

Calif. Privacy Law Revision To Appear On Nov. Ballots

By **Allison Grande**

Law360 (June 25, 2020, 11:12 PM EDT) -- California residents will soon have a chance to vote on a proposal to strengthen the state's landmark consumer privacy law, with the secretary of state announcing Thursday that the backers of the California Privacy Rights Act had gathered enough signatures to qualify the measure for November's general election ballot.

Secretary of State Alex Padilla confirmed that Californians for Consumer Privacy, the advocacy group founded by real estate developer-turned-activist Alastair Mactaggart, had submitted more than the 623,212 valid signatures required to put the proposed privacy measure before voters across the state on Nov. 3.

If approved, the CPRA would expand the state's Consumer Privacy Act — which took effect in January — in several important ways, including by giving consumers the right to limit the use and disclosure of a new category of "sensitive" personal information and by allowing them to opt out of the sale and sharing of their data. The initiative would also triple fines for the unlawful collection or sale of children's personal information and establish the California Privacy Protection Agency, which would replace the state attorney general's office in enforcing the law.

"We've come a long way in the two years since passing the landmark California Consumer Privacy Act, but during these times of unprecedented uncertainty, we need to ensure that the laws keep pace with the ever-changing ways corporations and other entities are using our data," Mactaggart said in a statement Thursday. "That's why our campaign is going to make sure all Californians know about the new and stronger rights provided under this ballot measure, the California Privacy Rights Act, and why we need their support in November."

The advocacy group added that recent polling by Goodwin Simon Strategic Research showed that Californians "are overwhelmingly supportive of being in control of their most sensitive personal information" and that 88% of those polled would vote in favor of a ballot measure expanding privacy protections for personal information.

One of the state senators who joint authored the CCPA — which was hastily enacted by the California legislature in June 2018 to avoid having another ballot initiative put together by Mactaggart's group presented to voters that year — also backed Thursday's development.

"I stand with California consumers as we work to craft laws that give them back the fundamental power

over their own information, an increasingly precious commodity," said Democrat Sen. Robert Hertzberg, the Senate's majority leader. "This ballot measure is the important next step in ensuring that privacy rights are sustained now and well into the future."

The ballot initiative's progression also drew opposition, with the Civil Justice Association of California arguing that it was "too soon" to enact another expansive state privacy statute by initiative, given that the CCPA has been in effect for less than a year and enforcement of the law, which is slated to begin July 1, hasn't even started.

"The CPRA will only exacerbate the substantial compliance and litigation burden already created by CCPA," said Kyla Christoffersen, the group's president and CEO. "California businesses need regulatory certainty – not a moving target – especially during these unprecedented times when many are in survival mode."

If adopted by California voters, the CPRA would take effect on Jan. 1, 2023. But despite the lead-in time, there would still be plenty of heavy lifting for businesses to comply with their new enhanced privacy obligations, according to attorneys.

"The CPRA proposes to substantially increase consumer privacy rights and the corresponding obligations for businesses," said Alan Friel, a California-based partner at BakerHostetler.

The ballot initiative contains provisions that would serve to both "make life easier" for companies by clarifying some of the more contested provisions of the CCPA as well as complicate their compliance efforts by requiring them to put more work into efforts to give consumers more control over how their personal data is collected and used, according to Odia Kagan, a partner and chair of General Data Protection Regulation compliance and international privacy practice at Fox Rothschild LLP.

For example, the ballot initiative would bring California's privacy regime closer to the one that's currently in effect in the European Union under GDPR, attorneys noted. This shift would both be helpful in allowing companies to more easily align their privacy practices globally while at the same time requiring them to put into place data minimization and retention protocols that have yet to catch on in the U.S.

"Until now, the focus of the CCPA has been more on disclosure of what you're doing with personal information and giving consumers a choice with respect to what you're doing with it. The law doesn't stop companies from collecting data," Kagan said. "The CPRA would require companies to have a legitimate reason to collect the data, which requires more thinking in advance and some change."

The ballot initiative, which if enacted would be significantly harder to amend than a law put in place by the legislature, would also likely result in more work for companies when it comes to managing their vendor relationships — in order to ensure that third parties are instituting the same robust privacy protections — and their handling of personal information belonging to children under 16, according to attorneys.

Aside from tripling fines for violations related to children's data, the CPRA would also require opt-in consent to collect data from minors, building on increased scrutiny that regulators such as the Federal Trade Commission and U.K.'s data protection authority have been placing on these activities in recent months.

"It would significantly up the stakes with respect to children's data, so if you're a company dealing with this information you're going to have to figure it out," Kagan said.

One CPRA provision, which could be potentially helpful for companies, would extend a one-year reprieve that is set to expire in January concerning the application of the CCPA to personal information generated within the employment, human resources and business-to-business contexts.

"What we're advising clients to watch right now is the status of the employee data carve-out because if the ballot measure passes, then companies don't have to worry about [compliance] with the CCPA with respect to employee data," said Brandon Reilly, a California-based partner at Manatt Phelps & Phillips, LLP. "But if it's rejected by California voters, we'll have this situation where employers will have a month to get in place a compliant privacy system with respect to employee data."

Attorneys noted that, while some opposition has been voiced to the measure, companies have yet to mobilize in any significant way to block the initiative in the same way that they did with the CCPA in 2018.

With the ballot barreling toward a November vote, Reece Hirsch, co-head of the privacy and cybersecurity practice at Morgan Lewis & Bockius LLP, noted that the next big question is likely to be whether a legislative compromise will be struck similar to the one that derailed the original ballot measure and led to the enactment of the CCPA.

However, "because Californians for Consumer Privacy has expressed dissatisfaction with some of the amendments that resulted from the legislative process last time around, a compromise measure may be less likely this time," Hirsch added.

Whatever the outcome of November's vote, Reilly noted that the momentum that the ballot initiative has generated so far makes one thing crystal clear: "Privacy regulation is here to stay."

--Editing by Steven Edelstone.