



By Matthew I. Kaplan and Ryan J. Evans of Tucker Ellis LLP

While the term “data privacy” may evoke memories of the Cambridge Analytica scandal, a new California law will affect industries far outside of Silicon Valley. Our industry is no exception.

The health, wellness and supplement market is highly fragmented. Small and large-scale vendors compete for greater market share in an industry where the top five branded dietary supplement manufacturers, together, hold less than a quarter of overall market share. The bulk of supplement sales occur online. According to a recent article in the *Wall Street Journal*, the global conversion rate for online shopping is only 2.86 percent. To succeed in such a highly competitive environment, many players seek more data about

prospective and actual customers as they pursue increased online conversion and consumer loyalty. But more information also means more risk.

In a matter of only a few days last June, California legislators drafted a rushed data privacy framework behind closed doors called the California Consumer Privacy Act (CCPA). When the news broke, many hoped it would mirror the terms of the European Union’s General Data Protection Regulation (GDPR) governing use and collection of E.U. citizens’ personal information, making global data privacy compliance requirements uniform. While the California law shares common concepts with the GDPR, it imposes different requirements. As businesses just begin to recover from their estimated \$8 bil-

lion efforts to comply with the GDPR, they must now determine what impact the CCPA will have on their operations and plan for additional expenditures in this burgeoning global patchwork of somewhat amorphous privacy laws. Although the CCPA does not become operative until January 1, 2020, the time to start planning for it is now.

What is the CCPA?

The CCPA is a law designed to protect consumers’ personal information. It imposes a general duty on businesses to implement and maintain reasonable security procedures and practices appropriate to the nature of the information collected to protect against unauthorized disclosure. For purposes of the Act, “consumers”

means all California residents, including every individual domiciled in California who is outside the state for a temporary or transitory purpose.

The CCPA stands out for its protection of “personal information,” which is broadly defined to include “any information that ... relates to ... [or that could] reasonably be linked with ... a particular consumer or household.” Thus, much of the data relied on by behavioral scientists and marketing professionals—household consumption data, IP addresses, purchase histories, geolocation data, consumer profiles based on inferences, etc.—fall within the definition of “personal information.” Notably, personal information need not be connected with one particular person’s name to fall within the “personal information” definition of data protected by the CCPA.

Who must comply with the CCPA?

The overwhelming majority of businesses will be impacted by nature of conducting even transitory business in California, which is the fifth largest economy in the world. The CCPA applies to any entity falling into one of the three following categories: (1) any business with annual gross revenues exceeding \$25 million; (2) any business that annually buys, receives, sells or shares, alone or in combination, the personal information of 50,000 or more consumers, households or devices—a term so broadly defined as to apply to businesses that simply collect IP addresses; or (3) any business deriving 50 percent or more of its annual revenue from selling consumers’ personal information.

What rights do California consumers have under the law?

So long as a business has an authorized reason for keeping a consumer’s personal information, the CCPA places few limits on its use. But under the law, consumers can exercise an “opt-out” right that prohibits the business from selling the consumer’s personal information. This prohibition applies not only to the monetary sale of information, but also the receipt by the business of any valuable consideration in exchange for the personal

information. Thus, for example, it appears that a retailer who offers to pay the cost of a joint promotional mailer in exchange for sharing a mailing list would be violating the law. Yet the rush to pass something quickly created a loophole that seems to undermine the entire purpose of the law, since this opt-out right extends only to the sale of a consumer’s personal information, not the free sharing of the information by a business.

California consumers will also have the right to obtain from the business a disclosure of the types of information a business collects and/or sells, the uses to which the business puts that information, and the right to be forgotten. That is, consumers have



the right to request access to “the specific pieces of personal information” a business has collected and the right to demand that a business delete any personal information about them. And to further protect consumers, businesses are prohibited from discriminating in terms of price, quality, service, etc., against a consumer that exercises his or her rights under the law. A business must respond to a consumer’s requests about his or her protected information within 45 days.

To protect businesses, the CCPA insures that they only have to honor consumer requests to opt-out, be forgotten, or disclose how they collect and use personal information when they receive a “verifiable request”

from the consumer. What constitutes a verifiable request? A request that is made in accordance with yet-to-be written regulations of the California Attorney General. The Attorney General is required to draft regulations by the operative date of the act (January 1, 2020), and the regulations must address rules and procedures for facilitating and responding to consumer requests under the law.

The right to be forgotten is both the most dramatic new provision and the one that has drawn the most attention of privacy advocates and concerns from businesses. In an effort to strike a balance between privacy rights and legitimate customer service and other business needs, the legislature included nine exceptions to the right to be forgotten. These exceptions allow a business to keep personal information notwithstanding receipt of a consumer’s request to be forgotten. The exceptions generally relate to whether a business has an ongoing business relationship with the consumer and if it is required by other law to maintain the records, protect the integrity of computer systems, prevent against fraud or other misconduct, “enable solely internal uses that are reasonably aligned with the expectations of the consumer based on the consumer’s relationship with the business,” or “otherwise use the consumer’s personal information, internally, in a lawful manner that is compatible with the context in which the consumer provided information.”

The exceptions appear imprecise, and they are. Businesses should carefully evaluate what type of approach they want to take with data storage in general. While superficially it may seem like a good idea to retain data since computer systems are inexpensive and there may, someday, be a profitable use discovered for the data, a business may find that the long-term costs are much greater in the event of a breach of regulatory requirements or other legal action. In other instances, however, developing and maintaining large and robust data sets about consumers may be of such importance that a business will want to structure its customer relationship so that one of the exceptions

to deletion applies. For example, a subscription-based business model or automatic renewal program would allow a business to retain consumer information even in the face of a consumer request to be forgotten, and the business could use the customer information to design and implement new products, services or business strategies.

The CCPA imposes several notable obligations on businesses to facilitate the ability of consumers to exercise their rights. For instance, businesses will be required to establish a toll-free telephone number for consumers to submit requests for information about a business's data collection program and to exercise their rights under the statute. And, if the business operates on the internet, they must include a web page to enable these requests to be made online. Many online businesses do not provide a channel for telephone communication, preferring instead to drive consumers toward email communications. But these businesses will be

required to establish toll-free phone services along with the other implementation costs.

How will the CCPA be enforced and what are the penalties for violating it?

The CCPA has two enforcement mechanisms. First, the California Attorney General may enforce all provisions of the law and pursue civil penalties up to \$2,500 per violation should a business fail to "cure" a violation within 30 days (or \$7,500 per intentional violation). Alternatively, consumers who are impacted by unauthorized disclosure that has not been cured within 30 days can bring a private right of action to recover actual or statutory damages of between \$100 and \$750. The law does not define what it means to "cure" a breach of the obligations under the CCPA, and class action lawsuits are allowed.

Although the law is not operative until Jan. 1, 2020, businesses should immediately begin to manage cov-

ered consumer data since consumers are entitled to obtain data about themselves reaching back 12 months before the date of their requests. Thus, consumer information on a business's computer system as of Jan. 1, 2019 must be kept in such a manner that a business can provide that information to a consumer who requests it on Jan. 1, 2020. **NIE**



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Condition Specific

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enhanced absorption curcumin ingredient, BioCurc."

Addressing Concerns

Today's consumers expect ingredients and products that are effective, well researched and sustainable, and they are able to find this information in the palm of their hands.

"Consumers are doing more research than ever on products and ingredients before purchasing, and they're interested in natural ingredients backed by science to improve their health concerns," Bornet said. "Manufacturers should be taking into consideration the reputation and scientific research behind the ingredients they are including in their products. This includes certifications like GRAS (generally recognized as safe) and GMP (good manufacturing practice)."

Bornet noted that Horphag Research has always made research an integral part of its ingredient marketing. The company utilizes a multi-

faceted approach that not only educates manufacturers on its science, but also consumers by means of co-marketing programs.

According to Paul Garrott, Marinova managing director, Marinova addresses consumer concerns through significant investment in R&D. "In fact, 25 percent of total company revenue is reinvested back into independent scientific studies, including human clinical trials, to uphold the company's commitment to providing credible ingredients with demonstrated efficacy," he explained. "Marinova has a strong ethos in clearly communicating the safety and efficacy of its range of Maritech fucoidan ingredients."

Stratum Nutrition is committed to the market of high-quality, well-researched ingredients with demonstrated benefits in the human body. Dockery noted that the company believes that research into an ingredient's function is never complete, as there is always more to learn. "Stratum strives to support our customer's success in every way possible,

whether it be through assistance with marketing or technical support through formulation assistance and providing answers to the difficult questions surrounding an ingredient's functioning," she said.

The pain and inflammation category is only growing stronger and larger, as people young and old are recognizing the benefits of a proactive approach. "With more and more consumers seeking quality nutritional products, there is increasing demand for dietary supplements containing effective, niche nutritional ingredients like fucoidan," concluded Garrott. "The pain and inflammation category shows no indication of slowing down, given the combination of consumers who live less active lifestyles, aging populations and increased uptake of nutritional and dietary supplements." **NIE**

FORMOREINFORMATION:

- Horphag Research, www.pycnogenol.com
- Marinova Pty Ltd., www.marinova.com.au
- Stratum Nutrition, www.stratumnutrition.com