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Financial Cos. Face A New Normal Under State Privacy Laws

By **Kristen Mathews and Adam Fleisher** (December 2, 2019, 4:04 PM EST)

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Financial institutions have long enjoyed a special status when it comes to consumer privacy legislation. Because their handling of consumer information is covered by, among other laws, the federal Gramm-Leach-Bliley Act, they've successfully argued that they should be exempt from additional privacy legislation.

These exemptions have to some degree allowed financial institutions to follow common standards nationwide rather than a patchwork of state laws, which can increase confusion, costs and compliance burdens.

However, financial institutions will have one additional privacy law to grapple with starting on Jan. 1, when the California Consumer Privacy Act becomes operative. While the sweeping law — intended to give individuals more control over their personal information — will provide exceptions to certain activities pursuant to the GLBA, it will not provide a blanket exemption for financial institutions.

That means that financial institutions will have to carefully analyze their compliance obligations. The alternative — choosing not to do business in the world's fifth-largest economy — is not an option for most financial institutions.

What's more, the California law may signal a new regulatory reality for financial institutions. Other states are pushing ahead with their data privacy laws, some of which are modeled on the CCPA, and some of which include vital differences. As a result, the financial industry may yet endure more regulatory complexity coming from state legislatures.

How the CCPA Reaches Financial Institutions

For the vast array of companies that fall under the CCPA's reach — any enterprise doing business in California with more than $25 million in annual revenues, or meeting other criteria — the obligations around the handling of personal information are significant. In part, this is due to an expansive conception of "personal information" defined in the law as "information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."

This definition encompasses a long list of obvious identifiers like names, postal addresses, email addresses, Social Security numbers and driver's license numbers. But it also includes more expansive information, such as unique online identifiers, purchasing history (products and property purchased), browsing history, search history, geolocation data and biometric data.

The law also defines "consumer" expansively as "a natural person who is a California resident." This definition obviously covers more people than just a company's retail customers. It includes the personal information of anybody residing in the state of California for state personal income tax purposes, which would cover several categories of people, including employees, job applicants, business contacts and visitors to a company's physical facilities.

Under the CCPA, businesses that handle personal information of California residents are obligated to provide disclosures to them as well as access, deletion and opt-out rights relating to their information. The law also creates a private right of action for failure to maintain reasonable security procedures and practice leading to a security breach, exposing companies in all industries to potentially significant liability.

Financial institutions do receive some relief thanks to what the law describes as an exemption for "personal information collected, processed, sold, or disclosed under the federal Gramm-Leach-Bliley Act." But just a cursory review of the GLBA reveals a shorter reach than the CCPA. For example, the GLBA defines a consumer as "an individual who obtains, from a financial institution, financial products or services which are to be used primarily for the personal, family, or household purposes."

That covers a lot of ground for financial institutions, shielding them from significant portions of the CCPA. But that definition is significantly narrower than the CCPA's. This means financial institutions will have to consider their obligations carefully by analyzing three buckets: people, activities, and information.

People

Financial institutions interact with people every day who are not seeking financial products or services for personal, family or household purposes and therefore fall outside the GLBA. Consider, for example, the information that a financial institution gathers from employees or potential employees. Or consider the data it collects from institutional or business customers and suppliers.

These are just a couple of examples of California consumers that are covered by the CCPA but not the GLBA. Although some of this personal information is exempted from some of the CCPA’s requirements during 2020, some is not exempted and, starting in 2021, none of it is exempted.

Activities

Financial institutions also engage in countless activities that fall outside the selling of financial products and services that must now be reviewed through the CCPA lens. Relevant activities may include interactions with prospective customers and with individuals visiting a financial institution's website or physical location in California. It's not uncommon, for example, for financial institutions to ask potential customers to sign up for a newsletter or participate in a survey. These and other kinds of activities would likely fall under the CCPA's reach.

Information

The scope of information covered by the CCPA is broad. Depending on the purpose under which it is collected, it could include unique online identifiers, IP addresses, cookies, and other geolocation information collected from a website visitor, and some of this information may not be included in the GLBA exception.

More States Follow California

Not every element of the CCPA will be in full force on day one. Amendments to the law, for example, narrow for one year requirements around the handling of personal information of a business's job candidates, personnel and their emergency contacts and benefits beneficiaries. Some CCPA obligations around a business's relationships with some other companies will also be delayed for a year.

But the California law nonetheless represents the most comprehensive privacy legislation passed in the U.S. in recent years. Perhaps just as significant: California inspired other states to explore their own laws. At least 25 states have proposed privacy laws in 2019, according to the National Conference on State Legislatures. Many are copycat versions of the CCPA, but some have fundamental differences.

For example, Nevada's law, which became effective Oct. 1, amends the state's existing online privacy law to allow consumers to opt out of the "sale" of personal information collected over a website or online service and imposes new obligations on operators of websites and online services.

Unlike the CCPA, the Nevada law includes a broad exemption for financial institutions; under the definition of "operator," GLBA institutions are excluded. But other states have adopted the CCPA's approach. A bill pending in Massachusetts, for example, includes the same information-level exemption for GLBA-regulated businesses.

In the meantime, many business interest groups continue to press for comprehensive federal privacy legislation to address the patchwork of emerging state legislation. But for now, financial institutions must get ready for a potential new normal where the federal GLBA no longer shields them completely from state consumer privacy laws.

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