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# How California's New Privacy Law Affects Everyone

**December 13<sup>th</sup>, 2018  
2:00PM-3:30PM (ET)**

**Justin Brookman  
Ariel Fox Johnson**

**with Moderator, Lauren Saunders**

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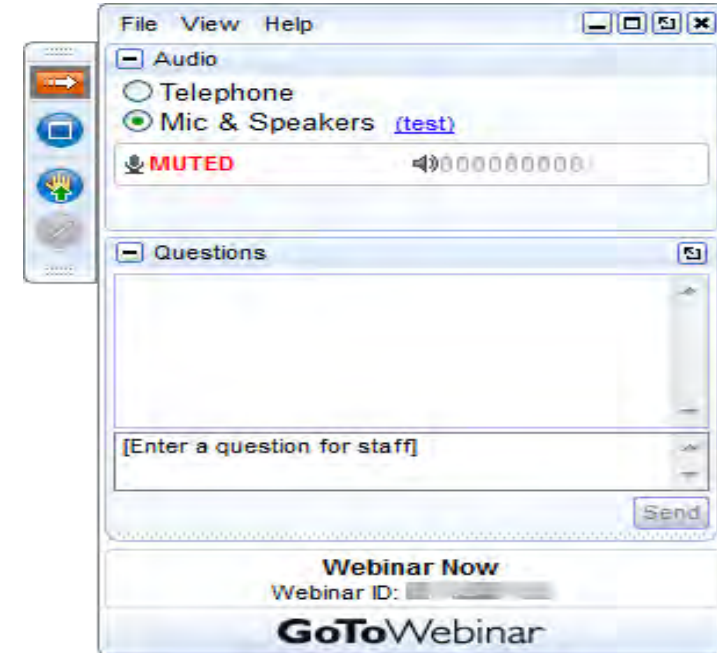
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## Moderator – Lauren Saunders (National Consumer Law Center)

Lauren Saunders is Associate Director at the National Consumer Law Center and manages the Washington, DC office, where she directs NCLC's federal legislative and regulatory work. Lauren is a recognized expert in various areas, including prepaid cards, electronic payments, small dollar loans, credit cards, bank accounts, and consumer protection regulation. She contributes to NCLC legal treatises, including [\*Consumer Banking and Payments Law\*](#), [\*Consumer Credit Regulation\*](#), and [\*Fair Credit Reporting\*](#), and has authored several reports and white papers. She previously directed the Federal Rights Project of the National Senior Citizens Law Center; was Deputy Director of Litigation at Bet Tzedek Legal Services; and was an associate at Hall & Phillips. She graduated magna cum laude from Harvard Law School and was an Executive Editor of the Harvard Law Review, and holds a Masters in Public Policy from Harvard's Kennedy School of Government and a B.A., Phi Beta Kappa, from Stanford University.



## Presenter – Justin Brookman (Consumer Reports)

Justin Brookman is the Director, Consumer Privacy and Technology Policy, for Consumer Reports. In this privacy role at CR, he helps the organization continue its groundbreaking work to shape the digital marketplace in a way that empowers consumers and puts their data privacy and security needs first. This work includes using CR research to identify critical gaps in consumer privacy, data security, and technology law and policy, as well as building strategies to expand the use and influence of the new Digital Standard being developed by CR and partner organizations to evaluate the privacy and security of products and services.

Consumer Reports was one of the first supporters of the ballot initiative that evolved into the CCPA, and has been involved in negotiations around the CCPA since May of last year.



## **Presenter – Ariel Fox Johnson** **(Common Sense Media)**

Ariel Fox Johnson is Senior Counsel for Policy and Privacy at Common Sense Media, where she advocates for smart practices, policies, and rules to help all kids thrive in today's wired world. Her work focuses on protecting student data privacy, enhancing consumer privacy rights, and promoting digital citizenship. Ariel is a graduate of Harvard College and Law School. Prior to joining Common Sense, Ariel worked on privacy, media, intellectual property, and technology matters at corporate law firms.

# Just a Reminder

- **Tomorrow you will receive an email from us with:**
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# How California's New Privacy Law Affects Everyone

Ariel Fox Johnson, Common Sense

Justin Brookman, Consumer Reports Advocacy



# Development of US law on privacy

- Brandeis argues for “right to be left alone” in 1890
- Articulation(s) of Fair Information Practice Principles
  - Transparency, data minimization, security, access, &c.
- Sectoral specific laws emerge
  - Fair Credit Reporting Act (FCRA)
  - Children’s Online Privacy Protection Act (COPPA)
  - Health Information Portability and Accountability Act (HIPAA)
  - Video Privacy Protection Act (VPPA)
- But no comprehensive privacy law

# Current state of US law

- Lags rest of world
  - GDPR, similar
- Section 5 of the Federal Trade Commission Act
  - Prohibition on “deceptive” business practices
    - “Don’t lie”
    - But may extend to material omissions
  - Prohibition on “unfair” business practices
    - Three-part test, including demonstration of “substantial harm”
    - FTC has applied sparingly on privacy cases (Facebook, Vizio)
    - Used aggressively on data security cases to mandate reasonable security

# The sudden advent of the CCPA

- **2017:** Ballot initiative proposed by real estate developer Alastair MacTaggart
- **March 2018:** Cambridge Analytica breaks — tremendous media and consumer backlash on privacy
- **Spring 2018:** Work begins in the California legislature on a legislative alternative to the ballot initiative
- **May 2018:** GDPR goes into effect
- **June 2018:** Drafting in earnest, small working group develops legislation

# The Negotiations



- Consumers would get more substantive rights, businesses would get fewer lawsuits
  - Data breach bill with private right of action also poised to pass
- Businesses very resistant to GDPR-type language, but very fearful of PRA
- Ultimately, up to MacTaggart as to what would make him withdraw initiative

# From bill to law (in a week)

**June 22, 2018:**

- Legislature introduces bill (AB 375)

**June 28, 2018:**

- With minimal amendments, bill passes House and Senate unanimously
- Governor signs bill into law
- MacTaggart withdraws initiative

Y Portantino  
Y Roth  
Y Skinner  
Y Stern  
Y Stone  
Y Vidak  
Y Wiecewski  
Y Wiener  
Y Wilk

AB 375  
Chau et al.  
YES: 36 NO: 0

▲ ACOSTA ▲ CHU ▲ HARPER ▲ OBERNOLTE  
▲ AGUIAR-CURRY ▲ COOLEY ▲ HOLDEN ▲ O'DONNELL  
▲ ALLEN ▲ COOPER ▲ IRWIN ▲ PATTERSON  
▲ ARAMBULA ▲ CUNNINGHAM ▲ JONES-SAWYER ▲ QUIRK  
▲ BAKER ▲ DAHLE ▲ KALRA ▲ QUIRK-SILVA  
▲ BERMAN ▲ DALY ▲ KAMLAGER-DOVE ▲ REYES  
▲ BIGELOW ▲ EGGMAN ▲ KILEY ▲ RIVAS  
▲ BLOOM ▲ FLORA ▲ LACKEY ▲ RODRIGUEZ  
▲ BONTA ▲ FONG ▲ LEVINE ▲ RUBIO  
▲ BROUGH ▲ FRAZIER ▲ LIMON ▲ SALAS  
▲ BURKE ▲ FRIEDMAN ▲ LOW ▲ SANTIAGO  
▲ CABALLERO ▲ GABRIEL ▲ MAIENSCHN ▲ STEINORTH  
▲ CALDERON ▲ GALLAGHER ▲ MATHIS ▲ STONE  
▲ CARRILLO ▲ GARCIA, C. ▲ MAYES ▲ THURMOND  
▲ CERVANTES ▲ GARCIA, E. ▲ MCCARTY ▲ TING  
▲ CHAU ▲ GIPSON ▲ MEDINA ▲ VOEPEL  
▲ CHAVEZ ▲ GLORIA ▲ MELENDEZ ▲ WALDRON  
▲ CHEN ▲ GONZALEZ FLETCHER ▲ MULLIN ▲ WEBER  
▲ CHIU ▲ GRAY ▲ MURATSUCHI ▲ WOOD  
▲ CHOI ▲ GRAYSON ▲ NAZARIAN ▲ MR. SPEAKER

Concurrence in Senate Amendments  
AB 375 CHAU

FILE:  
▲ AYE 69 ▼ NO 0 VOTE: Majority

# Scope

- Covers everyone doing business in California if
  - > \$25m revenues/year, *or*
  - Buys, receives, or sells data on 50k people annually, *or*
  - Derives ½ of income from selling personal data (1798.140(d))
- Covered information — very broad! (1798.140(o))
  - Covers online and offline data (1798.175)
- Deidentified data is out of scope though (1798.140(h))

# New rights: transparency!

- Today, CalOPPA requires online companies to have a privacy policy, but provides very little detail about what has to be in it!
- Businesses must inform consumers about categories it has collected in past twelve months, sources, purposes, categories of third parties with which data is shared (1798.100(b), 1798.110(c), 1798.130(a)(5)(B))
- Separate transparency requirements for third-party sharing: must disclose categories of data sold and categories of data shared with service providers (1798.115(c), 1798.130(a)(5)(C))



# New rights: access!

- Consumers granted the right to request categories *and* specific pieces of information from any covered business (1798.100(a))
  - If “verifiable consumer request” (1798.100(c))
  - Prompt, free of charge, twice a year (1798.100(d), 1798.130(a)(2), 1798.145(g))
  - Portable data format (1798.100(d))
- They can also request information about what types of information is collected and shared, and types of sources and recipients

# New rights: deletion!

- Right to request that a business delete the data it has about you (1798.105(a)-(c))
- But, lots of exceptions (1798.105(d)) if necessary for
  - Security, debugging, research you previously agreed to
  - “uses . . . reasonably aligned with the expectations of the consumer based on the customer’s relationship with the business”?
  - “in a lawful manner that is compatible with the context in which the consumer provided the information”?
  - Probably not a right to be forgotten: exception for free speech, others’ free speech.

# New rights: opt-out!

- Consumers get the right to tell businesses not to sell your information (1798.120(a))
- Important exceptions: if shared for “business purpose” with “service provider” (1798.140(d), (t), (v), (w))
  - Auditing, fulfillment, security, internal research
- How will it scale?
  - Consumers can delegate opt-out rights to third-party agent (1798.135(c))
- How does it apply to online ad tracking???

# New rights: special protections for minors!

- Companies can't sell information about minor without consent (1798.120(d))
  - 13-16 — consent of the minor
  - Under 13 — consent of the parent
- Companies have to treat user as minor if they have actual knowledge or are willfully disregarding the fact that user is a minor
- Builds on COPPA, with new protections for teens

# Can't punish someone for exercising these rights, except when you can

- Companies cannot charge more or offer lower quality . . . *unless* “that difference is reasonably related to the value provided to the consumer by the consumer’s data” (1798.125(a))
- *And* company may offer financial incentives for collection, sale, or deletion of information (1798.125(b)(1)) if difference is directly related to the value provided to the consumer
  - Financial incentive program must be opt-in (1798.125(b)(3))
  - Can't be “unjust, unreasonable, coercive, or usurious” (1798.125(b)(4))
- One of the most significant (and controversial) changes from the ballot initiative

# Enforcement

- Primarily enforced by CA Attorney General
  - Penalty of \$2500/\$7500 per violation (1798.155(a)-(b))
  - BUT, if you can *cure* the violation within 30 days of receiving notice, you can escape liability (also controversial!) (1798.155(a))
  - Consumer Privacy Fund 1798.155(c)(1), 1798.160
- Local/whistleblowers/private right of action largely stripped out
- PRA limited to violations of existing CA security law (1798.81.5)

# What CCPA doesn't do

- Doesn't really address a lot of collection or use by first parties
- Not an opt-in regime (which GDPR might be)
- No data minimization requirements
- Certain existing legal regimes protected (*e.g.*, CMIA)
- No new security requirements

# Attorney General: a big job



- Attorney General's office largely the only enforcer
- Also have to develop rules
- Businesses have the right to “seek the opinion” of the AG's office on how to comply with CCPA (1798.155)
- Made a number of legislative requests in August – got some but not all
  - Including \$\$\$



# Attorney General rulemaking process

- Attorney General's office directed to issue clarifying regulations on a number of topics (1798.185)
  - Verifiable consent
  - How opt-out works
  - What is okay under financial incentives
- Expected to hold a series of public workshops in winter/spring 2019, around the state

# What's next for California privacy?

- CA legislature agreed to narrow clerical amendments in August (SB 1121)
- AG implementing regulations
- Big fight over substantive amendments in 2019
  - Industry asks
  - AG asks
  - Advocate asks



# Advocate priorities

- Data use/data minimization
- Opt-in?
- Stronger enforcement
- Don't punish people for exercising privacy rights
- Security protections that cover more personal information
- ????

# Meanwhile, around the country...

- Other states looking at consumer privacy
- CCPA goes into effect in 2020 . . . unless
- Legal challenges under Commerce Clause, First Amendment, &c . . .
- Efforts to preempt through federal legislation

# Questions?

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