Virginia and Beyond: How the Virginia Consumer Data Protection Act Impacts the Data Privacy Landscape

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Mike Signorelli

Partner | MASignorelli@Venable.com

Tara Potashnik

Partner | TSPotashnik@venable.com

Allaire Monticollo

Associate | AMMonticollo@Venal

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Agenda

1. Background on the Virginia Consumer Data Protection Act: Overview and Key Dates
2. Rights and Obligations Under the Virginia Consumer Data Protection Act
3. Virginia Consumer Data Protection Act Compared to the California Consumer Privacy Act of 2018 and the California Privacy Rights Act of 2020
4. 2021 State Privacy Legislation Outlook
5. Questions

Background on the Virginia Consumer Data Protection Act (VA CDPA)

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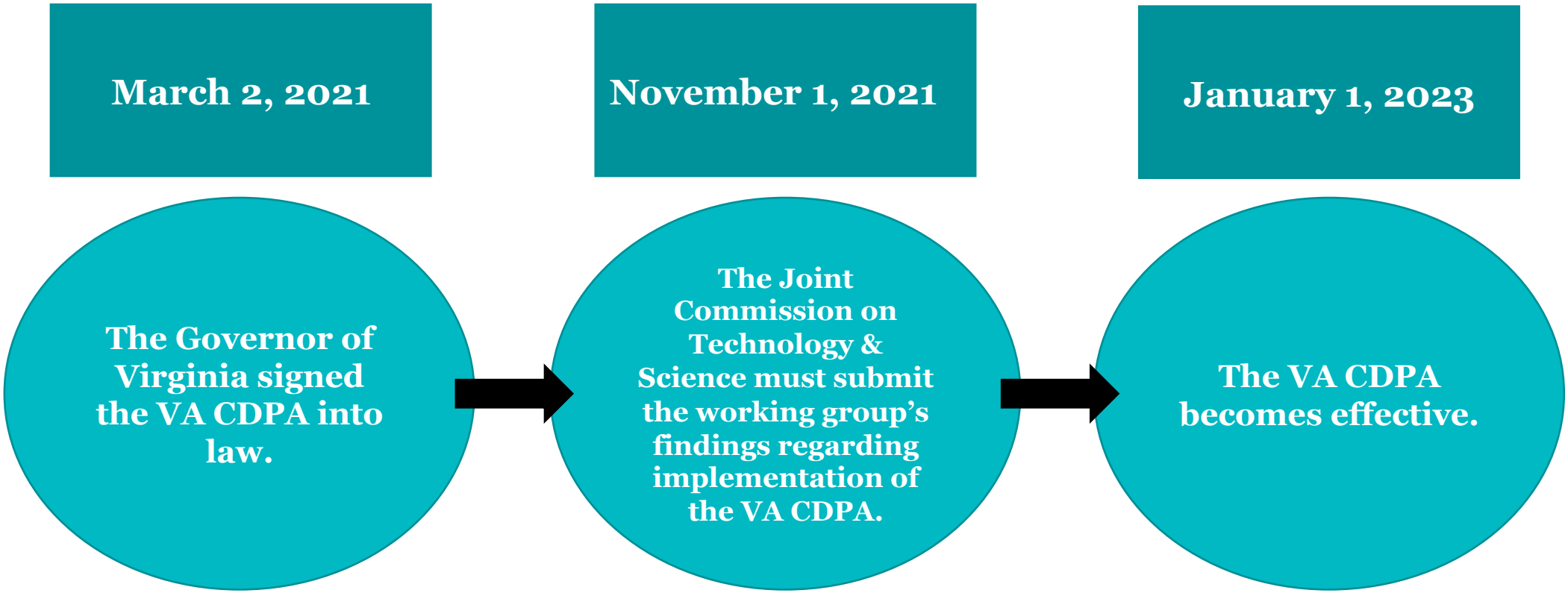
Overview of the Virginia Consumer Data Protection Act

- The Virginia Consumer Data Protection Act ("VA CDPA") was signed into law on **March 2, 2021**, making Virginia the second state after California to pass a comprehensive state privacy law.
    - Note that Nevada and Maine have also enacted more limited privacy laws in recent years.
- The VA CDPA includes **similar concepts** to the California Consumer Privacy Act of 2018 ("CCPA"), the California Privacy Rights Act of 2020 ("CPRA"), and the European Union's General Data Protection Regulation ("GDPR").
- The VA CDPA is a rights-based law, offering consumers specific rights with respect to personal data collected about them.
- **Enforcement is limited to the Virginia Attorney General** (no private right of action, unlike the CCPA/CPRA).
    - Controllers and processors accused of a violation will have a 30-day period to cure alleged violations, after which the Virginia Attorney General can seek damages of up to $7,500 per violation.

Report on Implementation of the VA CDPA

- The VA CDPA mandates the Chairman of the Joint Commission on Technology and Science ("JCOTS") to create a **working group** consisting of:
  - the Virginia Secretary of Commerce and Trade;
  - the Virginia Secretary of Administration;
  - the Virginia Attorney General;
  - the Virginia Chairman of the Senate Committee on Transportation;
  - Representatives of businesses who control or process personal data of at least 100,000 persons; and
  - Consumer rights advocates.
- The working group must "review provisions of [the VA CDPA] and issues related to its implementation."
- The Chairman of JCOTS must submit the working group's "**findings, best practices, and recommendations regarding the implementation of [the] act**" to the Chairmen of the Virginia Senate Committee on General Laws and Technology and the Virginia House Committee on Communications, Technology and Innovation no later than **November 1, 2021**.

VA CDPA Timeline: Key Dates



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Threshold Issues: Scope of the VA CDPA

The VA CDPA applies to any person or entity that:

A. **Conducts business** in Virginia; ***or***

B. **Produces products or services that are targeted to residents of Virginia *and*** that either:

    1. Controls or processes personal data of at least 100,000 consumers annually, or
    2. Controls or processes personal data of at least 25,000 consumers and derives over 50% of gross revenue from sales of personal data.
        i. Note that unlike the CCPA and CPRA, Virginia does not set a *pure* gross revenue threshold ($25 million in CA) that brings a business within the law's scope; the revenue threshold under the VA CDPA is combined with a requirement to process personal data of at least 25,000 Virginia consumers.

Notably, in addition to other exemptions for certain categories of data, the VA CDPA exempts from its obligations **data processed or maintained in the course of hiring and employment**, as long as the data is collected and used within that context.

Key VA CDPA Definitions

- The VA CDPA uses "**controller,**" "**processor**," and "**personal data**" terminology, similar to GDPR.

- "**Controller**" is defined as "the natural or legal person that, alone or jointly with others, determines the purpose and means of processing personal data."

- "**Processor**" is defined as "a natural or legal entity that processes personal data on behalf of a controller."

- "**Personal data**" is defined as "any information that is linked or reasonably linkable to an identified or identifiable natural person." It does not include de-identified or publicly available information.

Rights and Obligations Under the VA CDPA

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Rights of Consumers

Under the VA CDPA, consumers have the right to:

1. **Access** personal data that a controller collects about them;
2. **Correct** inaccuracies in the consumer's personal data, taking into account the nature of the personal data and the purposes of the processing of the consumer's data;
3. **Delete** personal data provided by or obtained about the consumer;
4. Obtain a portable copy of the consumer's personal data to transmit to another controller (right to **portability**); and
5. **Opt out** of the processing of personal data for the purposes of (i) targeted advertising, (ii) the sale of personal data, or (iii) profiling in furtherance of decisions that produce legal or similarly significant effects concerning the consumer.

Controllers are **prohibited from discriminating** against a consumer for exercising consumer rights.

Controllers must respond to consumer rights requests "without undue delay" and within **45 days** (a 45-day extension is permitted when reasonably necessary).

VA CDPA Opt-Out Right

- Under the VA CDPA, consumers have the **right to opt out of the processing of personal** for the purposes of:
  1. **Targeted advertising**, which is defined to mean "displaying advertisements to a con where the advertisement is selected based on personal data obtained from that consun activities over time and across nonaffiliated websites or online applications to predict s consumer's preferences or interests." It **does not include: (1)** advertisements based activities within a controller's own websites or online applications; **(2)** advertisements based on the context of a consumer's current search query, visit to a website, or online application; **(3)** advertisements directed to a consumer in response to the consumer's request for information or feedback; or **(4)** processing personal data processed solely measuring or reporting advertising performance, reach, or frequency.
  2. **Sales** of personal data; or
  3. **Profiling** in furtherance of decisions that produce legal or similarly significant effects concerning the consumer. "Profiling" is defined to mean any form of automated proce performed on personal data to evaluate, analyze, to predict personal aspects related to identified or identifiable natural person's economic situation, health, personal prefere interests, reliability, behavior, location, or movements."

Pseudonymous Data Exemption for Most Consumer Ri

- **Pseudonymous data is exempt from the consumer rights under the VA CDPA *except for* the right to opt out**, so long as any information necessary to identify the consumer is kept separate from the pseudonymous data and is subject to effective technical and organizational controls that prevent the controller from accessing such information.

- The VA CDPA defines "**pseudonymous data**" as personal data that cannot be attributed to a specific person without additional information, provided that such additional information is kept separately and subject to appropriate measures to ensure that the personal data is not attributed to an identifiable person.

Opt In Consent Required for Processing Sensitive Data

- The VA CDPA is an opt-out regime, except for "**sensitive data," which requires consent for processing**. Controllers may not process sensitive data absent opt in consent from a Virginia consumer.

- "**Sensitive data**" under the VA CDPA includes (1) personal data revealing race or ethnicity, religious beliefs, mental or physical health diagnosis, sexual orientation, or citizenship/ immigration status, (2) processing of genetic or biometric data for the purpose of identifying a natural person, (3) personal data collected from a known child, and (4) precise geolocation data.

Appeals Process Required

- The VA CDPA requires controllers to establish a process for consumers to **appeal** the controller's decision not to take action on consumer rights request.
    - The appeal process must be conspicuously available and similar to the process for submitting rights requests.
    - A controller must respond in writing within **60 days** of receiving an appeal informing the consumer of any action taken or not taken and explaining the reasons for its decisions.
    - If the appeal is denied, the controller must also provide the consumer with **a method of submitting a complaint to the Virginia Attorney General**.

Data Protection Assessments Required

- The VA CDPA requires controllers to conduct **data protection assessments** ("DPAs") for certain processing activities, such as:
    - Processing involving **targeted advertising**;
    - **Sales** of personal data;
    - **Profiling** that could lead to a risk of harm to the consumer;
    - Processing **sensitive data**; and
    - Any other processing that could lead to a **heightened risk** of harm to consumers.
- Controllers must maintain these DPAs. The **Virginia Attorney General may request su DPAs** if they are relevant to an ongoing investigation by the Virginia Attorney General. In th event of such a request, a controller must turn their DPAs over to the Attorney General.
    - The disclosure of a DPA pursuant to a request from the Virginia Attorney General **doe not constitute a waiver of attorney-client privilege or work product protec** with respect to the DPA and any information contained in the assessment.

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VA CDPA Privacy Notice Requirements

- Requires **privacy notices** that include:
    1. The categories of personal data processed;
    2. The purpose(s) for processing personal data;
    3. How consumers can exercise their rights and how to appeal a controller's decision not to act on a rights request;
    4. The categories of personal data the controller shares with third parties; and
    5. The categories of third parties with whom the controller shares personal data.

- If applicable, the VA CDPA requires controllers to disclose how they sell or process personal data for **targeted advertising** and the manner in which a consumer can opt out of targeted advertising.

VA CDPA Compared to CCPA *(CA)* and CPRA *(CA)*

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VA CDPA vs. CCPA *(CA)* vs. CPRA *(CA)* At-a-Glan

Requirement	VA CDPA	CCPA	CPRA
Right of Access	X	X	X
Right of Rectification	X		X
Right of Deletion	X	X	X
Rights Pertaining to Sensitive Information	X		X
Right of Portability	X	X	X
Right to Opt-Out	X	X	X
Right to Appeal	X		
Right Against Automated Decision-Making	X		
Private Right of Action		X	X
Opt-In Age Requirement	13	16	16
Notice/Transparency Requirement	X	X	X
Risk Assessments	X		X
Prohibition on Discrimination/Retaliation	X	X	X
Purpose/Processing Limitation	X	X	X

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General Differences

- **Thresholds** for each law's applicability are slightly different
  - No pure revenue threshold imposing obligations under VA CDPA
- Slight, but important, differences in **consumer rights**
- Varying approaches to treatment of **sensitive data**
- Different **enforcement mechanisms** and **regulatory authority**
  - Enforcement of VA CDPA is limited to the Virginia Attorney Gen whereas private rights of action can be brought under the CCPA and CPRA (CA).
  - No express regulatory authority under VA CDPA. Regulatory authority exists for the California Attorney General for CCPA (CA and the California Privacy Protection Agency for CPRA (CA).

Comparison: Right to Deletion

VA CDPA

- Consumers have a right to "delete personal data **provided by or obtained about** the consumer."
- Processors must delete personal data or return it to the controller at the controller's direction.

CCPA *(CA)*

- Consumers have a right to request that a business delete personal information "**about the consumer** w
  the business has **collected from** the consumer."
- The right to deletion in California is narrower here because it must have been collected from the consum
- Requirement to pass on deletion requests to service providers.

CPRA *(CA)*

- Same construction of the right to delete as the CCPA (CA) (right to delete personal information collected
  the consumer).
- Requirement to pass on deletion requests to service providers and contractors, as well as **notify all thir
  parties to whom the business has sold or shared personal information to delete the perso
  information**, unless this proves impossible or involves disproportionate effort.

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Comparison: Opt-Out Rights

VA CDPA

- Consumers have the right to opt out of the processing of personal data for purposes of: **targeted adver** the **sale** of personal data; or **profiling** in furtherance of decisions that produce legal or similarly signifi effects concerning a consumer.
- The "**sale of personal data**" is defined as "the exchange of personal data **for monetary considerati** the controller to the third party."

CCPA *(CA)*

- Consumers have the right to opt out of sales of personal information. "**Sale**" means "selling, renting, rel disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, electronic or other means, a consumer's personal information by the business to a third party **for mone other valuable consideration**."

CPRA *(CA)*

- Consumers have the "right to opt-out of the sale or **sharing**" of personal information.
- "Sharing" is defined as transfers of personal information for "**cross-context behavioral advertising**

Comparison: "Sensitive" Information

VA CDPA: Consumer right to opt-in to sensitive data processing.

- "Sensitive data" is more narrowly defined in Virginia than in California. However, **in Virginia, contro may only process sensitive data with a consumer's consent**. "Sensitive data" under the VA CDP defined as personal data "revealing racial or ethnic origin, religious beliefs, mental or physical health dia sexual orientation, citizenship or immigration status, personal data collected from a known child, precise geolocation data, and genetic or biometric data."

CCPA *(CA)*: Consumer right to opt-out of sales of personal information.

- **No definition of "sensitive data" or "sensitive personal information."** All "personal informati subject to a consumer request to opt out of sales.

CPRA *(CA)*: Consumer right to limit use and disclosure of sensitive personal information.

- "Sensitive personal information" is defined broadly as: "Personal information revealing social security, d license, state ID card, or passport number; certain financial information in combination with required credentials allowing access to an account; geolocation; racial or ethnic origin, religious beliefs, or union membership; contents of mail, email, and text messages; or genetic data; or… [t]he processing of biomet information to uniquely identify a consumer; personal information concerning a consumer's health; or p information concerning a consumer's sex life or sexual orientation."
- Consumers have the **right to limit the use and disclosure of sensitive personal information**.

Comparison: Opt-Out Mechanisms

VA CDPA

- Controllers must establish and describe means for consumers to submit a request to exercise their rights, including opt-out requests.
- The VA CDPA does not prescribe a specific link to effectuate opt out requests.

CCPA *(CA)*

- Consumers must have at least **two mechanisms** available for submitting requests to opt out of sales of personal information to businesses, including a clear and conspicuous "**Do Not Sell My Personal Information Link**" on a business homepage.

CPRA *(CA)*

- Businesses to post a **clear and conspicuous link** on their homepages titled "**Do Not Sell or Share My Personal Information**."
- Businesses must also provide a "**Limit the Use of My Sensitive Personal Information**" link or they **may choose to combine** this link with the link limiting sales and sharing in one comprehensive link.

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Comparison: User-Enabled Global Privacy Controls

VA CDPA

- The CDPA does not explicitly require adherence to global privacy controls.

CCPA *(CA)*

- CCPA regulations specify that **businesses must treat user-enabled global privacy controls as valid requests to opt out of personal information sales for a device or consumer**. Such controls include browser plug-ins or privacy settings, device settings, or other mechanisms that signal the consumer's choice to opt-out of the sale of personal information.

CPRA *(CA)*

- The CPRA appears to give businesses the **choice to honor user-enabled global privacy controls, or to offer links** enabling consumers to limit sales and sharing of personal information directly with the business.

Comparison: Regulatory Authority

VA CDPA

- **No explicit regulatory directives or authority** for Virginia Attorney General or any other agency.

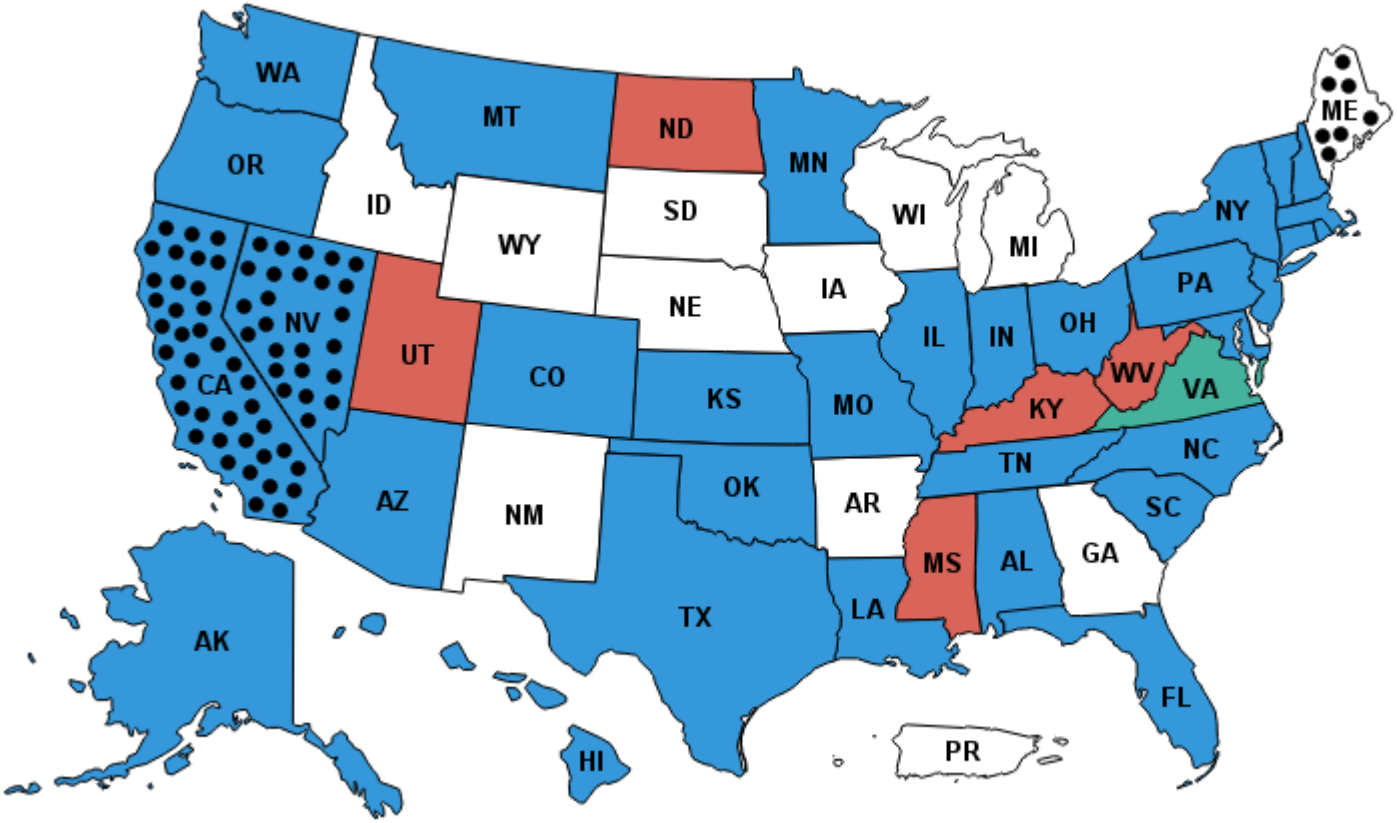
CCPA *(CA)*

- **California Attorney General** has the authority to issue regulations.
- CCPA regulations were finalized in March 2021.

CPRA *(CA)*

- California Attorney General must hand over rulemaking responsibilities to the California Privacy Protection Agency.
- The **California Privacy Protection Agency** is instructed to issue rules on a much broader variety of topics than the California Attorney General was under CCPA.

2021 State Privacy Legislation Outlook



VT	NH
MA	CT
RI	NJ
DE	MD
DC	US

- Considered (32)
- Enacted (1)
- Bill Did Not Pass (5)
- Privacy Law Enacted Prior to 2021 (3)

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Questions?

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