending the deadline for the AGO to publish CCPA-related regulations to July 1, 2020; (2) changing the date that the AGO can begin enforcing the CCPA to the earlier of either six months from the date that the AGO publishes its CCPA-related regulations or July 1, 2020; (3) making the statewide preemption provision effective immediately to avoid the potential effects of similar measures passed by counties or cities; (4) revising the provision exempting information covered by the GLBA; and (5) clarifying and expanding exemptions relating to medical information.
- The AGO, business groups and privacy activists may continue to press for additional revisions to the CCPA when the Legislature returns in December. It remains to be seen whether those efforts will take place or be successful and whether, and how, the CCPA may be amended further before it goes into force on January 1, 2020.

### I. Introduction

The California Consumer Privacy Act (CCPA), the nation's broadest privacy protection statute, was enacted by the California Legislature in June 2018 as part of a last-minute deal to stop a proposed statewide ballot measure that could have ushered in an even stricter privacy law. We have written about the CCPA's passage in earlier [alerts](#).

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Sponsored by San Francisco real estate magnate Alastair Mctaggart and privacy advocacy groups, the ballot measure was strongly opposed by business groups and tech interests. Racing to beat a statutory deadline for the Mctaggart measure to be placed on the ballot, the Legislature hastily passed the CCPA in June while promising to introduce cleanup legislation after the summer recess.

Efforts to substantively revise the CCPA began nearly immediately after its passage, with the AGO (the chief enforcement agency for the CCPA), business groups, and privacy activists pressing for focused changes. Those efforts coalesced around Senate Bill 1121 (SB 1121) in August.

At the beginning of August, Sen. Bill Dodd (D-Napa) amended SB 1121 to correct various technical and drafting errors contained in the CCPA (AB 375 Chapter XX Statutes of 2018). After intense lobbying from business groups, banks, tech interests and California Attorney General Xavier Becerra, additional substantive amendments were adopted.

On August 22, Attorney General Becerra sent a letter to the co-authors of the CCPA outlining five key complaints that he had with the CCPA and asking for corresponding revisions to the CCPA. ([X. Becerra Ltr.](#) (Aug. 22, 2018.)) Becerra opined that (1) businesses' and third parties' rights to seek Attorney General Office (AGO) opinions as to CCPA compliance issues would unduly burden the AGO and could lead to a conflict with its enforcement role; (2) the civil penalties included in the CCPA are likely unconstitutional, since they purport to amend and modify the California Unfair Competition Law's (Cal. Bus. and Prof. Code §§ et seq.) civil penalty provision as applied to CCPA violations; (3) consumers should not have to provide notice to the AGO prior to filing and pursuing their private rights of action related to data breaches; (4) the AGO needs additional time and resources to draft CCPA regulations; and (5) consumers should be able to bring a private right of action for any violation of the CCPA, not only for violations tied to a data breach.

Various business groups also lobbied for substantive changes to the CCPA, including (1) adding a defense to consumers' private rights of action where a business implemented an information security framework and documented its compliance with the same; (2) expanding the Gramm-Leech Bliley Act (GLBA) exemption; (3) expanding the exemption relating to medical information to cover business associates; (4) narrowing the definition of "personal information" to apply to information linked or linkable to a specific individual and excluding household information; (5) extending the compliance deadline to 12 months after the AGO enacts its final CCPA-related regulations; (6) ensuring that the statewide preemption goes into effect immediately; and (7) clarifying the definition of "consumer" to exclude employees, contractors and those involved in business-to-business interactions.

On August 31, SB 1121 passed both houses of the California Legislature. ([SB 1121](#)) The Governor now has until September 30 to sign it into law. We detail the key substantive changes included in SB 1121 below.

## II. Overview of Changes to CCPA in SB 1121

The revisions included in SB 1121 fall into two categories: (1) technical or grammatical revisions adopted to fix drafting errors, revise internal inconsistencies, etc.; and

(2) substantive revisions that change the enforcement of the CCPA itself. This alert will focus on the latter category. SB 1121 makes the following important changes to the CCPA:

- **Extends Time for the AGO to Adopt Regulations (Section 1798.185(a)):** The deadline by which the AGO has to adopt CCPA-related regulations was extended by six months from January 1 to July 1, 2020. Attorney General Becerra requested additional time to draft and pass regulations in his August 22 letter.
- **Postpones Enforcement to the Earlier of Six Months from the Date the AGO Adopts its Regulations or July 1, 2020 (Section 1798.185(c)):** In a corresponding change to that noted above, SB 1121 also extends the date on which the AGO can begin enforcing the CCPA by the **earlier** of either six months from the date that the AGO adopts its final CCPA-related regulations or July 1, 2020. Should the AGO adopt its final regulations on July 1, 2020, it appears that businesses may be faced with having to comply with those regulations on the first day that they are promulgated.
- **Makes Statewide Preemption Provision Effective Immediately (Section 1798.199):** The revisions speed up enforcement of the statewide preemption provision to ensure that it takes effect immediately upon the Governor signing SB 1121 into law. This revision is a direct response to local privacy protection efforts, including a ballot initiative set to go before San Francisco voters this November. The San Francisco initiative could result in a “Privacy First Policy” to which the city, its contractors and its permit holders would have to adhere. The Policy is made up of 11 principles that effectively give city residents and certain guests greater control over how their personal information is collected, stored and shared. If the initiative is passed, the city government would have to consider the Policy when drafting and proposing a privacy ordinance containing more detailed rules. SB 1121 would undercut this local effort by ensuring that the CCPA’s requirements preempt certain local laws statewide.
- **Removes Various Prerequisites to a Consumer Pursuing a Private Right of Action (Section 1798.150(b)(2), (3)):** SB 1121 removes Subsection 1798.150(b)(2) and (3) from the CCPA, which required consumers to notify the AGO within 30 days of filing a private right of action and then outlined the potential responses of the AGO to that notice. Some of the AGO responses under Subsection 1798.150(b)(2) appeared to limit consumers’ ability to pursue their private rights of action if the AGO responded in a certain manner. In his August 22 letter, Attorney General Becerra complained of the onus that these provisions would put on the AGO and requested that they be eliminated. Should this revision be adopted, the only prerequisite a consumer will have prior to pursuing a private right of action is providing a business 30 days’ notice of an alleged violation and a chance to cure.
- **Modifies the GLBA Exemption (Section 1798.145(e)):** The revised GLBA exemption eliminates the original requirement that it would apply only if the CCPA was in conflict with the GLBA (it would now apply even if there was no conflict). It also expands its protection to include personal information covered by the California Financial Information Privacy Act (Cal. Fin. Code § 4050 *et seq.*). However, SB 1121 adds language explicitly excluding Section 1798.150, which grants a consumer a private right of action, from the exemption. Business groups sought to revise this section in an effort to simplify compliance for companies that have already undertaken significant work and expense to ensure compliance with the

GLBA. It is not clear if that goal was entirely achieved, given the exclusion of the private right of action provision from the exemption.

- **Modifies Medical Information Exemptions to Expand Coverage (Section 1798.145(c)):** While the CCPA included an exemption aimed at limiting its applicability where privacy protection already existed under the California Confidentiality of Medical Information Act (CMIA) (Cal. Civ. Code Part § 56 et seq.) or the Health Insurance Portability and Accountability Act of 1996 and the Health Information Technology for Economic and Clinical Health Act of 2009 (together with their implementing regulations, HIPAA), the provision was poorly crafted and unduly narrow. SB 1121 overhauls this provision, making important improvements. “Medical information” as defined under and governed by CMIA is exempted. “Protected health information” as defined under HIPAA that is collected by a HIPAA-covered entity (such as a hospital or a health plan) or business associate (such as a vendor providing services for the hospital or a health plan that involve processing protected health information) is also exempted. “Providers of health care” as defined under CMIA and HIPAA-covered entities are exempted to the extent that they maintain patient information in the same manner as medical information or protected health information in accordance with CMIA and HIPAA, as applicable. Questions remain as to whether a company offering a mobile health app that collects information directly from individuals, without the involvement of a licensed health care professional, may take advantage of these exemptions. In addition, SB 1121 adds a new exemption for information collected as part of clinical trials, as long as the study was subject to certain human-research, subject-protection requirements.
- **Emphasizes the Broad Definition of Personal Information (Section 1798.140(o)(1)):** Revisions to the existing definition of “personal information” in SB 1121 emphasize that the term was intended to apply broadly by adding additional language stating that personal information includes the various examples listed in the CCPA if “it identifies, relates to, describes, is capable of being associated with or could be reasonably linked, directly or indirectly, with a particular consumer or household.” This reemphasis contrasts with requests from business groups to narrow the definition to exclude household information and to limit the definition to information that is actually linkable to a specific individual.
- **Continues Requirement for Intentional Conduct to Trigger Highest Penalty (Section 1798.155(b)):** At least one of the various iterations of SB 1121 (as amended on August 24) would have amended the CCPA to permit the AGO to seek the highest civil penalty (\$7,500) for any violation of the CCPA, intentional or otherwise. However, the final version of SB 1121 reimposed the original limits in the CCPA, including a \$2,500 cap for the amount that the AGO can seek for general violations and a \$7,500 cap for the amount that the AGO can seek for intentional violations.

### III. Conclusion

The CCPA goes into effect on January 1, 2020. It remains to be seen whether the business community will continue to push for further CCPA amendments when the Legislature returns in December. These efforts may intensify as more businesses nationwide realize the CCPA’s far-reaching scope. Indeed, some estimates suggest

that as many as 500,000 companies may fall under the statute. With Democrats expected to increase their large majorities in both houses of the Legislature in November, there may be little appetite to scale back CCPA consumer protections. Gov. Jerry Brown (D), who was instrumental in brokering the compromise to keep the McTaggart measure off the ballot, is also set to leave office at the end of his current term. In addition, there is a likelihood that the CCPA may further embolden other state and local governments outside of California to adopt similar measures. Getting ahead of some of these privacy issues now, before they go into full force in California, may provide businesses with the best means of driving policy development in an area that is sure to affect business practices and costs for years to come.