



# The Notice Trap

When and how to “inform,” provide  
“explicit notice,” and “disclose” under  
the CCPA

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# General Privacy Policy Notice Requirements

# General Obligation of Disclosure

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§1798.130(a)(5):

A Business shall...[d]isclose the following information **in its online privacy policy or policies** if the business has an online privacy policy or policies **and in any California-specific description of consumers' privacy rights**, or if the business does not maintain those policies, on its Internet Web site, and **update that information at least once every 12 months**:

- (A) **A description of a consumer's rights** pursuant to Sections 1798.110, 1798.115, and 1798.125 **and one or more designated methods for submitting requests**.
- (B) For purposes of subdivision (c) of Section 1798.110, **a list of the categories of personal information it has collected about consumers in the preceding 12 months** by reference to the enumerated category or categories in subdivision (c) that most closely describe the personal information collected.
- (C) For purposes of paragraphs (1) and (2) of subdivision (c) of Section 1798.115, two separate lists:
  - (i) **A list of the categories of personal information it has sold about consumers in the preceding 12 months** by reference to the enumerated category or categories in subdivision (c) that most closely describe the personal information sold, or if the business has not sold consumers' personal information in the preceding 12 months, the business shall disclose that fact.
  - (ii) **A list of the categories of personal information it has disclosed about consumers for a business purpose in the preceding 12 months** by reference to the enumerated category in subdivision (c) that most closely describe the personal information disclosed, or if the business has not disclosed consumers' personal information for a business purpose in the preceding 12 months, the business shall disclose that fact.

# “...by reference to the enumerated categories...”

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§ 1798.130(c):  
“Categories of personal information to be disclosed...shall follow the definition of personal information in Section 1798.140”

## “Personal Information” (§ 1798.140)

*(A) Identifiers such as a real name, alias, postal address, unique personal identifier, online identifier, Internet Protocol address, email address, account name, social security number, driver’s license number, passport number, or other similar identifiers.*

*(B) Any categories of personal information described in subdivision (e) of Section 1798.80.*

*(C) Characteristics of protected classifications under California or federal law.*

*(D) Commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.*

*(E) Biometric information.*

*(F) Internet or other electronic network activity information, including, but not limited to, browsing history, search history, and information regarding a consumer’s interaction with an Internet Web site, application, or advertisement.*

*(G) Geolocation data.*

*(H) Audio, electronic, visual, thermal, olfactory, or similar information.*

*(I) Professional or employment-related information.*

*(J) Education information, defined as information that is not publicly available personally identifiable information as defined in the Family Educational Rights and Privacy Act (20 U.S.C. section 1232g, 34 C.F.R. Part 99).*

*(K) Inferences drawn from any of the information identified in this subdivision to create a profile about a consumer reflecting the consumer’s preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.*

# Proposed Regulations

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## Content of Privacy Policy: Collection of Personal Information

- § 999.308(b)(1)(d): “The privacy policy shall include the following information...Collection of Personal Information
  1. List the categories of consumers’ personal information the business has collected about consumers in the preceding 12 months. **The notice shall be written in a manner that provides consumers a meaningful understanding of the information being collected.**
  2. For each category of personal information collected, provide the categories of sources from which that information was collected, the business or commercial purpose(s) for which the information was collected, and the categories of third parties with whom the business shares personal information. **The notice shall be written in a manner that provides consumers a meaningful understanding of the categories listed.**

# Proposed Regulations

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## Content of Privacy Policy: Disclosure of Sale of Personal Information

- § 999.308(b)(1)(e): “The privacy policy shall include the following information...Disclosure or Sale of Personal Information
  1. State whether or not the business **has disclosed or sold any personal information** to third parties **for a business or commercial purpose** in the preceding 12 months.
  2. **List the categories of personal information**, if any, that it disclosed or sold to third parties for a business or commercial purpose in the preceding 12 months.
  3. State whether or not the business sells the personal information of **minors under 16 years of age without affirmative authorization**.

# Proposed Regulations

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## Method & Format of Privacy Policy

- § 999.308(a)(2)(e): “Be available in an additional format that allows a consumer to **print it out as a separate document.**”
- § 999.308(a)(3): “The privacy policy shall be posted online through a **conspicuous link** using the word “privacy,” on the business’s **website homepage or on the download or landing page of a mobile application.** If the business has a California-specific description of consumers’ privacy rights on its website, then the privacy policy shall be included in that description. A business that does not operate a website shall make the privacy policy conspicuously available to consumers.”

# Discussion: Using CCPA Categories In Your Privacy Policy

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“...by reference to the enumerated categories...”

## **Verbatim Enumeration**

- Strictly compliant with language of statute.
- Some categories vague, self-referential, or broad as written (e.g. “any categories of personal information described in subdivision (e) of Section 1798.80”)

## **Enumerated +**

- Use enumerated categories plus more specific language.
- Some categories require further detail or overlap.
- Allows business to be more specific with categories of personal information, giving a great degree of transparency to the customer.
- Proposed regulations ask that categories of information provided give customers a “[m]eaningful understanding of the information being collected.”

## **Continue with current descriptors**

- Existing descriptions of personal information might be well crafted and tailored to each business.
- Low likelihood of enforcement if sufficiently transparent and consumer friendly.
- Not sustainable to update as new states come out with potentially different language.
- However, arguably non-compliant.

# Notice Requirement Before Collection of Personal Information

# Pre-Collection Notice

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§1798.100(b):

“A business that collects a consumer’s personal information shall, **at or before the point of collection, inform** consumers as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used. A business shall not collect additional categories of personal information or use personal information collected for additional purposes without providing the consumer with notice consistent with this section.”

# Pre-Collection Notice

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## Employee Data

- Recently amended – this data carved out of CCPA for one year (AB-25)
- Personal information collected and used within the context of role as an employee/contractor, related to emergency contact information, or that is necessary to the administration of benefits **IS** subject to the pre-collection notice requirement.

# Pre-Collection Notice

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## Content of Notice

- Narrower than what is included in privacy policy
  - Only “categories of personal information to be collected” and “purposes for which they are used”
- Proposed Regulation § 999.305 (b) “A business shall include the following in its notice at collection:
  - (1) A list of the categories of personal information about consumers to be collected. **Each category of personal information shall be written in a manner that provides consumers a meaningful understanding of the information being collected.**
  - (2) **For each category of personal information, the business or commercial purpose(s) for which it will be used.**
  - (3) If the business sells personal information, the link titled “Do Not Sell My Personal Information” or “Do Not Sell My Info” required by section 999.315(a), or in the case of offline notices, the web address for the webpage to which it links.
  - (4) **A link to the business’s privacy policy**, or in the case of offline notices, the web address of the business’s privacy policy.”

# Pre-Collection Notice

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## Method & Timing of Notice

- “at or before the point of collection.”
  - “Collection” defined broadly: “buying, renting, gathering, obtaining, receiving, or accessing any personal information pertaining to the consumer by any means.” (§ 1798.140(e)).
- “Inform” not defined.
  - Most likely to mean active disclosure.
  - But for information collected online it can likely be a link to website privacy policy
    - Proposed regulations §999.305 (c): “If a business collects personal information from a consumer online, **the notice at collection may be given to the consumer by providing a link to the section of the business’s privacy policy** that contains the information required in subsection (b).”

# Notice requirements for Third Party sale of purchased data

# Notice Before Sale of Data (3<sup>rd</sup> Parties)

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§ 1798.115(d):

“A third party shall not sell personal information about a consumer that has been sold to the third party by a business unless the consumer has **received explicit notice** and **is provided an opportunity to exercise the right to opt out** pursuant to 1798.120.”

# Notice Before Sale of Data (3<sup>rd</sup> Parties)

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## Proposed Regulations – Content of Notice

- § 999.306(c): “A business shall include the following in its notice of right to opt-out:
  - (1) A description of the consumer’s right to opt-out of the sale of their personal information by the business;
  - (2) The webform by which the consumer can submit their request to opt-out online, as required by Section 999.315(a), or if the business does not operate a website, the offline method by which the consumer can submit their request to opt-out;
  - (3) Instructions for any other method by which the consumer may submit their request to opt-out;
  - (4) Any proof required when a consumer uses an authorized agent to exercise their right to opt-out, or in the case of a printed form containing the notice, a webpage, online location, or URL where consumers can find information about authorized agents; and
  - (5) A link or the URL to the business’s privacy policy, or in the case of a printed form containing the notice, the URL of the webpage where consumers can access the privacy policy.”

# Notice Before Sale of Data (3<sup>rd</sup> Parties)

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## Proposed Regulation – Method & Timing of Notice

- § 999.305(d): “A business **that does not collect information directly** from consumers **does not need to provide a notice at collection** to the consumer, but **before it can sell a consumer’s personal information**, it shall do either of the following:
  - (1) **Contact the consumer directly** to provide notice that the business sells personal information about the consumer and provide the consumer with a notice of right to opt-out in accordance with section 999.306; or
  - (2) **Contact the source of the personal information** to:
    - a. Confirm that the source provided a notice at collection to the consumer in accordance with subsections (a) and (b); and
    - b. Obtain signed attestations from the source describing how the source gave the notice at collection and including an example of the notice. Attestations shall be retained by the business for at least two years and made available to the consumer upon request.”

# Principles of Notice

# Proposed Regulations

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- Designed and presented to the consumer in a way that is easy to read and understandable to an average consumer.
- Use plain, straightforward language and avoid technical or legal jargon.
- Use a format that draws the consumer's attention to the notice and makes the notice readable, including on smaller screens, if applicable.
- Be available in the languages in which the business in its ordinary course provides contracts, disclaimers, sale announcements, and other information to consumers.
- Be accessible to consumers with disabilities. At a minimum, provide information on how a consumer with a disability may access the notice in an alternative format.

Hypothetical

# CCPA Hypothetical

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Entity E collects personal information on Consumer C.



Entity E provides Consumer C's personal information to Business B, which is a CCPA "business" for its own business purposes.\*



What notice is Business B obligated to provide to Consumer C, and how must it provide that notice? What must B do otherwise, particularly if it sells the data?

\*Business B is not a CCPA "service provider."



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