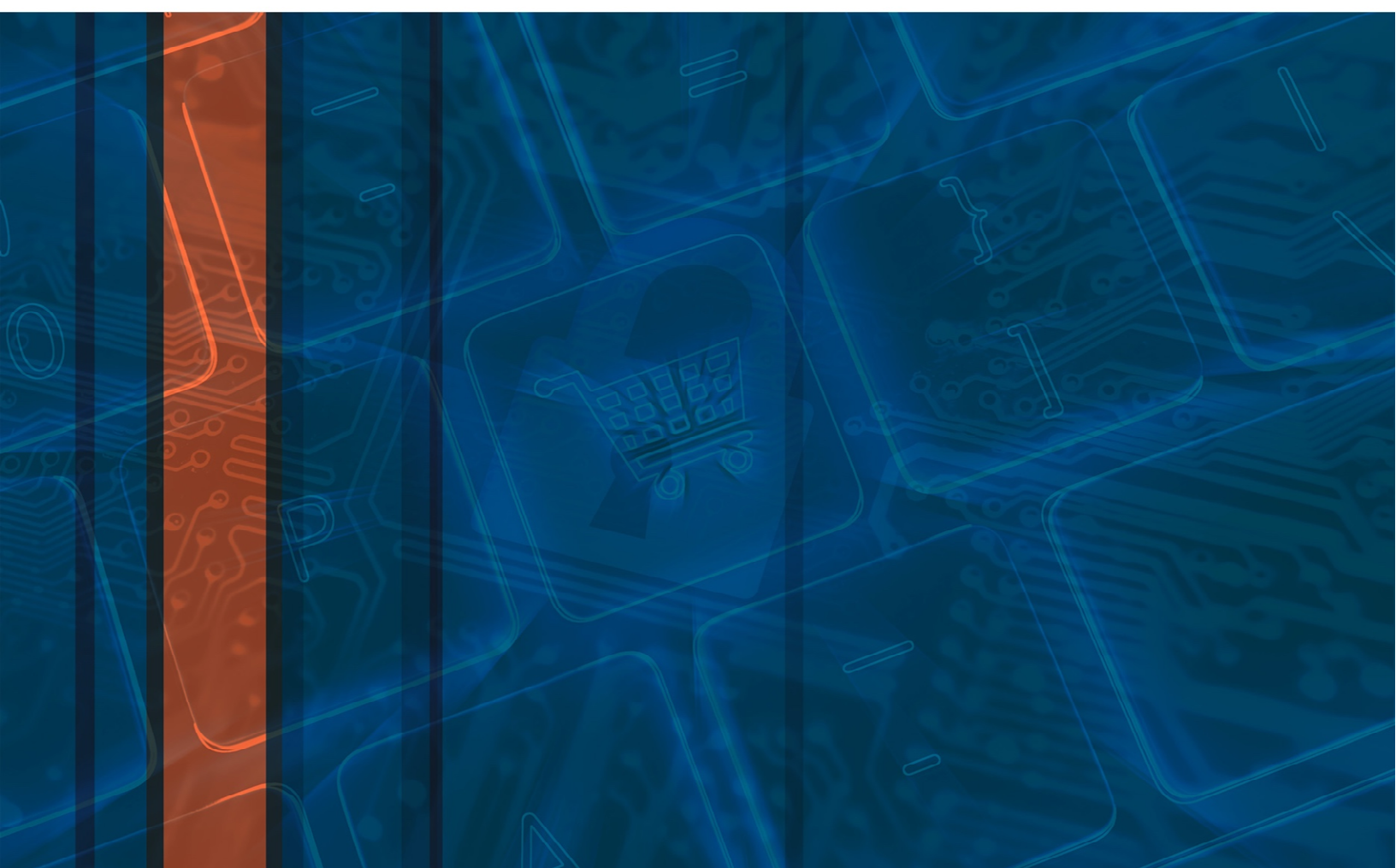


January 2020: Survey of the Retail Industry's Privacy Practices

David Zetoony

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Introduction

With the enactment of the European General Data Protection Regulation (“GDPR”) and the California Consumer Privacy Act (“CCPA”), retailers have been forced to cope with a shifting privacy landscape that impacts the data that they collect online and offline from customers, visitors, and employees. In the context of the CCPA, poor drafting, combined with a lack of practical regulatory guidance and the prospect of imminent judicial challenges, make it a particularly difficult statute for compliance.

At BCLP we have the honor to represent a wide cross-section of retailers and retail brands that encompass over 35,000 brick-and-mortar locations and dozens of eCommerce platforms. Given our unique position in the market, we believe that we have an obligation to provide our clients – and the retail sector as a whole – with accurate benchmarking to help them make the most informed compliance decisions possible.

To help identify trends, BCLP randomly sampled 33% of the Fortune 500 that are identified as primarily operating in the “retailing” sector. The sample includes a broad cross-section of retailers that focus on home goods, apparel, automotive, and office supplies (among others), and that have revenues which range from \$100 Billion to \$6 Billion in revenue. The metrics reflect public disclosure of privacy practices with a specific focus on CCPA requirements.

Sincerely,



David Zetony
Co-Chair Global Data Privacy and Security Team
Bryan Cave Leighton Paisner LLP

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Executive Summary

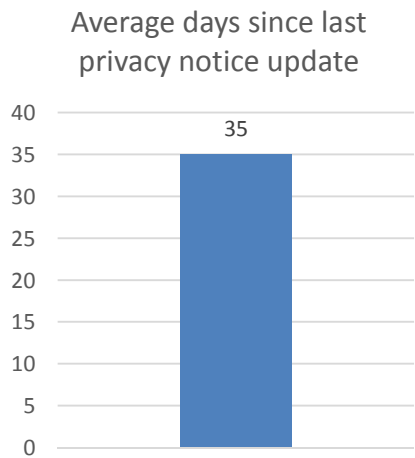
To help identify trends in privacy representations, BCLP randomly sampled 33% of the Fortune 500 that are identified as primarily operating in the “retailing” sector. The sample includes a broad cross-section of retailers that focus on home goods, apparel, automotive, and office supplies (among others), and that have revenues which range from \$100 Billion to \$6 Billion in revenue. The metrics reflect public disclosure of privacy practices with a specific focus on CCPA requirements.

The data shows that there is no one strategy for disclosing privacy practices to consumers, or for complying with the federal and state laws (including the CCPA) that govern data privacy. The following summarizes current trends within the retail industry:

- Privacy notices are, on average, a month old.
- The vast majority of retailers updated their privacy notices at the end of December for the CCPA.
- Retailer privacy notices that reference enumerated categories tend to use lists instead of tables.
- Retailers that had previously been silent about whether they “sold” information, are now disclosing that they do “sell” as that term is defined under the CCPA.
- There was a 46 point increase in the number of retailers that offer a “Do Not Sell” option.
- A small, but significant, number of retailers that don’t sell personal information are still providing a “Do Not Sell” option.
- Retailers are evenly split on whether they include a “Do Not Sell” link on their homepage.
- Even if they offer a “Do Not Sell” option some retailers are choosing not to include a “Do Not Sell” link on their homepage.
- Almost all retailers now offer access and deletion rights (at least to Californians).
- Most retailers have created a toll free telephone number and an online interactive form.
- Many retailers created a “home grown” request portal.
- Retailers deploy, on average, 22.4 behavioral advertising cookies on their homepages.
- Most retailers continue not to deploy a cookie notice.
- A small, but significant, percentage of retailers began displaying in January a cookie notice that asserts visiting a website constitutes consent to cookies.

Section 1: Age of Privacy Notices

Retailers routinely update their privacy notices to account for new legal requirements, changes in business practices, and changes in industry standards and practices. The average age of a privacy notice indicates the number of days since the notice was last updated:



Privacy notices are, on average, a month old.

Section 2: Size of Privacy Notices

Privacy notices differ in complexity and size. While longer privacy notices may provide more information concerning privacy practices, they can inadvertently make it more difficult for a reader to understand privacy practices if the reader does not have the time to fully review the notice. The following indicates the size of privacy notices:¹

Longest Privacy Notice	Shortest Privacy Notice	Average Size
10,986 words (43 pages)	2,589 words (10 pages)	4860 words (19 pages)

Section 3: Percentage of Retailer Privacy Notices Updated for CCPA

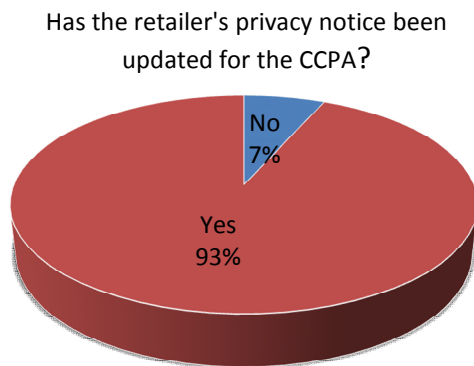
A privacy notice (sometimes referred to as a “privacy policy” or an “information notice”) is a document published by a retailer that includes, among other things, a description of what types of personal information the retailer collects, how the retailer uses that information, and with whom the retailer shares information. While most retailers historically maintained an online privacy notice, the CCPA requires retailers to provide a privacy notice to all California residents about whom they collect

¹ Page count is based upon the average of 250 words per page using double-spaced lines.

information (e.g., in-store and online), and to include specific provisions within the privacy notice including:

- A list of the “enumerated categories” of personal information collected by the retailer;
- A list of the “enumerated categories” of personal information shared by the retailer with third parties for business purposes;
- A disclosure about whether personal information is “sold” by the retailer;
- Disclosures concerning the rights of Californians to access, delete, or object to the sale of their personal information; and
- Methods for submitting such requests.

The following indicates the percentage of retailers that, as of the time of publication, had updated their privacy notices to attempt to account for the requirements of the CCPA.



The vast majority of retailers updated their privacy notices at the end of December for the CCPA.

Section 4: Disclosure by “Enumerated Category”

The CCPA states that a retailer should provide within its privacy notice lists of the categories of personal information that it has collected,² sold,³ and disclosed⁴ for business purposes. The statute also states that those lists should refer to the “enumerated category or categories” of “personal information” referenced within the statute.⁵ The term “enumerated category” refers to a list of specific data fields identified within the CCPA. The following indicates the percentage of retailers that, as of the time of publication, had disclosed – via a list or a chart – the “enumerated categories” identified within the CCPA:

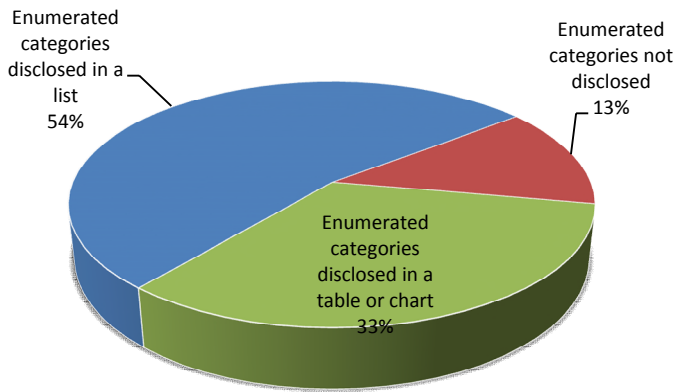
² [Cal. Civil Code 1798.130\(a\)\(5\)\(B\).](#)

³ [Cal. Civil Code 1798.130\(a\)\(5\)\(C\)\(i\).](#)

⁴ [Cal. Civil Code 1798.130\(a\)\(5\)\(C\)\(ii\).](#)

⁵ [Cal. Civil Code 1798.130\(c\); Cal. Civil Code 1798.140\(o\)\(1\).](#)

Disclosure by "Enumerated Category"

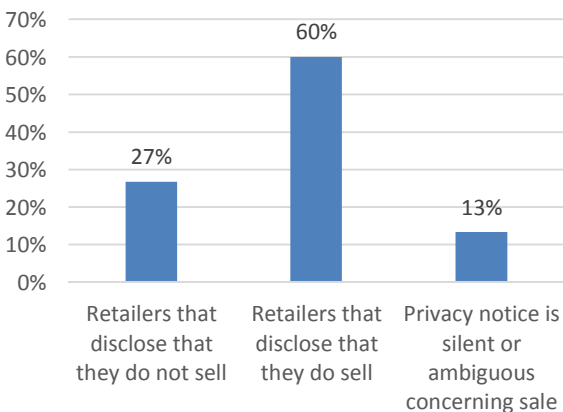


Retailer privacy notices that reference enumerated categories tend to use lists instead of tables.

Section 5: Disclosure of Selling Practices

The CCPA requires that a company affirmatively state whether it does, or does not, “sell” information. The term “sell” is broadly defined under the statute to include more than transferring personal information in return for payment. It includes “disclosing, disseminating, making available, transferring, or otherwise communicating” personal information “to another business or a third party for monetary or other valuable consideration.”⁶ The CCPA’s broad definition in combination with ambiguity concerning what courts will consider as “valuable consideration,” has led to uncertainty among retailers concerning the types of information sharing that might be considered a “sale” under the statute.⁷ The following indicates the percentage of retailers that, as of the time of publication, disclosed that they “sell” personal information:

Disclosure of sale of Personal Information



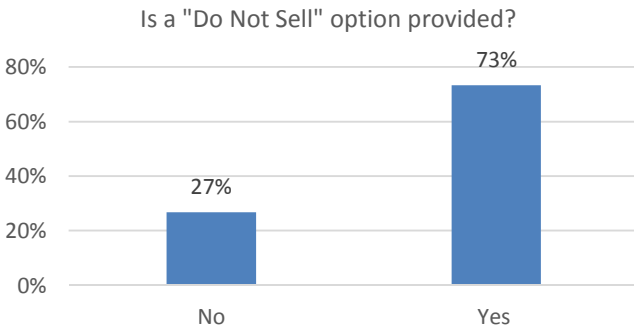
Retailers that had previously been silent about whether they “sold” information, are now disclosing that they do “sell” as that term is defined under the CCPA.

⁶ [Cal. Civil Code 1798.140\(t\)\(1\).](#)

⁷ [Cal. Civil Code 1798.130\(c\); Cal. Civil Code 1798.140\(o\)\(1\).](#)

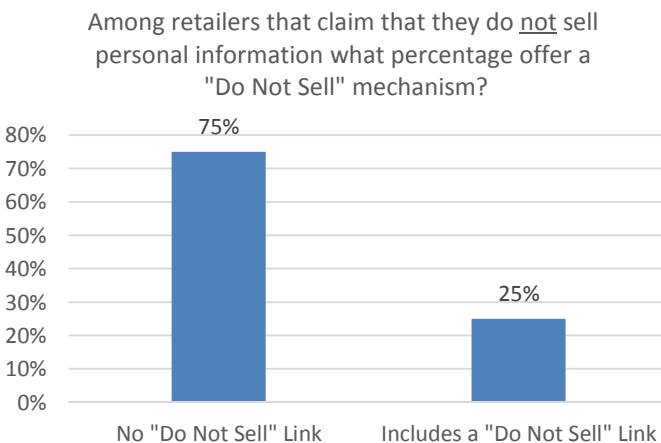
Section 6: Do Not Sell Option and Link

The CCPA states that if a retailer sells personal information it must provide California residents with the ability to opt-out of the sale of the information.⁸ In other words, it must disclose to Californians that they have the “right to opt-out” and provide them a mechanism to do so. The following indicates the percentage of retailers that provide Californians with some form of Do Not Sell option:



There was a 46 point increase in the number of retailers that offer a “Do Not Sell” option. The majority of retailers are now offering a choice not to sell information.

Among the subset of retailers that disclose that they do not sell personal information some still purport to offer a “do not sell” option. For these retailers, however, it is unclear what, if anything, the Do Not Sell option is intended to do if selected by a California resident:



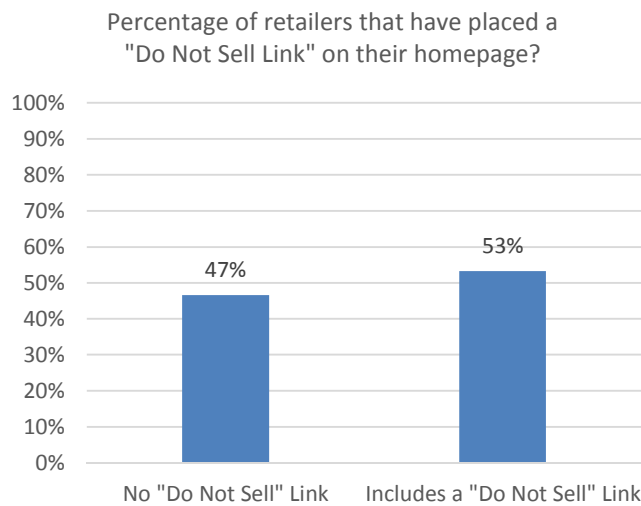
A small, but significant, number of retailers that don't sell personal information are still providing a “Do Not Sell” option.

In addition to providing a do not sell option, the CCPA requires that retailers that sell personal information provide a “Do Not Sell My Personal Information” link on both the company’s homepage and within the company’s privacy notice that takes California residents to an internet web page that enables the opt-out of such sales.⁹ Retailers that do not sell personal information are not required to post a “Do

⁸ [Cal. Civil Code 1798.120\(a\), \(b\).](#)

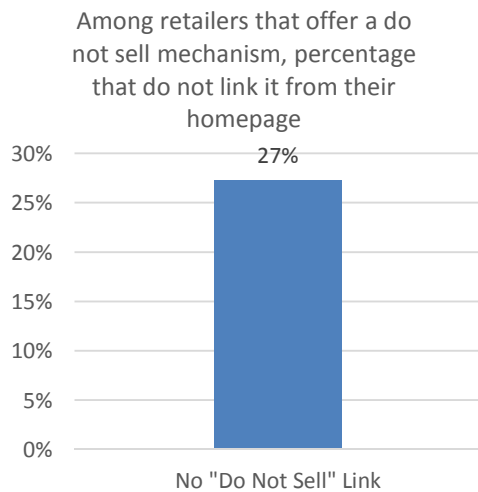
⁹ [Cal. Civil Code 1798.135\(a\)\(1\); Cal. Civil Code 1798.135\(a\)\(2\)\(A\).](#)

Not Sell Link.”¹⁰ The following indicates the total percentage of retailers that include a do not sell link on their homepage:



Retailers are evenly split on whether they include a “Do Not Sell” link on their homepage.

Note that some retailers offer a do not sell *option* (as indicated in the graphs above), but choose not to provide a link on their internet homepage labeled “Do Not Sell My Personal Information.” Many of these retailers only disclose within their privacy notice that Californians have the ability to opt-out of the sale of personal information. The following indicates the percentage of retailers that have taken this approach:

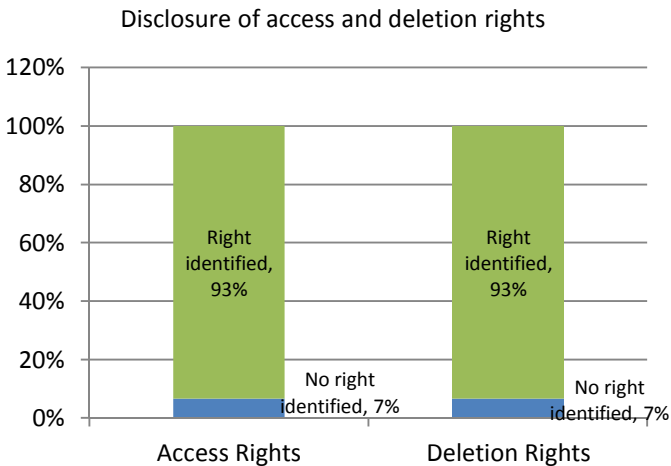


Even if they offer a “Do Not Sell” option some retailers are choosing not to include a “Do Not Sell” link on their homepage.

¹⁰ [Cal. Civil Code 1798.120\(b\).](#)

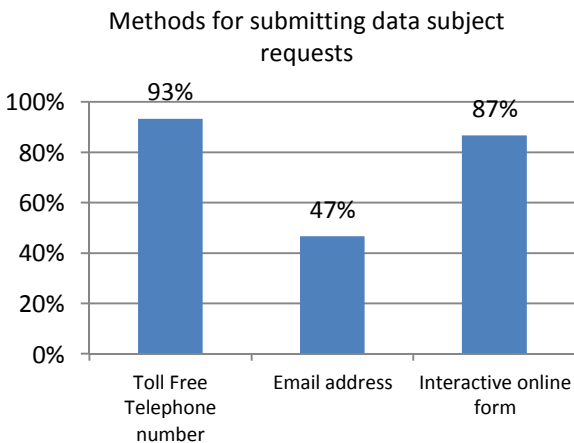
Section 7: Data Subject Rights (e.g., Access and Deletion)

The CCPA gives Californians the ability to request that a retailer provide them with access to their personal information or that a retailer delete the information that it holds about them. The following indicates the percentage of retailers that disclose access and deletion rights:



Almost all retailers now offer access and deletion rights (at least to Californians).

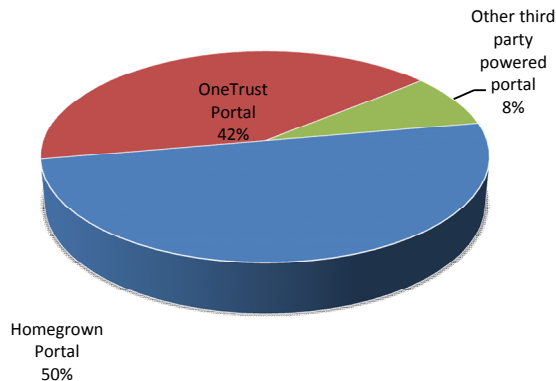
Companies may allow individuals to exercise their rights (e.g., make access or deletion requests) by email, telephone, or an interactive online form. The following indicates the methods that retailers are permitting for making right requests:



Most retailers have created a toll free telephone number and an online interactive form.

Companies that offer online interactive forms can either create those forms internally or utilize a third party to collect and help process data subject requests. The following indicates the breakdown of online interactive forms utilized:

Design of data subject request portals



Many retailers created a “home grown” request portal.

Section 8: Cookie Banners and Notices

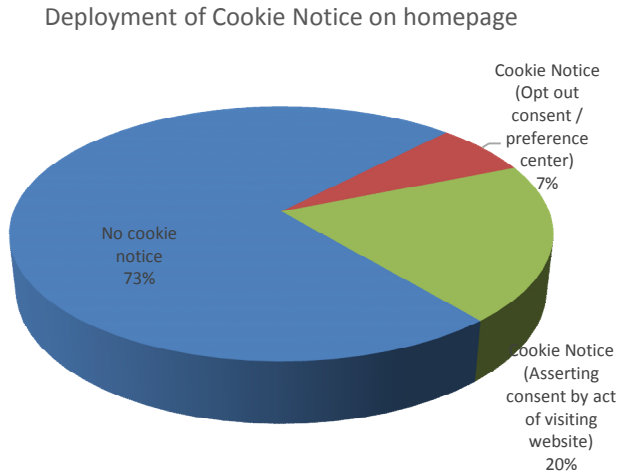
Many retailers utilize cookies, pixels, tags, and other forms of tracking technologies provided by third parties to identify individuals that visit their website, and to advertise to them when they leave their website. There is ambiguity about whether permitting a third party behavioral advertiser to track California residents on a website does, or does not, constitute the “sale” of personal information under the CCPA. Retailers have responded to that ambiguity in a variety of ways including, but not limited to:

- Limiting their use of tracking technology to only third parties that agree to be “service providers” under the CCPA.
- Posting a notice on their website that asks California users to consent to the deployment of third party behavioral advertising technology (an “opt-in cookie notice”).
- Posting a notice on their website that informs California users about the use of third party behavioral advertising technology and provides California users the ability to opt-out of such use on a device-specific and browser-specific basis (an “opt-out cookie notice”).
- Posting no cookie notice, but treating the use of third party behavioral advertising cookies as the “sale” of information and permitting Californians to opt-out of such sales via a do not sell mechanism.

The following indicates the quantity of third party behavioral advertising cookies deployed on retailer homepages:

Greatest Quantity	Smallest Quantity	Average Quantity
44	2	22.4

The following indicates the percentage of retailers that have posted a cookie notice on their homepage:



Most retailers continue not to deploy a cookie notice.

A small, but significant, percentage of retailers began displaying in January a cookie notice that asserts visiting a website constitutes consent to cookies.

Methodology

BCLP generated a report in December 2019 of those companies identified by the Fortune 500 as primarily within the “retailing” sector. A sample population was randomly selected using a computer random number generator of 33% of the total population. The privacy notices and homepages of the survey population were examined on January 2, 2019, using Chrome for iOS Version 79.0.3945.88 (official build) (64 bit). Cookies were identified and classified using Ghostery for Chrome Version 8.4.4. All websites were visited from an IP address physically associated with Los Angeles, California. Comparisons to other industries/companies refers to statistics identified in BCLP’s Survey of Fortune 500 Companies’ Privacy Representations.

In situations in which a company had more than one privacy notice, the “online” privacy notice (if one was so described) was reviewed. If a California-specific privacy notice was provided, both the California notice and the general notice were reviewed. If a privacy notice indicated that it was updated in a month and a year (but no date was provided) the first date of the month was recorded as the “updated” unless a more precise date could be inferred.

About the Author



David A. Zetoony
Bryan Cave Leighton Paisner

Mr. Zetoony is a partner in the Boulder, Colorado, office of Bryan Cave Leighton Paisner, LLP, an international law firm. Mr. Zetoony co-leads the firm's global data privacy and security practice and represents companies around the world on data privacy and security issues. He has helped hundreds of companies design their strategy for CCPA and GDPR compliance.

Mr. Zetoony graduated *cum laude* with a dual degree in history and policy studies from Rice University in Houston, Texas and received his juris doctorate from the University of Virginia School of Law in Charlottesville, Virginia. He has served in various leadership roles within the privacy and data security community including as a co-chair for the Colorado chapter of the International Association of Privacy Professionals.

Mr. Zetoony frequently speaks and writes on issues of domestic and international data privacy and security law. He received a JD Supra Readers' Choice Award in 2017, 2018, and 2019, and has been repeatedly named as the top "thought leader" in data privacy by Lexology. He was named a Cybersecurity & Data Privacy Trailblazer by the National Law Journal in 2016. In addition to his data privacy and security practice, he has received several awards for his *pro bono* contributions including the Pro Bono Partner of the Year Award from the Catholic Charities of the Archdiocese of Washington, D.C., and the Commitment to Justice Award from the Central American Resource Center

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