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**To:** Self Storage Association Members

**Re:** California Consumer Privacy Act of 2018

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## **I. Introduction and Background**

California recently passed the *California Consumer Privacy Act of 2018* (“CCPA”) with an effective date of January 1, 2020. The statute was passed in response to privacy breaches and data misuse issues that prompted a ballot initiative from California voters. The legislature acted quickly to bypass the initiative process, resulting in the CCPA.

Overall, the intent of the CCPA is to provide consumers<sup>1</sup> with the right to know what information is being collected about them; the right to know whether their personal information is being sold and to whom; the right to say no to the sale; the right to access their personal information or have it deleted; and the right to equal service and price, even if they exercise these rights.

## **II. Coverage**

Businesses<sup>2</sup> that satisfy one or more of the following thresholds are required to comply with the CCPA (“Covered businesses”):

- Has annual, company-wide gross revenues in excess of twenty-five million dollars (\$25,000,000); or,
- Annually buys, receives, sells, or shares for commercial purposes,<sup>3</sup> the personal information of 50,000 or more consumers, households, or devices; or,
- Derives 50 percent or more of its annual revenues from selling consumers’ personal information.

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<sup>1</sup> There was concern that the CCPA would also grant employees the ability to make the same requests of covered businesses. A.B. 25 was proposed to address that concern. The legislation is awaiting the Governor’s signature. If signed, it would temporarily exempt job applicants, employees, business owners, directors, and officers from much of the Act’s scope. This provision will expire on January 1, 2021. Those individuals are still entitled to file a private cause of action for data breaches and must be informed as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used.

<sup>2</sup> Means a sole proprietorship, partnership, limited liability company, corporation, association or other legal entity that is organized or operated for the profit or benefit of its shareholders or other owners, that collects consumers’ personal information, or on the behalf of which such information is collected and that alone, or jointly with others, determines the purchase and means of the processing of consumers’ personal information, that does business in the State of California.

<sup>3</sup> Commercial purposes means to advance a person’s commercial or economic interests, such as by inducing another persona to buy, rent, lease, join, subscribe to, provide, or exchange products, goods, property, information, or services, or enabling or effecting, directly or indirectly, a commercial transaction. Commercial purposes do not include for the purpose of engaging in speech that state or federal courts have recognized as noncommercial speech, including policy speech and journalism.

Businesses that fit into one or more of the criteria above must comply with the requirements of the law, which are examined in more detail below. Although the definition of “consumers” is limited to California residents, the definitions of “households” and “devices” are not so limited and could expand protections to individuals outside of California. Therefore, in practice, it may be advisable to honor all requests made pursuant to the CCPA.

### **III. Disclosing and Deleting Information**

The law requires that covered businesses give notice to consumers, at or before the point of collection, that they are gathering information about them and must explain how the information will be used. If requested in a form described below, the business must provide:

- The categories of personal information it has collected about that consumer;
- The categories of sources from which the personal information is collected;
- The business or commercial purpose for collecting or selling personal information;
- The categories of third parties with whom the business shares personal information; and,
- The specific pieces of personal information it has collected about that consumer.

If a covered business only uses the information for a one-time transaction, it is not required to retain the information. However, to the extent a company keeps records of that information, it must be provided to the consumer upon request.

The CCPA also grants consumers the right to have their personal information deleted.<sup>4</sup> The statute defines “personal information” as information that identifies, relates to, describes, or is reasonably capable of being associated with a consumer or household. Personal information<sup>5</sup> includes but is not limited to:

- Identifiers such as a real name, alias, postal address, unique personal identifier, online protocol address, email address, account name, social security number, driver’s license number, passport number, or similar identifier.
- Also, commercial information, including records of personal property; products or services purchased, obtained, or considered; or other purchasing or consuming histories or tendencies.

If desired, a consumer may make a formal request to a company to delete personal information that the company has collected about the consumer. The statute provides for certain exemptions, including:

- If a business must keep a consumer’s information to complete a transaction, it may retain that personal information;
- To detect security incidents, or to protect against malicious, deceptive, fraudulent, or illegal activity;

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<sup>4</sup> Each covered business must disclose that right in its online privacy policy or on its website.

<sup>5</sup> Personal information does not include publicly available information, including information made available from federal, state, or local government records. Personal information does not include consumer information that is deidentified or aggregate consumer information.

- To identify and repair errors that impair existing intended functionality;
- To comply with the California Electronic Communications Privacy Act;
- To enable solely internal uses that are reasonably aligned with the expectations of the consumer based on the consumer’s relationship; or,
- To comply with a legal obligation.

However, if a covered business is unable to utilize one of the exemptions once a request is made, it must honor the request and delete the personal information. To obtain the information collected<sup>6</sup> or request it be deleted, a consumer makes a “verifiable request,” asking that the company provide a copy (either electronically or through traditional mail) of the information presently in the businesses’ possession and/or delete that data. A consumer may make two (2) requests within a 12-month period and companies must provide two (2) or more mechanisms to initiate them.

Covered businesses are required to set up a toll-free telephone number and provide a space on their website for consumers to make those requests – if the business has a website. A business that operates exclusively online and has a direct relationship with a consumer from whom it collects personal information is only required to provide an email address for submitting requests for information required to be disclosed.

Businesses may require authentication of the consumer that is reasonable in light of the nature of the personal information requested. If the consumer maintains an account with the business, the business may require the consumer to submit the request through that account.

Once the request is received, the information must generally be given to the consumer – free of charge – within forty-five (45) days.<sup>7</sup> Deletion requests must also be honored within the same forty-five (45) day timeframe. Additionally, covered businesses must also direct any service providers<sup>8</sup> they may utilize to delete any covered personal information upon request.

#### **IV. Selling Data & Equal Access**

The CCPA also gives consumers the right to know if a covered business sells or discloses for a business purpose<sup>9</sup> their personal information to any third party. The CCPA gives consumers the right to request:

- The categories of personal information that the business sold about the consumer;
- The categories of third parties to whom the personal information was sold; and,

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<sup>6</sup> The “look back” period for the information covered is twelve (12) months.

<sup>7</sup> Under limited circumstances, the 45-day response requirement may be extended.

<sup>8</sup> Service provider means a sole proprietorship, partnership, limited liability, association or other legal entity that is organized or operated for the profit of its shareholders or owners, that processes information on behalf of a business and to which the business discloses a consumer’s personal information for any purpose other than for the specific purpose of performing the services specified in the contract for the business.

<sup>9</sup> Business purpose is defined in the statute as the use of personal information for the business’ or a service provider’s operational purposes, or other notified purposes, provided that the use of personal information shall be reasonably necessary and proportionate to achieve the operational purpose for which the personal information was collected or processed or for another operational purpose that is compatible with the context in which the personal information was collected. The statute provides further examples of what are businesses purposes.

- The categories of personal information that the business disclosed about the consumer for a business purpose.

The statute also affords consumers with the power to “opt out.” If a covered business sells information to third parties, consumers must be notified of that practice and notified that they have the right to stop that sale by “opting out.” **Importantly, even if a covered business does not sell or disclose personal information, the company must still respond to the consumer’s verifiable request to that effect.**

Each covered business must have a “clear and conspicuous” link on its internet homepage to inform consumers of their right to opt out, titled “Do Not Sell My Personal Information.” The business must also provide a description of the consumer’s rights, along with that link, which must be provided in its online privacy policy – if the business has one. If the covered business does not have a privacy policy, that information should be provided on its internet webpage. Once a consumer reviews and exercises his or her rights to opt out, the business may no longer sell the information unless the consumer provides express authorization later.

The CCPA also makes it unlawful for businesses to treat consumers differently or discriminate against them if they exercise their rights described above. Those anti-discrimination provisions must also be outlined in a business’s privacy policy or on its website.

However, the CCPA permits businesses to offer financial incentives to consumers for the collection, sale, or deletion of their information. A business that offers any financial incentive must notify consumers of the practice and may only enter a consumer into a financial incentive program if they “opt-in” to do so. Further, a business may charge a different price or provide a different level of service if it is reasonably related to the value provided by the consumer’s personal information.

While permissible, companies, including SSA members, should exercise caution if they elect to treat consumers differently depending upon the value of their personal information.

## **V. Enforcement & Future Action**

The CCPA allows for individual or class action lawsuits on behalf of consumers whose nonencrypted or nonredacted personal information was accessed without authorization, stolen, or disclosed as a result of the covered business’ violation of the duty to implement and maintain reasonable security procedures and practices. The consumer may seek statutory damages up to \$750 per incident or actual damages. Intentional violations may result in a civil penalty up to \$7,500 per incident.

Before a consumer may bring a lawsuit requesting statutory damages, it must provide the business with 30-days written notice of the alleged violation. The business then has 30 days to cure. If the violation is cured and the consumer is provided a written statement to that effect, no further action may be pursued by the consumer for damages. If the business fails to cure within 30 days or does not provide the required written statement, the consumer may then proceed with the suit.

While consumers may bring suit on the grounds stated above, the California Attorney General (CAG) is tasked with primary enforcement of the law. The CAG must finalize regulations by *July 1, 2020* that will govern key aspects of the CCPA such as how covered businesses comply with a consumer's "opt-out" and "verifiable" requests and procedures to ensure that information is provided in a clear manner.

The CAG may not begin enforcement until six (6) months after the final regulations are implemented or July 1, 2020, whichever is sooner. However, consumers may commence enforcement actions consistent with the procedures above as soon as the CCPA goes into effect on January 1, 2020.

## **VI. Conclusion**

Covered businesses, including SSA members, should review the law and determine whether they are required to comply. If so, covered businesses should start to implement internal procedures to comply with the mandates of the statute. Time and attention should be given to reviewing privacy and website policies and updating as needed. Additionally, covered businesses will need to establish their internal procedures for reviewing and responding to verifiable requests, including setting up a toll-free number for consumers to call. Covered businesses should ensure they have established needed compliance procedures in advance of the turn of the calendar to avoid lawsuits and compliance problems that the new law is likely to invite.