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PERSPECTIVE

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Planning for CCPA compliance with shifting timelines

By Grant Davis-Denny, John Berry,
Robyn Bacon and Nefi Acosta

Last week, the California attorney general released draft regulations for the California Consumer Privacy Act, the nation's most ambitious data privacy law. The regulations do not merely interpret the CCPA statute; if finalized, they would significantly expand the CCPA's requirements for businesses subject to the law. The potential consequences for the California economy — and the national economy — are immense. The attorney general estimates that as many as 400,000 businesses will be subject to the CCPA, and an independent analysis found that the 10-year cost of complying with the draft regulations could be up to \$16.5 billion. Unfortunately, exactly when this massive regulatory regime becomes fully enforceable is unclear, leaving the business community in a quandary over how to plan.

For those new to the CCPA, a little history is in order. Facing the prospect of a stricter ballot measure, the California Legislature passed the CCPA in June 2018 with minimal deliberation. The CCPA imposes a host of new duties on businesses that have electronic or paper-based data on California residents or households and meet one of several thresholds,

such as making \$25 million in annual revenues. Those obligations include providing notice of what data is being collected and how it will be used; com-

plying promptly with consumer requests to delete or access their data or opt out of data sales; and educating consumers about their new rights through revised privacy notices.

Although complying with the CCPA was always going to be burdensome, the draft regulations ratchet up compliance costs substantially. For example, the regulations require businesses that handle the personal data of more than 4 million California residents to calculate and publicly disclose data about their handling of consumers' data access requests and force businesses offering financial incentives for the collection, sale or deletion of personal data (e.g., most customer loyalty programs) to document how they calculate the value of consumer data. The regulations would also require businesses to create web forms for submitting data access requests; change their websites to respond to browser settings; and offer

paper-based request forms in brick-and-mortar stores. The draft regulations also contain a complicated and subjective set of provisions

regarding verifying the identity of consumers requesting access to or deletion of their data and require businesses to implement reasonable measures to detect and prevent fraudulent requests. None of these requirements are in the statute itself.

Dealing with these regulatory requirements is made more difficult because the CCPA's timing provisions do not make clear when they will go in effect. The statute has an effective date of Jan. 1, 2020. Seemingly recognizing that regulations interpreting the CCPA needed to be finalized before businesses should be threatened with enforcement actions and fines, the Legislature also provided that the attorney general's enforcement authority would not begin on the statute's effective date, but would instead be tied — at least in part — to the finalizing of regulations. The attorney general cannot bring enforcement actions until six months after the publication of final

regulations or July 1, 2020, whichever is sooner.

So when will the final regulations be published? Quite simply, we do not know, though we can say with confidence that it will not be before Jan. 1, 2020. Therefore, because publication of the new rules will likely be less than six months before July 1, the attorney general's enforcement authority will most likely begin on July 1, 2020.

Unfortunately, there is a real possibility that the attorney general's regulations will not be finalized until shortly before, or even months after, CCPA enforcement can begin. Here's why: The public comment period for these draft regulations lasts until Dec. 6, 2019. In light of the new duties that the draft regulations impose and the high attendance at prior public hearings on the CCPA, we expect that there will be extensive public comments. The attorney general then can choose to amend the regulations in response to comments. If those changes are "nonsubstantial" (as determined by the attorney general), nothing further needs to happen and the regulations would take effect on April 1, 2020. If, however, the changes are substantial, there will be at least one additional public comment period of either 15 or 45 days (depending on whether the changes were

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foreseeable). A second round of amendments to the regulations and yet another public comment period is certainly possible. After all this, if the attorney general publishes the amended, final regulations before Feb. 29, 2020, then the new regulations become effective on April 1. But if the final regulations are published between March 1 and May 31, they will not become effective until July 1. And if the final regulations are published after May 31, the new rules will not become effective until Oct. 1.

While there is significant

uncertainty in predicting how this will play out, one reasonable scenario is that after

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receiving the initial round of public comments, the attorney general will take a period of several months to revise the regulations, allow for a 45-day public comment period, and finalize the regulations in the late spring or early summer. If this occurs after May 31, businesses might have

several months to adapt their compliance programs to the new regulations before the regula-

tions take effect on Oct. 1. But another possibility is that the regulations could be published in late May leaving businesses with just over a month to change their operations before the regulations, and the attorney general's enforcement power, kick in on July 1. For most businesses, that time

span will not be enough.

So what should businesses do? There is no single right answer to this question. In-house counsel and compliance professionals should estimate how quickly they can adapt their companies' CCPA compliance programs to the requirements of the draft regulations; consider the realistic possibilities of April 1, July 1, or Oct. 1 effective dates for the new regulations; and then decide how long they can afford to wait to see whether the draft regulations will be revised before being finalized. ■

Grant Davis-Denny is a *Munger, Tolles & Olson* partner who focuses on complex litigation, data privacy and data security matters.

John Berry is a *Munger, Tolles & Olson* partner and former SEC Enforcement Division senior officer who focuses on SEC and other white collar matters, cybersecurity issues, as well as securities-related and other high-stakes commercial litigation.

Robyn Bacon is a *Munger, Tolles & Olson* partner who focuses on complex commercial litigation, trial advocacy and white collar defense and investigations. She is a former Assistant U.S. Attorney who has prosecuted criminal cases involving a range of cybercrimes.

Nefi Acosta is a *Munger, Tolles & Olson* associate who advises clients on compliance with data privacy and security regulations.

