

Practical Compliance with Opt-Out Requirements Under State Privacy Laws

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Bart
Huffman



Wendell
Bartnick

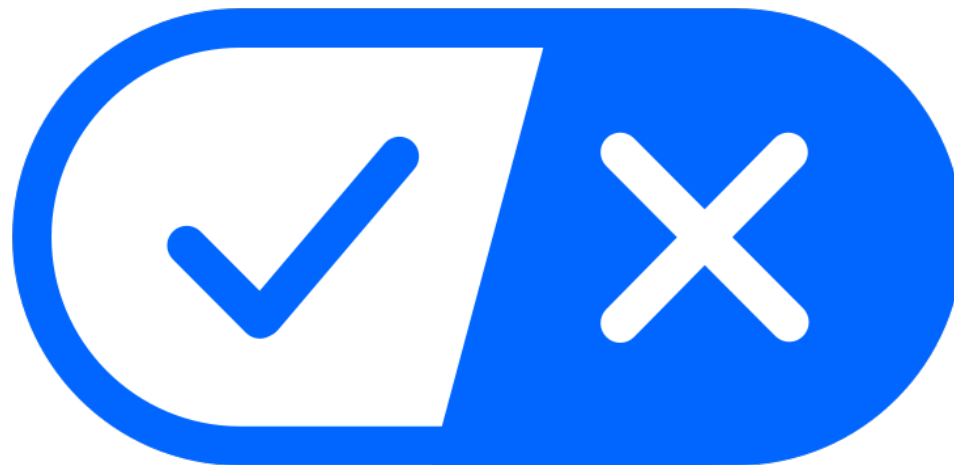


Haylie
Treas

Holland & Knight

WHY THE OPT-OUTS?

- Special processing of personal information
 - Selling
 - Sharing/online targeted advertising
 - Profiling
- Special data
 - Sensitive personal information



“SALE”

California	<i>“[S]elling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer’s personal information by the business to a third party for monetary or <u>other valuable consideration</u>.”</i>
Colorado, Connecticut	<i>“[T]he exchange of personal data for monetary or <u>other valuable consideration</u> by a controller to a third party.”</i>
Utah, Virginia	<i>“[T]he exchange of personal data <u>for monetary consideration</u> by a controller to a third party.”</i>

Examples of entities that may trigger a “sale” when an organization discloses personal information to them:

- Data brokers
- Analytics providers
- Catalog database providers
- Marketing cooperatives
- Targeted advertising providers
- Research – transfers
- AI and ML companies

“SHARING” (aka TARGETED ADVERTISING)

California

Sharing “means sharing, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer’s personal information by the business **to a third party for cross-context behavioral advertising**, whether or not for monetary or other valuable consideration, including transactions between a business and a third party for cross-context behavioral advertising for the benefit of a business in which no money is exchanged.”

Colorado, Connecticut, Utah, Virginia

Targeted advertising “means displaying advertisements to a consumer where the advertisement is selected based on personal data obtained (**or inferred** – CO and CT only) from that consumer’s activities over time and across nonaffiliated Internet web sites or online applications to predict such consumer’s preferences or interests.”

“PROFILING”

California	<i>“[A]ny form of automated processing of personal information [to be further defined by the regulations], to evaluate certain personal aspects relating to a natural person and in particular to analyze or predict aspects concerning that natural person’s performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location, or movements.”</i>
Colorado, Connecticut, Virginia	<i>“[A]ny form of automated processing performed on personal data to evaluate, analyze or predict personal aspects related to an identified or identifiable individual’s economic situation, health, personal preferences, interests, reliability, behavior, location or movements.”</i>
GDPR	<i>“[A]ny form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person’s performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements.”</i>

“SENSITIVE PERSONAL INFORMATION”

California

- Racial or ethnic origin, religious or philosophical beliefs, or union membership
- Health
- Sex life or sexual orientation
- Genetic data
- Biometric information processed for uniquely identifying a consumer
- Precise geolocation
- **Social security, driver’s license, state identification card, or passport number**
- **Contents of a consumer’s mail, email, and text messages** unless the business is the intended recipient of the communication
- **Account log-in**, financial account, debit card, or credit card number in combination with any required security or access code, password, or credentials allowing access to an account

Colorado, Connecticut, Utah, Virginia

- Racial or ethnic origin, religious beliefs, or citizenship or immigration status
- Mental or physical health condition or diagnosis
- Sex life, sexual orientation
- Genetic or biometric data processed for the purpose of uniquely identifying an individual
- **Precise geolocation** (CT, VA, and UT only)
- **Personal information from a known child** (CO, CT, and VA only)

THE OPT-OUT(ISH) RIGHTS

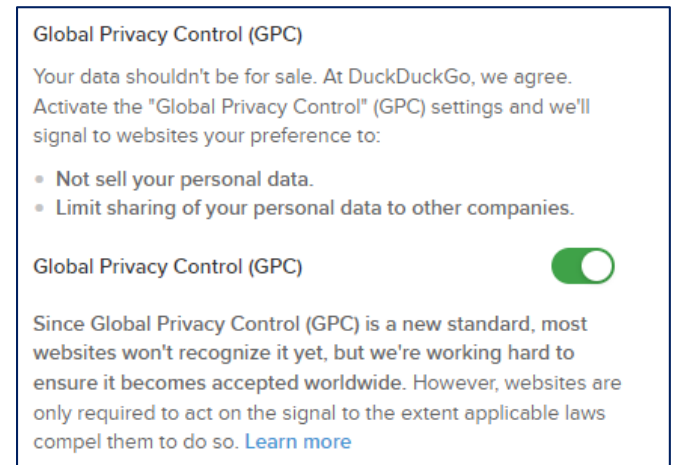
California	<ul style="list-style-type: none">• Opt-out of sale/sharing<ul style="list-style-type: none">◦ Sale is exchange for monetary or other valuable consideration◦ Share is exchange for cross-context behavioral advertising• Right to limit use or disclosure of sensitive personal information under certain circumstances
Colorado, Connecticut, Virginia, Utah	<ul style="list-style-type: none">• Opt-out of processing for purposes of a sale<ul style="list-style-type: none">◦ Utah and Virginia – for monetary consideration◦ Colorado and Connecticut – the California approach• Opt-out of processing for purposes of targeted advertising
Colorado, Connecticut, Virginia, and (soon) California	<ul style="list-style-type: none">• Opt-out of processing for purposes of profiling in furtherance of decisions that produce legal or similarly significant effects concerning the consumer
Colorado, Connecticut, Virginia	<ul style="list-style-type: none">• Opt-in (consent) for processing sensitive personal information
Utah	<ul style="list-style-type: none">• Opt-out of processing sensitive personal information

HOW DO COOKIES FIT IN WITH SALES AND SHARING/TARGETED ADVERTISING?

- Sharing/targeted advertising utilizes data collected through cookies and other similar technologies to deploy targeted ads or for cross-context behavioral advertising
- Selling may involve data collected through cookies and other similar technologies when an organization provides cookie data to an entity that can use such data for its own purposes (in states where “sale” includes disclosing for non-monetary consideration)
- Classifying cookies:
 - **Advertising** – most of, if not all, these types of cookies likely involve targeted advertising
 - Examples: Facebook/Meta Pixel, Bing Ads, Google Ads and DoubleClick
 - **Performance / analytics** – some may involve a “sale”
 - Examples: Google analytics, depending on whether certain settings are disabled/enabled
 - **Functional / essential / strictly necessary** – likely not a “sale” or targeted advertising

WHAT IS A GLOBAL PRIVACY CONTROL (GPC)?

- An on/off switch
- An individual can turn a switch “on” once in a web browser or other software and operators of websites and mobile apps need to recognize and honor it
- Currently no legally-dictated technical standard on how the “preference signal” works
- Legal compliance considerations (DRAFT regulations/rules)
 - California
 - Interpret signal as opt-out for both sales and sharing/targeted ads
 - Honor signal that “is in a format commonly used and recognized by businesses”
 - Colorado
 - Signal can be granular and opt-out of 1) sales, 2) targeted ads, or 3) both
 - Browser/software cannot default signal to “on,” unless the browser/tool is marketed that way
 - Honor signals that are recognized and publicly listed by Colorado AG



- DuckDuckGo Browser Extension

OPT-OUT RIGHTS FOR PROFILING AND SENSITIVE PERSONAL INFORMATION

Opt-out of "profiling":

Colorado, Connecticut, Virginia	Provide a limited right to opt-out of profiling when personal information is processed " <i>in furtherance of [solely (CT only)] automated decisions that produce legal or similarly significant effects concerning the consumer</i> "
California	Regulations to address opt-out (and access rights) " <i>with respect to businesses' use of automated decisionmaking technology, including profiling, and requiring businesses' response to access requests to include meaningful information about the logic involved in those decisionmaking processes, as well as a description of the likely outcome of the process with respect to the consumer</i> "

Opt-in and Opt-out of processing sensitive personal information:

Utah	Right to <u>opt-out</u> of the use and processing of sensitive personal information
California	Right to <u>limit the use and disclosure</u> of sensitive personal information where such information is processed for the purpose of "inferring characteristics" about an individual and it is used for purposes other than those specifically permitted by California law
Colorado, Connecticut, Virginia	Right to <u>consent</u> before collecting and processing sensitive personal information

OPT-OUT METHODS TO CONSIDER

- Relating to cookies, DRAFT California regulations require organizations to honor GPC
 - Requirement coming soon in CO (July 2024) and CT (January 2025)
- California requires a toll-free number
- Legal requirements:
 - Link to webpage
 - Notice and disclosures
- Consider settings of cookie provider where available
- Options:
 - Cookie banner approach
 - Cookie/tracker management tool through pop-up
 - Online request form
 - Email
 - Use of self-regulatory AdChoices icon

NOTICES RELATED TO OPT-OUT RIGHTS

- Organizations are required to disclose:
 - How they collect, use, disclose, and otherwise process personal information
 - How individuals can exercise their privacy rights, including opt-out rights
- California's specific notice requirements:
 - Notice at collection
 - Notice of right to opt-out of sale/sharing – “Do Not Sell or Share My Personal Information”/“Your Privacy Choices”/“Your California Privacy Choices” link
 - Notice of right to limit
 - How GPC will be processed and how the consumer can use GPC, including in a frictionless manner



DARK PATTERNS

- The FTC and state privacy laws prohibit the use of dark patterns when presenting privacy options
- Dark pattern is a term used to describe a tricky or intentionally complex or ambiguous design method that results in user responses that benefit an organization and not the user

Cookies

Do you oppose not allowing [Company] to share your personal information with third parties?

Your Privacy Choices

Do Not Sell	Off
Limit Use of Sensitive Information	Off
Targeted Advertising	On
Cookies	On

Total: \$127.50

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WHAT ELSE ARE WE SEEING?

- Standard template language and functionality of consent management tools, and challenges associated with other nuances re: opt-out rights
- Legal, marketing, IT, operations, and vendors working together
- Timing of implementation of do-not-sell choice
- Enforcement (limited so far to California):
 - Notices of non-compliance
 - Illustrative examples of situations of alleged non-compliance
 - A settlement with Sephora that resulted in a \$1.2 monetary payment and ongoing compliance obligations



CONSIDERATIONS FOR MULTIPLE JURISDICTIONS

- No uniformity among many international and U.S. jurisdictions that regulate privacy and opt-outs/opt-ins
- California's detailed requirements make uniform approach difficult
- Consider applicability of privacy laws before complying with them
- Some compliance options
 - Segment processing and data subjects by jurisdiction (e.g., geo-fencing)
 - Apply the strictest bar for all processing
 - A mix of the above



INTERPLAY WITH OTHER FEDERAL LAWS

- GLBA governs non-public financial information maintained about consumers and customers by financial institutions
 - All but California provide entity-based exemption
- HIPAA governs health information handled by a covered entity or a business associate
 - Exemptions, in effect, extend to PHI (for both covered entities and business associates) and information that is similarly handled by a covered entity
- FCRA governs "consumer reports" which are a collection of personal information maintained and provided by a third-party data broker (the CRA) for use for a particular purpose (*eligibility for credit, insurance, employment, ...*)
 - CRAs, Furnishers, Users
 - FCRA is strongly preemptive, but note that a CRA is a third party
- Other laws

Thank you for joining us today!