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How Does the CCPA Affect My Business? Important Early Considerations For California Consumer Privacy Act Compliance

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The California Consumer Privacy Act is the most stringent U.S. privacy law to date. It grants Californians novel rights to access, review, request deletion of their personal information, and to opt-out of its sale. Though it was signed into law one year ago, on June 28, 2018, the CCPA does not take effect until January 1, 2020. Despite the significant lead time to operational compliance, many businesses subject to the law have not yet started. Those that have may be aware that operationalizing compliance is not as easy as updating a privacy policy. The most important primary task is to clearly define the role your organization will play in the CCPA ecosystem.

The CCPA categorizes non-consumer entities as "businesses," "service providers," or "third parties." An entity may be one or more depending on the circumstances, so it is important to identify how the law will treat your organization. This requires an evaluation of the personal information your organization processes, how it received it, and for what purpose. This article will address how the law defines each type of entity and how to clearly identify how the CCPA applies to your organization as a result.

What is a "Business" under the CCPA?
An entity is a "business" pursuant to the CCPA if it is a for-profit entity that *collects and determines the purposes of processing* personal information, that does business in the State of California and satisfies one or more of the following thresholds: (1) Has annual gross revenues in excess of $25 million dollars; (2) Alone or in combination, annually buys, receives for the business' commercial purposes, sells, or shares for commercial purposes the personal information of 50,000 or more consumers, households, or devices; or (3) Derives 50 percent or more of its annual revenues from selling consumers' personal information.

Notably, an organization may indirectly qualify as a business if it is the parent company or subsidiary of an entity that qualifies as a business and it shares common branding with that entity. Common branding means that it shares a name, service mark, or trademark with the business subject to the law. It is unclear whether parents or subsidiaries of CCPA-subject business are treated one-in-the-same as the CCPA-subject entities or whether they are considered separate business also subject to the CCPA. The ramifications for compliance between the parent and subsidiary may look quite different depending on the outcome.

There is a common misconception that the CCPA applies to a business that merely *collects* personal information about 50,000 or more Californians. This is based on a misreading of the second threshold for compliance which conflates "collection" of information with use for a commercial purpose. "Commercial purposes" means to advance a person's commercial or economic interests. Collecting personal information to induce another person to buy a good or subscribe to a service is commercial purposes. This is in contrast to "business purposes" (i.e., operational purposes) which use personal information for things like processing and fulfilling orders, verifying customer information, or using analytics. Collecting an IP address to count the number of site visits is a business purpose; collecting it to send targeted advertising is a commercial purpose. Businesses should note this distinction carefully if they do not meet either of the other two thresholds.

What is a "Service Provider" under the CCPA?
Another issue often overlooked is the application of the CCPA to "service providers." Service providers process a business' personal information for one or more business purposes. However, to qualify as a service provider, the entity must sign a written contract with the business that prohibits the service provider from retaining, using, or disclosing the personal information *for any purpose other than for the specific purpose of performing the services specified in the contract for the business* (or other purposes permitted under the CCPA). Businesses are incentivized to create a service provider relationships whenever possible because doing allows them to avoid liability for the service provider's violations of the CCPA (so long as the business wasn't aware of that the service provider intended to commit those violations). When the entity receiving personal information from a business does not meet the definition of a "service provider," the recipient is deemed a "third party."

Vendors who provide processing services for businesses may resist signing service provider contracts because doing so limits their ability to use the personal information collected from the business for their own commercial or non-business purposes. If a business shares personal information with a vendor who will not sign a service provider agreement or a similar contractual restriction, then the business will be deemed to have *sold* that information to a third party. Since a consumer has the right to opt-out of the sale of her personal information to third parties (but not the sharing of it with service providers), the business be faced with logistical and legal challenges in honoring the opt-out. Because of this most businesses will seek to implement service provider arrangements whenever possible.

What is a "Third Party" under the CCPA?
Entities that are neither businesses nor service providers are "third parties" under the CCPA. Because of the way the CCPA defines a third party, as a catchall for entities who are not business or service providers, it is presumed that there is no other type of entity that exists within the data processing ecosystem. However, if a third party receives personal information about consumers from a business (as opposed to the consumer), and otherwise meets the definition of a business under the CCPA, it will be considered a "business" with its own obligations attendant to that designation. In other words, an organization doesn't need to collect personal information directly *from* consumers in order to be deemed a "business." Entities should not focus myopically on first-party relationships with consumers when determining what type of entity they are.

It is unclear whether third-parties are subject to CCPA enforcement. The only prohibition placed on third parties in the CCPA is that they may not further sell personal information about a consumer unless the consumer has received explicit notice and is provided an opportunity to exercise the right to opt out. While the attorney general has the authority to bring enforcement actions against any entity that violates the CCPA, it is not clear that courts would assert jurisdiction over foreign third parties with only tangential relationships with California.

Evaluating the legal relationships constructed by the CCPA will sometimes be very difficult. Strict scrutiny ought to be paid to your organization's data collection, use, and sharing practices in order to determine how best to comply with the CCPA. From there, you may properly evaluate your compliance obligations.

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