

# INTRODUCTION

If you grew up in the 1970s or the 1980s, you probably remember the School House Rock song *I'm Just a Bill*, which, each Saturday morning, explained, at breakneck tempo, the legislative process:

I'm just a bill.  
Yes, I'm only a bill.  
And I'm sitting here on Capitol Hill.  
Well, it's a long, long journey  
To the capital city.  
It's a long, long wait  
While I'm sitting in committee,  
But I know I'll be a law someday  
At least I hope and pray that I will,  
But today I am still just a bill.

In practice, the normal legislative process—draft legislation, committee discussions, subcommittee reports, hearings, conferences, and the same process starting over again by the companion legislative branch—sometimes does not happen. Indeed, in the world of data privacy the normal process feels more like the exception than the rule.

The data privacy world has seen two landmark changes in the past decade—the European General Data Protection Regulation (GDPR) and the California Consumer Privacy Act (CCPA) and its companion, the California Consumer Privacy Rights Act (CPRCA). Neither the European approach to privacy regulation nor the California approach to privacy legislation fits the traditional model. Indeed, they should be taught at every law school as case studies to understand how divergent the legislative process can be.

The process by which the European GDPR was created sits on one extreme. Modern European data privacy laws can be traced back to the 1995 European Data Protection Directive (Directive 95/46/EC). In 2012, the European Commission proposed a comprehensive reform of the Data Protection Directive. That reform was extensively, and independently, evaluated by the European Data Protection Supervisor, the Article 29 Working Party (which was composed of representatives of each of the data privacy regulators in the Member States), and the European Parliament. Each entity convened groups of experts to evaluate the proposed text and offer opinions, insights, and recommendations. The collective thoughts of hundreds of privacy experts from those bodies ultimately influenced

the European Data Protection Supervisor to provide, in 2015, a final recommendation for the text of the GDPR, and the final agreement of the European Parliament, the Council, and the European Commission was achieved a year later on April 27, 2016. The GDPR provided a two-year grace period during which the Article 29 Working Party (and later the European Data Protection Board) issued new guidance and ratified prior guidance that collectively provided thousands of pages of interpretative guidance for businesses prior to the GDPR going into effect in May of 2018. Ultimately, from start to finish, the GDPR took six years to come into being—four years to draft (2012–2016) and two years to implement (2016–2018). It benefited from the input of hundreds of privacy experts who pressure tested, discussed, and vetted each of its 99 Articles and 173 preambles. People can (and do) have strong opinions about the GDPR, but nobody can say that it is not a polished regulation. It arose from an exhaustive and thorough process that consumed thousands of hours of drafting and compromise.

The processes that created the CCPA and the CPRA were far from exhaustive or thorough. For DC Comics fans, you could consider the legislative process that created California’s privacy laws the Bizarro-world of the orderly and thorough European GDPR-creation process.

In 2017, a California real-estate-developer-turned-privacy-advocate filed a ballot initiative for a California Right to Privacy Act. The ballot initiative, which was refiled and amended several times, was ostensibly based upon portions of the GDPR, but there is no indication that it was drafted by an attorney, let alone one familiar with data privacy. Under fear of passage of what was considered by many a poorly drafted, and poorly conceptualized, initiative, a deal was reached on June 21, 2018, between the proponents of the ballot initiative and certain members of the California legislature under which the ballot initiative would be withdrawn if the California legislature adopted, and the governor of California signed, a statutory replacement by June 28, 2018—that is, within seven days.<sup>1</sup> Assembly Bill 375, an inactive proposal that had been gathering dust from the previous year and was never fully drafted, vetted, or reviewed, was pulled from the inactive file. On June 21, 2018, it was referred to the Judiciary Committee for hasty approval. On June 25, 2018, it was referred to the Appropriations Committee. On June 28, 2018, it was enacted and signed by the Governor.<sup>2</sup> It took seven days to transform a previously abandoned bill into legislation. During that time it is not clear if any legal privacy experts (as opposed to privacy advocates) reviewed, revised, or opined on the text of the statute. While subsequent amendments in 2018 and 2019 tweaked the language, they mainly corrected grammatical errors and typos, doing little to modify the substance of the original text. The only real overhaul came in 2020 when the same California real-estate-developer-turned-

1. Taryn Luna, *There’s a Deal to Pull Consumer Privacy Measure from the California Ballot*, SACRAMENTO BEE (June 21, 2018, 5:15 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article213608964.html>.

2. *B. History Cal. Assemb. B. 375*, Gen. Assemb., Reg. Sess. (CA 2018), CAL. LEGIS. INFO., [https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=201720180AB375](https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180AB375) (last visited Feb. 22, 2021).

privacy-advocate filed a second ballot initiative. No legislative compromise intervened that time, and, ultimately, the ballot initiative led to the enactment by referendum of the CPRA and its large-scale amendment of the CCPA. People can (and do) have strong opinions about the CCPA, but nobody can say that it is a polished statute.

While the CCPA and the CPRA had an entirely different process for coming into being as compared with the GDPR, at the end of the day they are related and are, if not sisters, perhaps distant cousins. So much of the verbiage, intent, structure, and ultimately ideas found within the CCPA were borrowed from (sometimes excerpted from) the GDPR. The net result is that to truly understand and interpret the CCPA and the CPRA requires an understanding of the complex regulatory scheme that they were trying to emulate—the GDPR—as well as an acceptance of the fact that the CCPA is *not* that regulatory scheme, did *not* go through the same vetting process, and may *not* always lead to the same interpretations and legal conclusions.

This book does not dwell on the history of the two statutes, or the academic debate about which regulatory/legislative model is superior. Instead it focuses on the CCPA/CPRA as a stand-alone legislative regime and attempts to answer the questions most often asked by in-house counsel and businesses that have to put those statutes into practice. Nonetheless, throughout the book you will find more than 450 references to the “European” position. Those have been included at times to point out how the CCPA and the CPRA converge or diverge from their European counterparts. At other times, they have been included to describe how Europe has handled an issue that has yet to be decided within California. The fact that Europe has gone in one direction may be probative of where California may end up, but it is, of course, not conclusive. As anyone with a large family knows, cousins may be related but rarely agree on everything.

My hope is that this becomes a useful resource for companies that are new to the world of data privacy, as well as companies that have a long history of wrestling with U.S. and international data privacy laws.

The real credit for this book goes to the hundreds of companies that have brought their data privacy questions to me over the years and have trusted me to help shape their privacy programs. To them I say, “Thank you.” It has been, and continues to be, an honor.