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The Banking & Business Law Firm

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"Consumer" Information Carved Out of California's New Privacy Act but Sole Proprietor Info Remains Covered

The California Consumer Privacy Act of 2018 (Privacy Act) (Civil Code Section 1798.100 *et seq.*), signed into law on June 28, 2018, greatly expands consumers' information privacy and data protection rights. While the law does not become effective until January 1, 2020, not less than three months after the law was initially enacted, the California Legislature amended the Privacy Act with SB 1121. SB 1121's amendments clarify some issues the initial Privacy Act raised. Briefly, the amendments:

- Expand the Gramm-Leach-Bliley Act (GLBA) exception;
- Clarify and narrow the private right of action provision; and
- Change certain provisions that apply directly to the California Attorney General dealing with consumer notification requirements, remedies, implementing regulations and enforcement actions.

The Privacy Act applies to California businesses that collect, sell or disclose consumers' personal information. The Privacy Act defines a "consumer" as a natural person who is a California resident. Section 1798.140(g). This definition is not limited to individuals who purchase goods or services from a business for personal, family or household purposes (often called "consumer purposes"). Consequently, this definition is broader than other privacy laws, including the federal GLBA and the California Financial Information Privacy Act (CFIPA) (California Financial Code Section 4050 *et seq.*).

As originally adopted, the Privacy Act stated that it did not apply to personal information collected pursuant to GLBA so long as it did not conflict with GLBA. Specifically, Section 1798.145(e) stated: "This title shall not apply to personal information collected, processed, sold, or disclosed pursuant to the federal Gramm-Leach-Bliley Act (Public Law 106-102), and implementing regulations, if it is in conflict with that law."

This offered little comfort to financial institutions. While the Privacy Act went much further than GLBA, it did not seem to conflict with it. SB 1121 drops the conflict concept and simply exempts most consumer financial information. As amended by SB 1121, the Privacy Act "shall not apply to" personal information, collected, processed, sold or disclosed under GLBA or CFIPA. Section 1798.145(e). This

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appears to exempt virtually all consumer information a financial institution collects since GLBA and CFIPA cover all consumer information.

But there is a catch. GLBA and CFIPA apply to "consumer purpose" information only and the Privacy Act covers all "personal 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." Section 1798.140(o)(1). Therefore, financial institutions still need to comply with the Privacy Act's provisions pertaining to individual customers who obtain financial products or services for <u>business</u> purposes.

The likeliest example is the personal information of sole proprietor consumers when opening sole proprietorship deposit and loan accounts. To the extent that a state's laws do not treat a sole proprietor as a legal entity separate and apart from the proprietor, the Privacy Act would apply to a sole proprietor's deposit and loan accounts. (California law does treat sole proprietorships as separate legal entities.) GLBA does not apply to a sole proprietor's personal information when a sole proprietor establishes a deposit or loan account for business purposes. Thus, the Privacy Act would apply to sole proprietor consumers. The Privacy Act may also apply to commercial accounts if such accounts contain information that "could be reasonably linked" to a consumer (again, meaning an individual).

SB 1121 did not exempt financial institutions from the Privacy Act's civil penalties (Section 1798.150). That section authorizes a private right of action against a business for violating its duty to implement and maintain reasonable security procedures and practices with damages between $100 and $750 per consumer per incident or actual damages, whichever is greater. Note that initially, the law required a consumer to notify the California Attorney General before bringing a private right of action. SB 1121 deleted this notice requirement. Moreover, a business is in violation of the Privacy Act if it fails to cure any alleged violation within 30 days after being notified of its alleged noncompliance. In this case, the CA AG can sue for an injunction against the violator and impose a civil penalty of not more than $2,500 per violation or $7,500 for each intentional violation. Section 1798.155(b). The bill also removed a prior cross reference to Section 17206 of the Business and Professions Code in connection with the imposition of these civil penalties.

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