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**Privacy in 2023:
Compliance and Product
Counseling in the New Year**

January 11, 2023

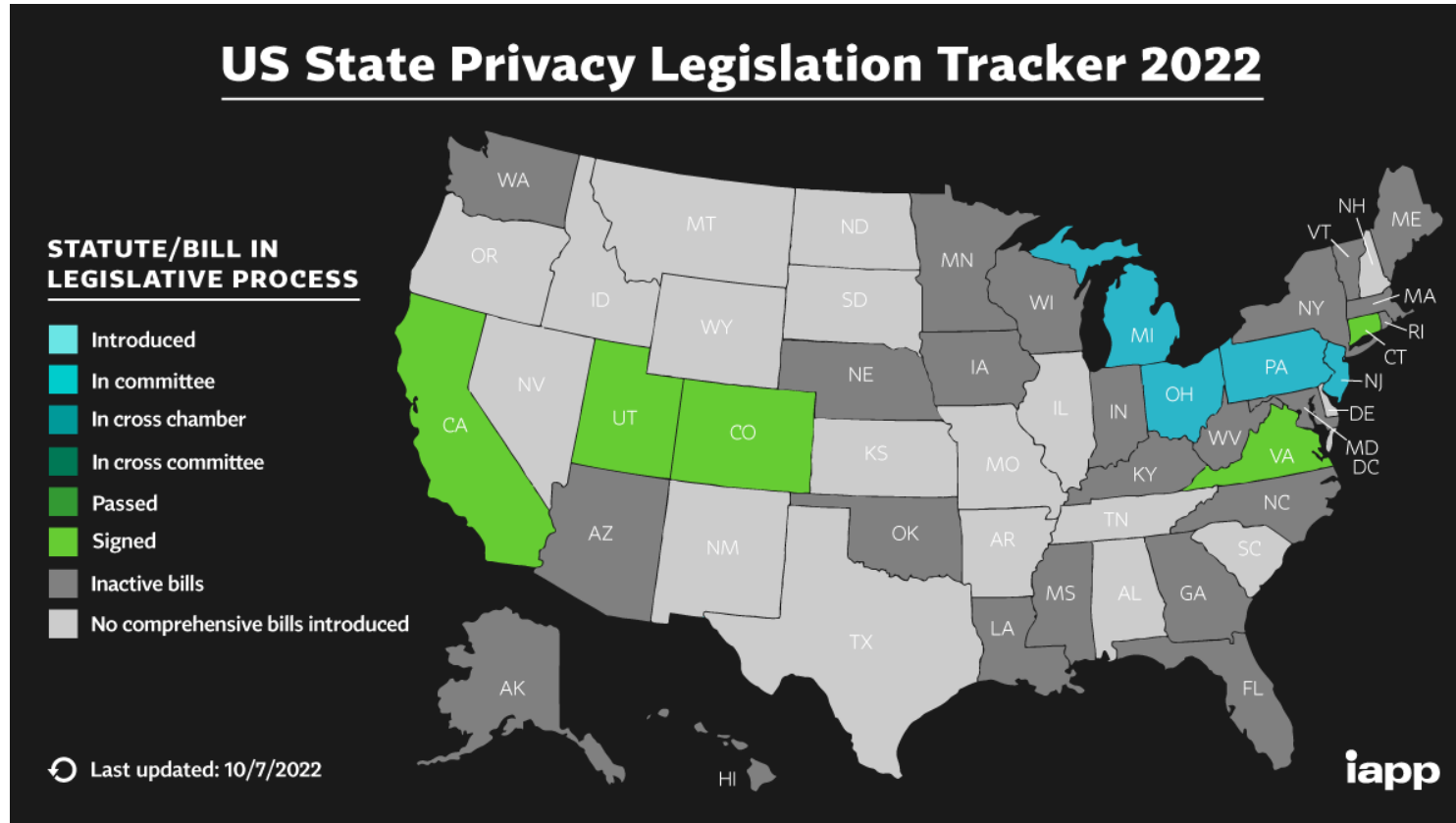
What Is Privacy Compliance and Product Counseling?

- Evaluating **risks** and **requirements**, including under applicable privacy laws, during product development, and designing **solutions** that mitigate key risks and advance **business goals**.
- General steps:
 1. Understand the product (relatedly, what is a product?)
 2. Identify applicable privacy requirements
 3. Analyze risk
 4. Consider how to mitigate the risk
 5. Recommend a go-forward approach, balancing product / business need with risk

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Legal Considerations in 2023

Comprehensive State Privacy Laws



Enforcement

| | CCPA | CPRA | VCDPA | CPA | CTDPA | UCPA |
|--------------------------------|--|---|--|---------------------------------|--|---|
| Enforcement Date | Jan. 1, 2020 | July 1, 2023 | Jan. 1, 2023 | July 1, 2023 | July 1, 2023 | Dec. 31, 2023 |
| Penalties | \$2,500 per violation \$7,500 per intentional violation | \$2,500 per violation \$7,500 per intentional violation or violation involving a minor's protected information | \$7,500 per violation plus "reasonable expenses incurred in investigating and preparing the case, including attorney fees" | \$20,000 per violation | \$5,000 per violation for willful offenses | \$7,500 per violation or actual damages |
| Enforced By | AG | AG and CPPA | AG | AG and state district attorneys | AG | AG |
| Private Right of Action | ✓ | ✓ | ✗ | ✗ | ✗ | ✗ |
| Cure Period | 30 days | Discretionary | 30 days | 60 days until Jan. 1, 2025 | 60 days until Dec. 31, 2024 | 30 days |

Scope

CPRA

- For-profit businesses that do **business in CA** and
 - Have a gross annual revenue of **over \$25 million**;
 - Buy, sell, or share the personal information of **100,000 or more** CA residents or households; or
 - **Derive 50% or more of their annual revenue** from selling CA residents' personal information.

VCDPA

- Persons that **conduct business** in VA or produce products or services that are **targeted to residents** of VA and that annually control or process personal data of at least
 - **100,000** VA residents; or
 - **25,000** VA residents **and derive over 50% of gross revenue** from the sale of personal data.

CPA

- Any legal entity that **conducts business in CO** or produces or delivers commercial products or services **intentionally targeted to residents of CO** and annually controls or processes personal data of
 - **100,000** or more CO residents; or
 - **25,000** or more CO residents **and derives revenue or receives discounts** from selling personal data

CTDPA

- Any person that **conducts business in CT** or produces products or services **targeted to residents of CT** and during the preceding calendar year controlled or processed the personal data of
 - **100,000** or more CT residents, **excluding residents whose personal data is processed solely for the purpose of completing a payment transaction**; or
 - **25,000** or more CT residents **and derives 25% or more** of its gross revenue from selling personal data

UCPA

- Any person that **conducts business in UT** or produces a product or service that is **targeted to residents of UT**, and
 - has annual revenue of **\$25,000,000 or more**; **and**
 - annually controls or processes personal data of (1) **100,000** or more UT residents; or (2) **25,000** or more UT residents **and derives over 50% of gross revenue** from the sale of personal data.

- ❖ **CPRA sunsetted CCPA's B2B and employee data exemptions.**
- ❖ **CPA applies to nonprofits.**

Consumer Rights

| | CCPA | CPRA | VCDPA | CPA | CTDPA | UCPA |
|---|------|--|--------------|--------------|--------------|--------------|
| Right to Access, Data Portability, & Delete | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Right to Correct | ✗ | ✓ | ✓ | ✓ | ✓ | ✗ |
| Right to Opt Out of Sale | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Right to Opt Out of Sharing for Targeted Advertising | ✗ | ✓* For cross-context behavioral advertising | ✓ Implied | ✓ Implied | ✓ Implied | ✓ Implied |
| Right to Opt Out of Processing for Targeted Advertising | ✗ | ✗ | ✓ | ✓ | ✓ | ✓ |
| Right to Opt Out of Processing for Profiling | ✗ | ✗ | ✓ | ✓ | ✓ | ✗ |
| Right to Opt In or Out of Processing of Sensitive Information | ✗ | ✓ Opt Out | ✓ Opt In | ✓ Opt In | ✓ Opt In | ✓ Opt Out |
| Right to Non-discrimination | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Right to Appeal | ✗ | ✗ | ✓ | ✓ | ✓ | ✗ |

Business' / Controller's Obligations

| | CCPA | CPRA | VCDPA | CPA | CTDPA | UCPA |
|--|--|------|-------|-----------------------------|----------------------|-----------------------------|
| Respond to Opt-Out Signal Preferences | ✗ | ✓ | ✗ | ✓ By July 1, 2024 | ✓ By Jan. 1, 2025 | ✗ |
| Data Minimization | ✗ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Purpose Limitation | ✓ | ✓ | ✓ | ✓* Purpose Specification | ✓ | ✓* Purpose Specification |
| Implement Technical Safeguards | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Conduct Data Protection Assessments | ✗ | ✓ | ✓ | ✓ | ✓ | ✗ |
| Enter into Data Processing Agreements | ✗* Required to qualify as a "service provider" relationship | ✓ | ✓ | ✓ | ✓ | ✓ |

Rulemaking

California Privacy Protection Agency

- Published July 2022; revised Nov. 2022
- Finalized **April 2023** at the earliest
- Rulemaking priorities – definitions, automated decisionmaking, cybersecurity, consumers' rights, opt outs
- Dark patterns
- Expanded rules for service providers
- Third-party contracts
- Third-party notifications
- Opt-out preference signals
- Data minimization and retention

Colorado Attorney General

- Published Sept. 2022; revised Dec. 2022
- Comments accepted until Feb. 1, 2023
- Revised draft removed requirement that privacy notices be centered around business purposes
- Notification of “substantive or material changes” to privacy policies
- Consent to process “sensitive data inferences”
- Purpose specification and secondary use
- Retention schedules

Biometric Laws



- **Illinois**

- Biometric Information Privacy Act (BIPA) (2008)
- Swathe of BIPA-related litigation in 2022 alleging failure to obtain informed, written consent
- \$35 million class action settlement with social media company

- **Texas**

- Capture or Use of Biometric Identifier Act (CUBI) (2009)
- First two enforcement actions brought in 2021 and 2022

- **Washington**

- Several failed attempts to pass a comprehensive data privacy law
- Biometrics Privacy Law (H.B. 1493) (2017)

Litigation Trends

- Data breach litigation
- CCPA litigation, and guidance on reasonable data security measures
- Anti-wiretapping statutes, session replay and chat litigation



Enforcement Actions

- Notable state enforcement actions
- Notable FTC enforcement actions

Regulators' Priorities

- Federal Trade Commission
 - Algorithmic bias and artificial intelligence
 - Commercial surveillance
 - Data security
 - Consent interfaces and dark patterns
 - Advertising technology
 - Children's privacy risks and vulnerabilities
 - Reproductive health related information
- Consumer Financial Protection Bureau
 - Artificial intelligence and algorithmic bias



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Product Counseling Pointers in 2023

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Questions

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Cassandra Gaedt-Sheckter is a partner in the Palo Alto office of Gibson, Dunn & Crutcher. She practices in the firm’s Privacy, Cybersecurity and Data Innovation group, with a focus on data privacy, cybersecurity and data regulatory litigation, enforcement, transactional, and counseling representations.

Ms. Gaedt-Sheckter has substantial experience advising companies on privacy and cybersecurity issues, including relating to legal and regulatory compliance with the California Consumer Privacy Act (CCPA), General Data Protection Regulation (GDPR), Children’s Online Privacy Protection Rules (COPPA), and other federal, state, and international laws and regulations. She also has extensive experience counseling on data breach response management and notification concerns, and privacy and cybersecurity compliance risk assessments. Ms. Gaedt-Sheckter further represents clients across industries—including consumer product, software, manufacturing, home appliance service, and healthcare companies—in the context of product and program development, merger and acquisition privacy and cybersecurity due diligence, and pre-litigation negotiation.

Ms. Gaedt-Sheckter also represents leading technology companies in federal and state courts throughout the country, on a variety of technologies, including relating to social media, medical devices, pharmaceuticals, mobile gaming, telecommunications, enterprise software, and consumer electronics. She has significant experience in all aspects of litigation—particularly relating to privacy, cybersecurity, and patent claims—serving as lead associate on expert and fact discovery and pre-trial hearings and briefing, and participating in multiple bench and jury trials. Ms. Gaedt-Sheckter is licensed to practice before the U.S. Patent and Trademark Office as a patent attorney, and is a Certified Information Privacy Professional (CIPP/US).

Ms. Gaedt-Sheckter maintains a significant pro bono practice as well, including successfully obtaining asylum for a Chinese immigrant, representing families in conservatorship proceedings, and advising non-profit and research companies on privacy programs and policies.

Ms. Gaedt-Sheckter received her law degree from the University of California, Los Angeles, in 2011, where she was elected to the Order of the Coif. While in law school, she served as President of the Health Law Society and was selected to the Moot Court Honors Program. In 2008, Ms. Gaedt-Sheckter graduated cum laude from University of California, Los Angeles with a Bachelor of Science degree in Anthropology, and a minor in Political Science.

Ms. Gaedt-Sheckter is a member of the State Bar of California.

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Vivek Mohan is a partner in Gibson Dunn’s Palo Alto office, where he is Co-Chair of the Artificial Intelligence and Automated Systems practice and a member of the Privacy, Cybersecurity and Data Innovation practice. Vivek advises clients on legal, regulatory, compliance, and policy issues on a global scale with a focus on cutting-edge technology issues. His practice spans regulatory response, counseling, advocacy, and transactional matters allowing him to provide clients with strategic advice whether they are responding to a regulatory inquiry, setting up a privacy program, responding to a data breach, or selling the company.

Vivek previously worked Apple Inc., where he was a senior attorney on the company’s global privacy law & policy team and head of information security law. At Apple, Vivek was responsible for privacy and security legal issues associated with the company’s products, services and corporate infrastructure. During his time at Apple, Vivek managed a team of lawyers responsible for privacy counseling for all software, biometric, augmented reality (AR), artificial intelligence/machine learning (AI/ML), and search products, and served as lead counsel for information security. He oversaw the privacy and security legal aspects of Apple’s forays into regulated spaces, including in financial services and health, and played a key role in the development of Apple’s GDPR and CCPA compliance strategy and program. He handled some of the privacy team’s most complex issues and served as the team’s point person for regulatory response, legislative developments, global policy advocacy, and congressional testimony.

Earlier in his career, Vivek was in private practice, where he counseled clients in the technology, telecommunications, healthcare and financial services sectors on privacy and cybersecurity. He has represented clients in dozens of investigations before the FTC, SEC, FCC, state Attorneys General, Department of Homeland Security, Department of Justice, financial services regulators, and data protection regulators around the world. Vivek also has significant experience counseling companies responding to legal process issued under law enforcement or national security authorities, including advising on attendant cross-border implications. Vivek has worked as an attorney at Microsoft, at the Internet Bureau of the New York State Attorney General (under a special appointment), and at General Electric’s corporate headquarters (on secondment), and was previously a partner at another international law firm. For five years, he was a resident fellow and later a non-resident associate with the Cybersecurity Project at the Harvard Kennedy School.

Vivek is a thought leader recognized by the legal, academic and policy community. He regularly serves as a panelist and presenter at leading privacy and security conferences and industry events and has guest lectured at Harvard, Columbia, and Yale Law School. Notably, he is the co-editor and author of the PLI treatise “Cybersecurity: A Practical Guide to the Law of Cyber Risk” (5d. 2021).