

## The Evolution of Privacy Enforcement in California: CPRA and the CA Attorney General's Office

The California Privacy Protection Agency will be the first agency in the United States devoted to the enforcement of general consumer data privacy rights. Less attention has been paid, however, to the evolving role of the California Attorney General's Office—which is significant, says Gibson Dunn's Benjamin B. Wagner and Cassandra L. Gaedt-Sheckter and recent law graduate Iman Charania.

By Benjamin B. Wagner, Cassandra L. Gaedt-Sheckter and Iman Charania

Since voters enacted the California Privacy Rights Act (CPRA) through a ballot initiative in November, there has been considerable focus on the new California Privacy Protection Agency (CPPA) that will soon be established. That focus is warranted; the CPPA will be the first agency in the United States devoted to the enforcement of general consumer data privacy rights. Less attention has been paid, however, to the evolving role of the California Attorney General's Office—which is significant. The Attorney General's Office has been increasingly active in the enforcement of data privacy laws in recent years, and its role will continue to grow under California's new data privacy laws.

The California Attorney General has been active in enforcing privacy laws since at least 2012, when Vice President-elect Kamala Harris, then the California Attorney General, established an in-house Privacy Unit. That unit, housed within the Consumer Protection Section of the Attorney General's Office, enforces state and federal privacy laws, educates consumers and advises the Attorney General on privacy matters.

Exercising the Attorney General's enforcement authority under Cali-

fornia's broad unfair competition law, Business and Professions Code Section 17200, the Privacy Unit under Attorney General Xavier Becerra has continued in this vein by bringing enforcement actions where data breaches led to the exposure of consumer data. In the last year alone, the Attorney General brought two actions for data breaches that resulted in multi-million dollar settlements alongside other actions for smaller dollar amounts. The Privacy Unit was also able to secure a settlement in which no breach was alleged, but where the design of the app was alleged to pose risks to the sensitive personal information of app users.

With the enactment of the California Consumer Protection Act (CCPA), California Civil Code Section 1798.100 et seq., in 2018, the California Attorney General was equipped with a new tool to enforce data privacy. The Attorney General's Office was tasked with issuing regulations under the CCPA, and with enforcing the statute. Under Section 1798.155(a), the California Attorney General can seek civil penalties



Gibson Dunn & Crutcher's Benjamin B. Wagner, left, and Cassandra L. Gaedt-Sheckter, right.

(Courtesy photos)

of \$2,500 per violation or \$7,500 per intentional violation of the CCPA. Its authority to enforce the CCPA, which began in July 2020, will continue until enforcement commences under the CPRA on July 1, 2023, pursuant to Section 1798.185(d) of the CPRA, which amends the CCPA.

When CPRA enforcement begins in 2023, a new player—the California Privacy Protection Agency—will assume an important role. Notably, however, although this agency is taking over the role of promulgating new privacy rules from the Attorney General's Office and will have investigative and administrative enforcement powers, it will share enforcement powers with the Attorney General. Under the new California Civil Code Section 1798.155(b), the new agency will be authorized to seek administrative penalties of up to \$2,500 per

violation or \$7,500 per intentional violation or a violation including the personal information of minors under the age of 16. In contrast, under Section 1798.199.90, the Attorney General will have authority to seek these same penalties through civil enforcement actions, as it does under the CCPA.

The new CPPA's administrative enforcement procedures will be similar to those of other state agencies—such as the Fair Political Practices Commission—which, like the CPPA, also have administrative enforcement authority and must comport with the California Administrative Procedure Act (APA). Under the CPRA's Section 1798.199.65, the agency will have the authority to conduct audits, and to subpoena witnesses and documents. Once the agency has investigated potential violations of the CPRA, it will follow a relatively well-defined procedure:

- Pursuant to Section 1798.199.50, the CPPA must hold a probable cause hearing, which will likely be conducted by an agency employee designated as a probable cause officer.

- If probable cause that a violation occurred is found, Section 1798.199.55 provides that the matter can proceed to the agency's five-member board for a determination. Under the California APA, Government Code Section 11517, it may be heard either by an administrative law judge or the agency itself. Based on comparable agencies, most hearings will likely be held before an ALJ, and after the ALJ issues a ruling, the agency can ratify it or dispute it under the CPRA's Section 1798.199.60.

- After the hearing, the agency can issue a cease and desist order or impose an administrative fine as specified in Civil Code Section 1798.199.55(a). The agency must issue a decision within 100 days of submission of the case under Government Code Section 11517.

- Judicial review of any agency decisions is on an abuse of discretion standard under both Government Code Section 11521 and Civil Code Section 1798.199.85.

- If a fine remains unpaid, the CPPA can bring an action in civil court to collect, or apply to the court for an order to enforce an administrative fine if the time to challenge the underlying ruling has lapsed as set out in the CPRA's Section 1798.199.75, 199.80.

How exactly the CPPA and Attorney General will interact is yet to be seen, but certain aspects are defined in the CPRA itself. As noted above, the CPRA authorizes the Attorney General to seek the same penalties in civil enforcement actions that the CPPA can obtain in administrative actions. As a result, the statute includes several deconfliction provisions.

In Section 1798.199.90(d), for example, the CPPA is required, if requested by the Attorney General, to stay an administrative action or investigation in order to permit the Attorney General to go forward with its own civil action. On the other hand, the Attorney General may not file an action if the CPPA has already issued a decision under its administrative authority for the same violation. Further, under Section 1798.199.100, businesses cannot be required by the CPPA, or any court, to pay both an administrative fine and a civil penalty for the same violation.

Beyond continuing enforcement authority on its own behalf, the Attorney General's Office, and particularly the Privacy Unit, will likely play an active role in developing the new agency. In Section 1798.199.95(c), the CPRA contemplates that the Attorney General will provide staffing for the new agency until it can hire its own staff, and given the AG's role in promulgating rules under the CCPA, the

agencies will work together to pass on that institutional expertise. Once the agency is established, it will also be represented in future civil litigation by the Attorney General's Office unless it receives a waiver from the Attorney General as set out in Government Code Section 11040.

The creation of the new California Privacy Protection Agency is a significant step in the enforcement of data privacy laws in California. But the California Attorney General, which will have co-extensive civil remedies under the CPRA, and which will continue to utilize its authority under the unfair competition law and other statutes, will continue to be the dominant player when it comes to data privacy enforcement. It will likely have the resources and big-case experience to bring larger, more impactful cases than will the new CPPA.

In 2023, when the new agency will bring its first enforcement actions, it can be expected to move aggressively to demonstrate that there is a new deputy in town. But for the foreseeable future, for major enforcement actions with huge potential penalties, it is likely to be the old sheriff that will be the chief enforcer of California data privacy laws.

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