The California Privacy Rights Act of 2020

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Agenda

1. CPRA Background and Procedure
2. CCPA Overview
3. Comparison of CPRA to CCPA
4. Comparison of CPRA to GDPR
5. How to Prepare for CPRA
6. Questions

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California Privacy Rights Act of 2020 (CPRA) Background and Procedure

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California Privacy Rights Act Background

- Californians will vote on the CPRA during the general election on November 3, 2020. If approved, CPRA would materially amend the CCPA.

- The CPRA ballot initiative was proposed by the group that initiated the CCPA, “Californians for Consumer Privacy,” founded by real estate developer Alastair Mactaggart.

- If passed, the CPRA would become operative on January 1, 2023, but there would be a “look-back” period beginning on January 1, 2022 for access rights.

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CPRA Amendments

- According to Californians for Consumer Privacy, the main proponent group supporting the CPRA, the text of the law would "[m]ake it almost impossible to weaken privacy in California in the future, absent a new initiative allowing such weakening… [as] any amendment would have to be 'in furtherance of the purpose and intent' of CRPA, which is to enhance consumer privacy."
- The CPRA specifically addresses amendments:
  - "The provisions of this Act may be amended after its approval by the voters by a statute that is passed by a vote of a majority of the members of each house of the Legislature and signed by the Governor, provided **that such amendments are consistent with and further the purpose and intent of this Act** as set forth in Section 3…."
  - "The provisions of this Act shall prevail over any conflicting legislation enacted after January 1, 2020. **Any amendments to this act or any legislation that conflicts with any provision of this Act shall be null and void upon passage of this Act by the voters,** regardless of the code in which it appears. Legislation shall be considered "conflicting" for purposes of this subdivision, unless the legislation is consistent with and furthers the purpose and intent of this Act as set forth in Section 3."

CPRA, Sec. 25(a), (d).

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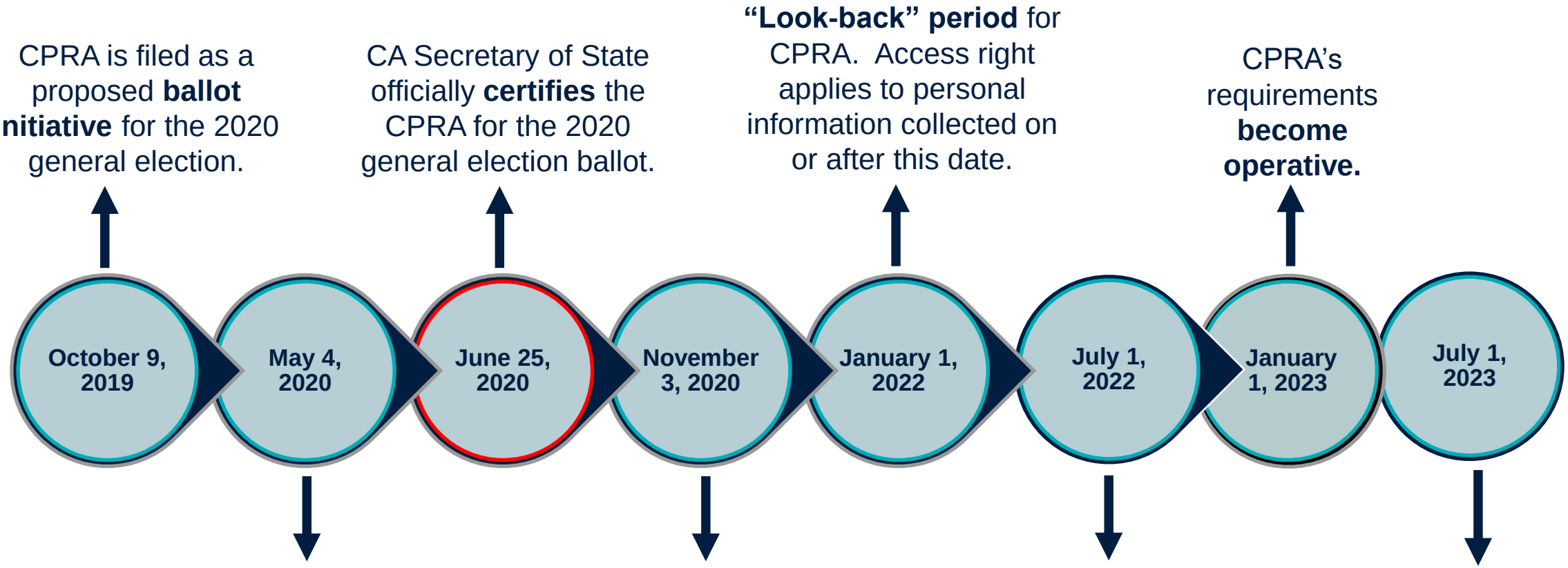
CPRA Timeline



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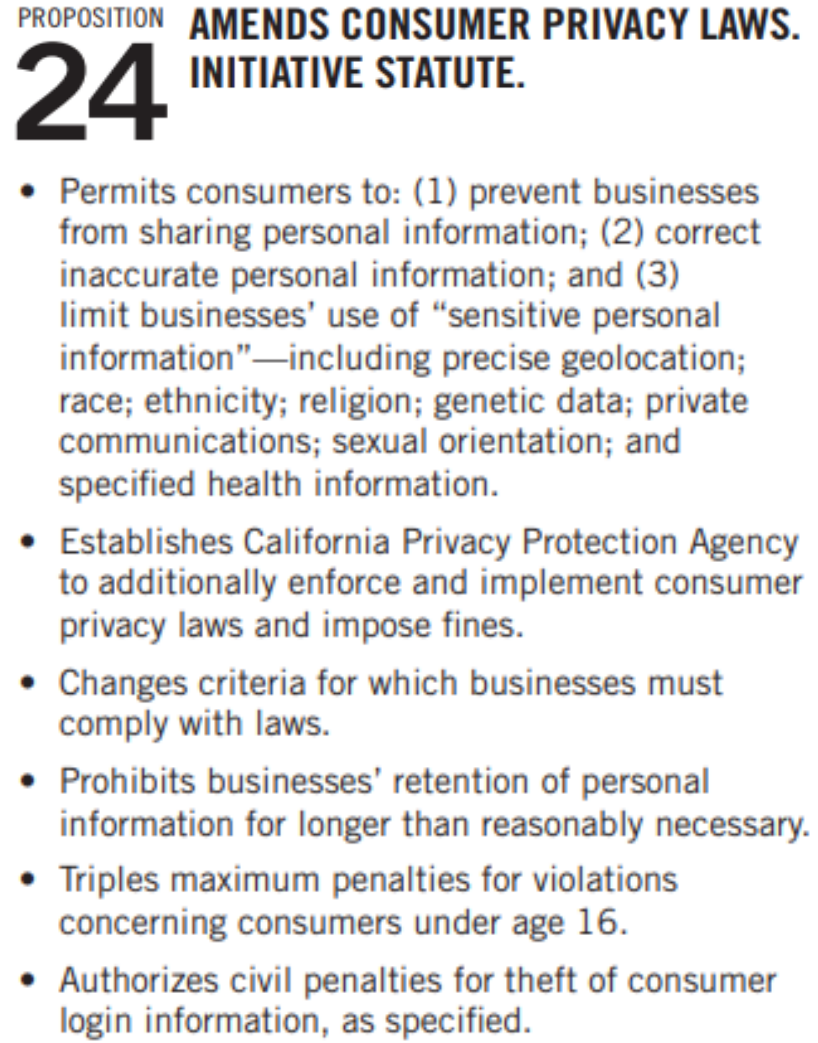
CPRA on the Ballot



PROPOSITION **24** **AMENDS CONSUMER PRIVACY LAWS. INITIATIVE STATUTE.**

- Permits consumers to: (1) prevent businesses from sharing personal information; (2) correct inaccurate personal information; and (3) limit businesses' use of "sensitive personal information"—including precise geolocation; race; ethnicity; religion; genetic data; private communications; sexual orientation; and specified health information.
- Establishes California Privacy Protection Agency to additionally enforce and implement consumer privacy laws and impose fines.
- Changes criteria for which businesses must comply with laws.
- Prohibits businesses' retention of personal information for longer than reasonably necessary.
- Triples maximum penalties for violations concerning consumers under age 16.
- Authorizes civil penalties for theft of consumer login information, as specified.

- The CPRA will appear to California voters as "Proposition 24" on the general election ballot.
- When Californians go to vote, they will see:
  - An official title and summary for Proposition 24
  - Background information on the initiative prepared by the state legislative analyst
  - A description of the projected fiscal effects of the initiative
  - Arguments in favor of and against the initiative
  - A short "Yes / No" statement describing what votes for and against Proposition 24 mean

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If CPRA Is Approved, What Happens Next?

- CCPA will "remain in full force and effect and shall be enforceable until the same provisions of [the CPRA] become operative and enforceable."
- California will create a new administrative agency to enforce the CPRA and issue regulations implementing its terms.
- The new agency, the California Privacy Protection Agency, will assume rulemaking responsibilities from the California Attorney General.
- **Key Dates:**
  - **July 1, 2022**: Deadline for final regulations implementing the CPRA.
  - **January 1, 2023**: CPRA becomes operative.
  - **July 1, 2023**: Administrative enforcement may begin.

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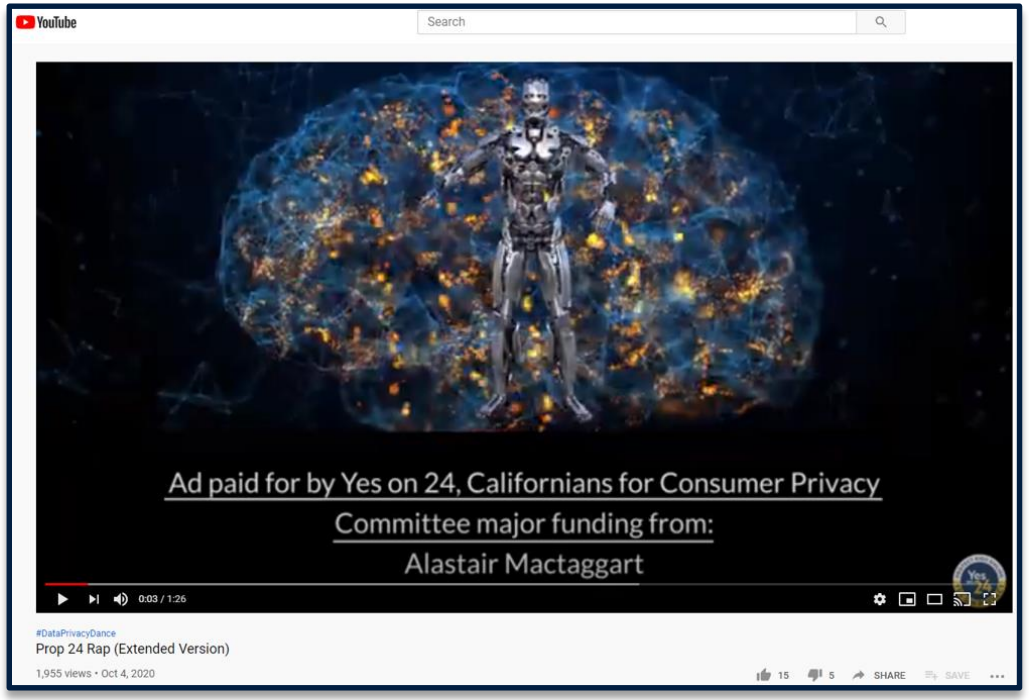
Support for and Opposition to CPRA

STATEMENT OF OPPOSITION TO PROPOSITION 24
THE CALIFORNIA PRIVACY RIGHTS ACT OF 2020 BALLOT INITIATIVE



California Consumer Privacy Act of 2018 (CCPA) Overview

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CCPA Background

- The CCPA defines three categories of entities: **businesses, service providers, and third parties**. The majority of CCPA obligations apply to **businesses.**

- The CCPA gives Californians rights to **access, delete, and opt out of "sales" of personal information**. The law also places particularized consumer notice obligations on businesses.

- The CCPA allows for a **limited private right of action** for certain data breaches that result from a business's violation of the duty to implement and maintain reasonable security procedures.

- The **California Attorney General** is permitted to bring enforcement actions for violations of all other terms of the CCPA.

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CCPA Developments

"Final regulations" implementing the CCPA were made effective on August 14, 2020. Then on October 12, 2020, the CA AG proposed a third set of modifications to the CCPA regulations. Comments on these proposed modifications are due tomorrow, October 28, 2020.

October Proposed Changes:

- Offline personal information collection = offline notice method.
- In brick-and-mortar locations, businesses may post signage, in the area where the personal information is collected, directing consumers to an online notice of the right to opt out or provide notice on the physical form used to collect data.
- For phone channels, businesses may provide the required disclosure of the right to opt out orally by phone.
- Opt-out requests need to be straightforward and involve minimal steps .
  - No using double negatives, requiring too many actions between clicking a DNS link and submitting a request, or requiring consumers to click through or listen to reasons why they should not submit a request to opt out.
- Modifications to verifying an authorized agent.

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CCPA vs. CPRA

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Overview of CPRA's Changes to CCPA

- The CPRA is a ballot initiative that would **materially amend** the CCPA if it is approved by California voters during the general election.
- The CPRA would:
  - ✓ Add a **right to correct inaccurate personal information**.
  - ✓ Provide an express right to opt out of "**sharing**" personal information for "**cross context behavioral advertising**."
  - ✓ Add a right to limit the use and disclosure of a new category of data called "**sensitive personal information**."
  - ✓ **Expand** the CCPA's limited **private right of action**.
  - ✓ 30-day **cure period** remains the same for civil actions but **becomes discretionary for administrative enforcement actions**. Instituting reasonable security procedures will not constitute a cure.
  - ✓ New agency to issue and implement regulations called the **California Privacy Protection Agency (CPPA)**.
  - ✓ **Triple the maximum penalty for** privacy **violations affecting children** under 16—$7,500 per intentional violation.

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CCPA Compared to CPRA: Entity Definitions

- CPRA would change one of the thresholds for an entity to meet the definition of a "business" subject to the law.
  - CPRA would change the threshold from **50,000 to 100,000 or more consumers or households; it would remove devices from the threshold**.

- CPRA adds a new defined entity: a "**contractor**"
  - A contractor is "a person to whom the business makes available a consumer's personal information for a business purpose pursuant to a written contract" containing the same restrictions that are required in a contract with a service provider, plus some additional terms.

- CPRA would change the definition of **third party** by defining what a third party *cannot* be**.** A third party cannot be "the business **with whom the consumer intentionally interacts** and that collects personal information from **the consumer as part of the consumer's current interaction with the business** …**; a service provider** to the business; or a **contractor."**

CPRA Sec. 14, §§ 1798.140(d), (j), (ai).

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CCPA Compared to CPRA: Agreements Between Businesses and Service Providers, Contractors, and Third Parties

- CPRA would require **businesses to enter into agreements with service providers, contractors, and third parties** containing specific terms. Such agreements must:
  - ✓ Specify that the personal information is sold or disclosed by the business only for limited and specific purposes
  - ✓ Obligate the third party, service provider, or contractor to comply with applicable CPRA obligations and provide the same level of privacy protection as is required of them under the CPRA
  - ✓ Grant the business rights to take reasonable and appropriate steps to help ensure that the third party, service provider, or contractor uses the personal information transferred in a manner consistent with the business's obligations under CPRA
  - ✓ Require the third party, service provider, or contractor to notify the business if it makes a determination that it can no longer meet its obligations under the CPRA
  - ✓ Grant the business the right, upon notice, to take reasonable and appropriate steps to stop and remediate unauthorized use of personal information

CPRA Sec. 4, § 1798.100(d).

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CCPA Compared to CPRA: Contracts Between Businesses and Service Providers or Contractors

- Under the CPRA, **service providers and contractors must enter into contracts with businesses** prohibiting the service provider or contractor from:
  - ✓ **Selling or sharing** the personal information;
  - ✓ **Retaining, using, or disclosing the personal information** for any purpose other than for the business purposes specified in the contract, including retaining, using, or disclosing the personal information for a commercial purpose other than the business purpose specified in the contract, or as otherwise permitted by the CPRA;
  - ✓ **Retaining, using, or disclosing the personal information outside of the direct business relationship between the service provider or contractor and the business;** and
  - ✓ **Combining the personal information** which the service provider or contractor receives from the business with personal information it receives on behalf of another person, or collects from its own interactions with the consumer, subject to certain exceptions to be defined by regulation.
- If a **service provider or contractor** engages any other person to assist in processing personal information on behalf of the business, or if any other person engaged by the contractor engages another person to assist in processing personal information for such business, the service provider or contractor must notify the business of the engagement, and the engagement must be pursuant to a written contract binding the other person to observe all the aforementioned requirements agreed to by the service provider or contractor.

CPRA Sec. 14, §§ 1798.140(j), (ag).

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CCPA Compared to CPRA: Contracts Between Businesses and Contractors

- Contracts between **businesses and contractors must also**:
  - ✓ Include a **certification** made by the contractor that the contractor understands the above restrictions and will comply with them; and
  - ✓ Permit the business, subject to an agreement with the contractor, to **monitor the contractor's compliance** with the contract through measures including, but not limited to, ongoing manual reviews and automated scans, and regular assessments, audits, or other technical and operational testing at least once every 12 months.

CPRA Sec. 14, §§ 1798.140(j)(1)(B), (C).

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CCPA Compared to CPRA: Addition of "Share" and "Cross-Context Behavioral Advertising" Definitions

CCPA

Consumers may opt out of business "**sales**" of personal information

CPRA

Consumers may opt out of business "sales" of personal information ***and*** **limit the business's "sharing" of personal information**

- **"Share**" means "sharing, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating… personal information by the business to a third party for cross-context behavioral advertising, whether or not for monetary or other valuable consideration…."
- "**Cross-context behavioral advertising**" is defined as "the **targeting of advertising** to a consumer based on the consumer's personal information obtained from the consumer's activity across businesses, distinctly-branded websites, applications, or services, other than the business, distinctly-branded website, application, or service with which the consumer intentionally interacts."

CPRA Sec. 14, §§ 1798.140(k), (ah).

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CCPA Compared to CPRA: Changes to Consumer Rights

CCPA	CPRA
Right to Know and Access: Grants consumers the right to know about and access specific pieces of personal information collected about them. Consumers also have the right to know about and access the categories of personal information collected about them; the categories of sources from which personal information is collected; the business or commercial purpose for collecting or selling personal information; and the categories of third parties with whom the business shares personal information. Permits access requests for personal information over the **prior 12-month period**.	***Right to Know and Access:*** Extends the right to know and access to personal information shared with third parties. Additionally, CPRA requires disclosure of the length of time personal information and sensitive personal information will be kept. May apply to personal information collected **beyond the prior 12-month period** (but not before January 1, 2022) if approved by regulation, unless doing so would be "**impossible or involve disproportionate effort**." *CPRA Sec. 4, § 1798.100(a)(3); Sec. 7, § 1798.110; Sec. 12, § 1798.130(a)(2)(B).*

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CCPA Compared to CPRA: Changes to Consumer Rights

CCPA

Right to Delete: Businesses must delete personal information upon a consumer's request and pass such deletion requests along to service providers.

Businesses and service providers may decide *not* to delete personal information if it is necessary to maintain it for certain reasons, such as to complete the transaction for which it was collected; detect security incidents; debug to identify and repair errors that impair existing functionality; exercise free speech; comply with the California Electronic Communications Privacy Act; engage in public or peer-reviewed research; for solely internal uses that are reasonably aligned with consumer expectations; for legal obligations; and to otherwise use the personal information internally in a lawful manner that is compatible with the context in which the consumer provided the information.

CPRA

***Right to Delete*:** Businesses must notify contractors to delete personal information (in addition to service providers).

Service providers and contractors are not required to comply with deletion requests directly from consumers if they collected, used, processed, or retained personal information in their role as a service provider or contractor.

Businesses must notify third parties to whom the business sold or shared personal information to delete the personal information, unless this proves "impossible or involves disproportionate effort."

Creates a new exception for maintaining personal information for "security and integrity" purposes.

CPRA Sec. 5, § 1798.105.

CCPA Compared to CPRA: Changes to Consumer Rights

CCPA	CPRA
No Right to Correct Inaccurate Personal Information	***NEW Right to Correct Inaccurate Personal Information***
Right to Nondiscrimination: A business may not discriminate by denying goods or services, charging different prices or rates, providing different levels or quality of service, or suggesting a consumer will receive a different level or quality of service for exercising rights under the CCPA.	***Right to No Retaliation:*** Explicitly sates that "[t]his subdivision does not prohibit a business from offering loyalty, rewards, premium features, discounts, or club card programs" consistent with the title.
Right to Opt Out of Personal Information Sales: Businesses must respect "user-enabled global privacy controls" that communicate a request to opt out as a valid request to opt out of personal information sales. Businesses operating online must offer a "Do Not Sell My Personal Information" link.	***Right to Opt Out of Personal Information Sales and "Sharing":*** Businesses have the choice to respect opt-out preference signals set by browsers ***or*** offer an opt-out link titled "Do Not Sell or Share My Personal Information."
	CPRA Sec. 6, § 1798.106; Sec. 11, § 1798.125; Sec. 13, § 1798.135(b).

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CCPA vs. CPRA : Browser/Device Signals

CCPA

- ✓ Ability to opt out of sale of personal information

CCPA Regulations

- ✓ User-enabled settings or controls are opt-out requests

CPRA

- ✓ A business is not required to honor a global opt-out signal, but rather they can honor the signal or have a DNS link

CPRA Sec. 13, § 1798.135(b); Sec. 21, § 1798.185(a)(20).

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CCPA Compared to CPRA: Sensitive Personal Information

- The CPRA defines a new category of data called "**sensitive personal information**" and gives Californians the right to **limit a business's use and disclosure** of this type of information to use that is necessary to perform the services or provide the goods reasonably expected, use to help ensure security and integrity, use that is short term or transient, use that is necessary to perform services on behalf of a business, and use to verify or maintain the quality or safety of a service or device or to improve, upgrade, or enhance the service or device.
- The right to limit a business's use and disclosure of sensitive personal information **applies only to sensitive personal information that is collected or processed with the "purpose of inferring characteristics about a consumer,"** which will be defined by regulation.
- CPRA defines "sensitive personal information" to mean:
  - "(1) personal information that reveals (A) a consumer's social security, driver's license, state identification card, or passport number; (B) a consumer's account log-in, financial account, debit card, or credit card number in combination with any required security or access code, password, or credentials allowing access to an account; **(C) a consumer's precise geolocation**; (D) a consumer's racial or ethnic origin, religious or philosophical beliefs, or union membership; (E) the contents of a consumer's mail, email, and text messages, unless the business is the intended recipient of the communication; (F) a consumer's genetic data," biometric information processed for certain purposes, health information, and information concerning a consumer's sex life or sexual orientation.
- Does not include information that is **publicly available**.
- Businesses must provide a "**Limit the Use of My Sensitive Personal Information**" **link** on their Internet homepages to allow consumers to submit a request to effectuate the right to limit the use or disclosure of this information.

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CPRA Sec. 10, § 1798.121; Sec. 13, § 1798.135(a); Sec. 14, § 1798.140(ae).

CCPA Compared to CPRA: Privacy Policies/Notices and Exemptions

- Privacy policies under CPRA must contain certain disclosures related to
  - **Sharing** of personal information; and
  - **Sensitive personal information**.
- The homepage notices may combine the disclosures of "Do Not Sell or Share My Personal Information" and "Limit the Use of My Sensitive Personal Information" into a "**single clearly-labeled link**."
- Notices at the time of collection under CPRA must contain information about **data retention**.
- CPRA would extend **exceptions for employee and business-to-business data** until January 1, 2023.

CPRA Sec. 4, § 1798.100; Sec. 7, § 1798.110; Sec. 13, § 1798.135; Sec. 15, §§ 1798.145(m), (n).

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CCPA Compared to CPRA: Enforcement

CCPA

PRIVATE RIGHT OF ACTION

- Limited private right of action for certain data breaches.
- 30-day cure period.

AGENCY ENFORCEMENT

- CA AG may bring enforcement actions for violations of the CCPA's terms.
- 30-day cure period.

VS.

CPRA

PRIVATE RIGHT OF ACTION

- Extends the CCPA's PRA to include breaches involving email addresses with a password or security question and permitting access to the account.
- 30-day cure period, but implementing reasonable security procedures does not constitute a cure.

AGENCY ENFORCEMENT

- Sets up a brand new agency to bring enforcement actions alongside the AG.
- Cure period is discretionary.

CPRA Sec. 16, §§ 1798.150; Sec. 24, 1798.199.10 et seq.

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CCPA Compared to CPRA: Agency Enforcement

- New agency: **California Privacy Protection Agency**
  - Five-member Board
  - May investigate possible violations of the CPRA upon the sworn complaint of any person or on its own initiative
  - No guaranteed 30-day cure period
  - Administrative fines for violations of the CPRA may extend from $2,500 for each violation to $7,500 for each intentional violation or any violation involving the personal information of a minor consumer
  - Authorized to assume rulemaking responsibilities from the Attorney General
    - **July 1, 2022**: Deadline for the new agency to adopt final regulations implementing the CPRA.
    - **July 1, 2023**: New agency may begin enforcing the law.

CPRA Sec. 24, § 1798.199.10 et seq.

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CPRA Compared to CPRA: Regulatory Authority

- CCPA provides **specific regulatory directives** to the California Attorney General in addition to authority to promulgate regulations "[a]s necessary to further the purposes of [the CCPA]."

- CPRA similarly provides for regulatory authority to issue rules to "further the purposes of [the] title," as well as rules addressing the following **non-exhaustive list of specific issue areas**:
  - Issuing regulations to define or add additional color to specific terms
  - Cybersecurity audits and risk assessments for businesses whose processing of personal information presents "significant risk" to privacy or security
  - Defining when allowing consumers to access personal information collected beyond the prior 12-month period would be "impossible" or "involve a disproportionate effort"
  - Access and opt-out rights with respect to businesses' use of automated decision-making technology, including profiling
  - Technical specifications for an opt-out preference signal

CPRA Sec. 21, § 1798.185(a)-(b).

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CCPA vs. GDPR

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CPRA Compared to GDPR: Terminology and Scope

- The GDPR was adopted by the European Union (EU) on April 14, 2016 and went into effect on May 25, 2018.

- The majority of GDPR requirements apply if an entity constitutes a data "**controller.**" Entities that process personal information on behalf of controllers are called **processors**.

- In contrast, most CPRA obligations apply to "**businesses**" that collect "**personal information**." Entities that process personal information on behalf of businesses are called "**service providers**."

- The CPRA's applicability thresholds differ from the GDPR's. For GDPR:
  - Establishment in the EU – can be a single employee or agent.
  - Targeting data subjects in the EU – intention to offer goods or services to EU data subjects.

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CPRA Compared to GDPR

CPRA

- Consumer Rights
- Personal information collection is generally allowed, but disclosures are subject to an opt out
- Sensitive Personal Information
- Privacy-focused agency and California Attorney General may enforce CPRA

GDPR

- Individual Rights
- Collection and processing of personal data requires a lawful basis
- Special Categories of Personal Data
- Various country data protection authorities may enforce GDPR

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CPRA Compared to GDPR

A few of the provisions in the CPRA and GDPR that are NOT in the CCPA:

- Right to restrict use of sensitive personal information
- Right to correct data
- Governing data protection agencies
- Requirement to conduct assessments of high-risk processing activities
- Right to prevent companies from storing personal information longer than necessary
- Right to data minimization (cannot collect more information than necessary)
- Provides transparency around “profiling” and “automated decision making”
- Risk assessments required for high-risk data processors

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How to Prepare for CPRA

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Top Action Items to Prepare for CPRA

In addition to the steps you took for CCPA, to prepare for the CPRA you should also:

- ✓ Review and update your privacy policy and other consumer-facing notices to account for new rights and notice requirements
  - ✓ Add or combine links on homepage to account for opting out of sharing personal information and limiting use of sensitive personal information
  - ✓ Update privacy policy on information about right to correction
- ✓ Sensitive personal information
  - ✓ Data map to understand sensitive personal information the businesses processes
  - ✓ Add link to homepage and update information in privacy policy

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Top Action Items to Prepare for CPRA

- ✓ Review and update your partner contracts
  - ✓ Check with partners to see what category they fall under (third party, service provider, contractor) and update contractual provisions
  - ✓ Develop a plan for passing on deletion flags to partners
- ✓ Cross-context behavioral advertising
  - ✓ Determine the extent to which the business “shares” personal information for cross-context behavioral advertising
  - ✓ Determine the best method to effectuate opt-out requests for this information
- ✓ Stay apprised of new privacy law developments in the states and at the federal level

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Questions?

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