

# THE CALIFORNIA CONSUMER PRIVACY ACT:

## Knowing When to Comply with CCPA is Half the Battle

BY MICHAEL BARONE



Michael Barone

**Given the importance of California to the overall mortgage market, it is imperative that lenders understand the particulars of this game-changing regulation.**

**M**ove over GDPR. There's a new consumer privacy law in town. Last year, California passed the California Consumer Privacy Act of 2018 (CCPA), one of the strongest state privacy regulations in the nation. Following in the footsteps of the European Union's General Data Protection Regulation (GDPR), the CCPA's aim is privacy control and transparency in data practices. The CCPA declares that the right of privacy is an inalienable right, and fundamental to privacy rights is the ability of all consumers to control the use, including the sale, of personal information.

While the CCPA only applies to residents of California, lenders nationwide will feel the effects of the new law. Per the Conference of State Bank Supervisors (CSBS) in its 2018 NMLS Mortgage Industry Report, there were 42,189

federally registered mortgage loan originators in the state of California as of year-end 2018. The next closest state is Florida with 27,009.

Therefore, it's no surprise that California is the largest mortgage market in the country in terms of both number of loans originated (797,536 or 12.04 percent) and volume (\$342 billion+ or 20.36 percent), according to the Mortgage Bankers Association (MBA) in its 2018 HMDA Originations Databook, and it's only getting bigger. The Consumer Financial Protection Bureau (CFPB) estimates that new originations in California increased 20 percent between July 2017 and 2018.

Given the importance of California to the overall mortgage market, it is imperative that lenders understand the particulars of this game-changing

regulation and prepare their organizations to comply with the law when it takes effect on January 1, 2020. While the full text of the bill can be found on the California State Assembly's Legislative Information site, with possible amendments still in the works, the highlights of the new law are as follows:

- The CCPA applies to all personal information collected by businesses from California consumers and is not limited to information collected electronically or over the Internet.
- Any CCPA requirements must be provided in a manner that is easily understood by the average consumer, accessible to consumers with disabilities, and available in the language primarily used to interact with the consumer.
- Businesses must also provide two or more designated methods for submitting requests for information required to be disclosed, including, at a minimum, a toll-free telephone number and a website or email address.
- Any CCPA violation must be cured within 30 days after being notified of any alleged non-compliance.
- Damages could amount to \$2,500 per violation and \$7,500 for an intentional violation.
- A consumer has the right to request that a business that collects a consumer's personal information disclose the categories and specific items of personal information that the business collects, which can happen either at or before the point of collection, or consumers can request such information after the fact.
- A consumer has the right to request that a business delete any personal information about the consumer previously collected, and businesses that collect personal information must disclose this right to the consumer after the transaction is completed.
- Businesses must disclose to consumers, when requested, the categories of personal information that the business either sold to or shared with a third party.
- If a consumer requests information, the information must be disclosed and delivered free of charge to the consumer within 45 days of receipt, which may be extended once by an additional 45 days when reasonably necessary.
- A business cannot discriminate against a consumer for exercising his/her rights under the CCPA.
- Businesses must disclose certain information, including all consumer's rights under the CCPA in its online privacy policy (if it has one) and in any California-specific description of consumers privacy rights. If a business does not maintain these specific items, then it must include this information on its website.

While the main points of CCPA compliance can seem overwhelming, the good news is that there are several litmus tests lenders can use to determine whether they must comply with a consumer's request to have the consumer's personal information expunged from their records.

1. ***Did the request come from a California resident?*** This one is fairly straight-forward. Only California residents are covered. The CCPA does not apply to loan transactions pertaining to a California property owned by an out-of-state resident. Conversely, it does apply to a non-California property owned by a California resident.
2. ***Does the lender meet the definition of a "business" under CCPA?*** Under the CCPA, a business is defined as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners, that collects consumer's personal information, or on the behalf of which such information is collected and that alone, or jointly with others, determines the purposes and means of the processing of consumer's personal information that does business in the state of California, and that satisfies one of the following thresholds: ▷

- Has annual gross revenues in excess of \$25 million.
- Alone or in combination, annually buys, receives for the business' commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households or devices.
- Derives 50 percent or more of its annual revenues from selling consumers' personal information.
- Any entity that controls or is controlled by a business, and that shares common branding with the business, which meets the criteria above.

If the lender does not meet any of these criteria, then it is exempt from complying with the request. There is some debate as to whether California legislators intended for CCPA to cover all businesses interacting with California consumers or just businesses located in California. However, it would be safe to assume that, given California legislator's track record of erring on the side of the consumer, CCPA was intended to cover all businesses, and regardless of where they are located, lenders should proceed as such.

**3. *Is there a legitimate business purpose for retaining the information?*** A business or service provider shall not be required to comply with a consumer's request to delete the consumer's personal information if it is necessary for the business or service provider to maintain the consumer's personal information in order to:

- Complete the transaction for which the personal information was collected, provide a good or service requested by the consumer, or reasonably anticipated within the context of a business's ongoing business relationship with the consumer, or otherwise perform a contract between the business and the consumer.

- To comply with a legal obligation.
- Otherwise use the consumer's personal information, internally, in a lawful manner that is compatible with the context in which the consumer provided the information (i.e. a legitimate business purpose).

These last two points are especially relevant for lenders because the life of the loan does not end at the closing table. All states have record retention requirements, which would qualify as a legal obligation. However, most lenders retain their records far longer than what is required by law as a matter of good business practices.

Furthermore, a mortgage loan is a potential 30-year asset, and lenders could rightly argue that retaining the borrower's information for the life of the loan qualifies as a legitimate business purpose. Only time, and perhaps a court battle, will tell if this assumption will be held up as fact, but the best defense for lenders in such a scenario is to anticipate the possibility and hone internal, standard practices accordingly.

**4. *Is the information covered under the Gramm-Leach-Bliley Act (GLBA)?*** Finally, and most importantly, the CCPA recognizes the legal precedence the GLBA takes over state regulations, and as such, any information that is collected and governed by the GLBA is exempt from the CCPA. It should be noted that entities are not exempt, just the information they collect. Because a significant majority of the information lenders intake from consumers during the mortgage process is covered by the GLBA, it greatly reduces the kinds of information consumers can request to remove from a lender's records.

On the flip side, lenders must also take the time to sit down with their department heads, determine what consumer information they collect, and then categorize that data into two groups, covered by GLBA or not covered. In addition, there are certain loan types, such as

non-owner-occupied loans, that are not covered by GLBA and must be identified in this process.

From there, the lender will need to build out its internal process for assessing how to process CCPA consumer requests, which should include training front-line staff to recognize and route these requests accordingly. In addition, lenders will need to update their internal policies and procedures related to privacy and consumer data collection practices to reflect these changes.

As a final risk management measure, lenders should also ensure that their vendors are prepared to comply with CCPA. Even though the onus is on the consumer to request to have any non-GLBA-protected data shared with third-parties expunged, proper vendor management protocol dictates that lenders do their due diligence on this, if for no other reason than to reduce any reputational risk that might occur from non-compliance.

Even though California is the first to introduce such wide-sweeping data privacy protections for consumers, it is not likely that it will be the last state to do so. As such, building out a fulsome compliance strategy for CCPA will only help lenders replicate such a program in response to the next state that follows in California's footsteps.

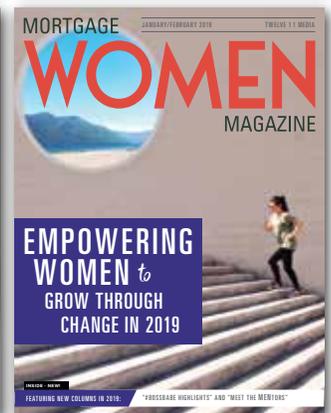
With the power that California holds in the overall mortgage market, lenders cannot afford to take the CCPA lightly. However, compliance need not be an overly burdensome task if lenders take the time to clearly understand the law's provisions and when compliance with CCPA requests is required. 

*Michael G. Barone, Esq. serves as the Executive Director of Compliance and General Counsel of MQMR, overseeing all compliance and regulatory guidance with MQMR's clients and prospective clients. He can be reached at mbarone@mqmresearch.com.*

# SIT BACK & Catch Up



Click on the covers for content to advance your career!



twelve11 media