

The Transformation of Digital Advertising

Across the economy, businesses are using digital technology to **pivot** into innovative service lines, **accelerate** growth and **transform** their businesses altogether. These businesses' digital strategies and data assets play important roles in their success.

Since the California Consumer Privacy Act (CCPA) went into effect in January 2020, a growing number of comprehensive state privacy laws have been proposed in the United States, many of them aimed at providing consumers with privacy rights related to online advertising.

In this issue, we are highlighting Bisi Adeyemo and how her Privacy Governance and Tech Transactions practice intersects with digital transformation and the data economy.

Spotlight



Bisi Adeyemo addresses the changing adtech landscape

In 2020, the CCPA went into effect as the first comprehensive U.S. state privacy law, providing California consumers with privacy rights similar to those available to European data subjects under the General Data Protection Regulation (GDPR). With the CCPA at the forefront, a number of other U.S. states have passed or are considering comprehensive legislation related to privacy rights. In less than a year, three state laws have passed, granting consumers the right to opt out of targeted advertising: the California Privacy Rights Act (CPRA), which amends the CCPA; Virginia's Consumer Data Protection Act (VCDPA); and the Colorado Privacy Act. Below, I discuss key ways in which targeted advertising is addressed in these new laws.

1. California Privacy Rights Act

The CCPA went into effect Jan. 1, 2020, and was amended by the CPRA, a November 2020 ballot initiative approved by California voters. When the CCPA went into effect, there was uncertainty as to whether permitting third-party cookies on a website constituted a "sale" of personal information. The CPRA addressed this ambiguity by amending the CCPA to include definitions for terms such as "cross-context behavioral advertising" and "sharing."

The CPRA defines "cross-context behavioral advertising" as "the targeting of advertising to a consumer based on the consumer's personal information obtained from the consumer's activity across businesses, distinctly-branded websites, applications, or services, other than the business, distinctly-branded website, application, or service with which the consumer intentionally interacts." The CPRA

Spotlight (cont'd.)

explicitly excludes “cross-context behavioral advertising” as a permissible business purpose for which a business can disclose personal information to a service provider or contractor. However, the CPRA allows businesses to disclose personal information to service providers and contractors for nonpersonalized advertising as a permissible business purpose.

Furthermore, the CPRA provides consumers with a new privacy right — the right to limit the sharing of their personal information. Sharing under the CPRA means the disclosure of a “consumer’s personal information by the business to a third party for cross-context behavioral advertising,” regardless of whether there is an exchange of monetary or other valuable consideration. Additionally, a business must obtain consent to share personal information from a minor under 16, either from a parent or guardian if the minor is 13 or younger, or from the minor if they are 14 to 16 years old.

The CPRA comes into effect on Jan. 1, 2023.

2. Virginia Consumer Data Protection Act

On March 2, 2021, Virginia’s Gov. Northam signed the VCDPA into law. It comes into effect Jan. 1, 2023, and mimics both the GDPR and the CCPA/CPRA in certain respects.

Under the VCDPA, “targeted advertising” means “displaying advertisements to a consumer where the advertisement is selected based on personal data obtained from that consumer’s activities over time and across nonaffiliated websites or applications to predict such consumer’s preferences or interests.” The VCDPA’s definition of targeted advertising explicitly permits certain digital advertising activities such as measurement of the advertising performance and capping the frequency at which a consumer is shown a particular advertisement. As a result, adtech companies may still perform services that do not involve “displaying the advertisement.” In addition, if a controller processes personal data for the purpose of targeted advertising, it must conduct a data protection assessment prior to processing personal data and targeting consumers.

Consumers are granted the right to opt out of the processing of personal data for the purposes of targeted advertising. Unlike the CCPA, the VCDPA explicitly allows controllers to offer different prices or service levels to consumers who allow the controller to process their personal data for targeted advertising.

3. Colorado Privacy Act

The Colorado Privacy Act was signed into law on July 8, 2021, and became the U.S.’s third comprehensive state privacy law.

Similar to the VCDPA, the Colorado law defines “targeted advertising” as “displaying to a consumer an advertisement that is selected based on personal data obtained or inferred over time from the consumer’s activities across nonaffiliated websites, applications, or online services to predict consumer preferences or interests.” Certain activities, such as advertisements based on a consumer’s activities within the controller’s own websites or applications, are excluded from the definition of “targeted advertising”. A controller must conduct a data protection assessment for processing activities that present a heightened risk

of harm to a consumer, which includes the processing of personal data for the purposes of targeted advertising.

Similar to the CPRA and the VCDPA, the Colorado Privacy Act includes a right to opt out of the processing of personal data used for the purpose of targeted advertising. A controller that engages in targeted advertising would have to provide a “clear and conspicuous” method for consumers to opt out of processing of their personal data for such purposes through a “user-selected universal opt-out mechanism.” The technical specification and regulations for the mechanism will be established by the Colorado attorney general.

However, a consumer’s consent to targeted advertising would take precedence over a previous opt-out, provided the controller informs the consumer about the choice to opt out and describes the categories of personal data to be processed and the purposes for which they will be processed when obtaining such consent.

The Colorado Privacy Act comes into effect on July 1, 2023.

Conclusion

With the CPRA, the VCDPA and the Colorado Privacy Act all coming into effect in 2023, companies will have to ensure their compliance programs grant consumers the ability to opt out of targeted advertising. Companies may want to consider making changes on a national level to comply with all laws rather than create three separate compliance programs. Furthermore, companies should be prepared to change their advertising practices in the event that a large number of consumers opt out of targeted advertising. In addition to the consumer rights related to targeting advertising in these new laws, tech companies have also implemented new privacy features that will affect the future of adtech; for example, app developers may be required to obtain opt-in consent from users prior to tracking their online activities. Companies will likely have to adapt their models to address these changes in the adtech landscape.

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Emerging Issues

[Why Colorado's data privacy bill may be a big mountain to climb for marketers](#), *The Drum*, Jun. 10, 2021

The Colorado Privacy Act is expected to be signed into law imminently. While the bill will empower consumers to take greater control over their personal information, the transparency in advertising will also erect new hurdles for marketers, who generally rely on the collection and sale of consumer data to track consumer behavior and serve targeted ads.

[The Cookieless Future Just Got Closer—More Privacy Tsunamis Hitting Adtech Island](#), *Forbes*, Jun. 8, 2021



In addition to the phasing out of third-party cookies, some tech companies are providing consumers with additional privacy options such as hiding their IP address to avoid being tracked. Should a consumer exercise such a right, adtech companies would be unable to utilize the consumer's IP address as a unique identifier to connect that consumer's activity across websites and build a profile of them.

[The End of IDFA: 4 Misconceptions and 3 Ways Forward](#), *Ad Exchanger*, Jun. 8, 2021

Generally, advertisers have relied on unique device identifiers to target individuals, including behavioral, attitudinal, location and demographics, and measurement methodology. With the major changes to IDFAs (identifiers from advertisers) and third-party cookies, marketers may need to adapt their marketing strategies and implement new technologies and capabilities.

[The digital ad industry is rewriting the bargain at the center of the internet](#), *Quartz*, Apr. 25, 2021

Third-party cookies help advertisers target ads and measure the effectiveness of their marketing campaigns. They've become one of the central technologies underpinning the business model of publishing on the web. Digital advertising is a multibillion-dollar industry that will soon undergo major revamping. With the phasing out of a majority of third-party cookies by 2022, the adtech industry is looking for alternatives to use in digital advertising.

[How targeted advertising is impacted under Virginia's CDPA](#), *MarTech*, Mar. 8, 2021



Virginia's CDPA will give consumers more control over targeted ads; however, the CDPA is careful to specifically exclude a few items from its definition of "targeted advertising." For example, ads delivered based on specific and unambiguous opt-ins by consumers, ads delivered based on activities on the data controller's own website(s) and/or app(s), and ads delivered based on the consumer's search query are all excluded from the definition of "targeted advertising." The CDPA permits marketers a host of other options to target consumers.

[Privacy laws push online ads beyond tracking](#), *Axios*, Mar. 3, 2021



The future of the adtech industry and the way to proceed are unclear. Studies show that while 81 percent of consumers would support banning companies from collecting consumers' data for targeted advertising, 71 percent of consumers prefer ads that are tailored to their shopping habits and personalized. Recent privacy laws have aimed to address the uncertainty by providing consumers with the ability to opt out of such advertising.

[How expansion of privacy laws, adtech standards limits third-party data use for retargeting](#), *IAPP*, Apr. 27, 2021

Businesses must now provide consumers with the ability to opt out of cross-contextual advertising. Pursuant to the CPRA, transferring personal information to a vendor for cross-context behavioral advertising no longer constitutes a business purpose, which was necessary for businesses to categorize adtech companies as service providers. Data privacy laws are not the only driving factor when it comes to limiting the sharing of personal information for targeted advertising. Tech companies have also begun to provide users with more control over their personal information.