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The Banking & Business Law Firm

Banking Operations & FinTech Update

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CCPA REGULATIONS FINALIZED

On August 14, 2020, the California Office of Administrative Law (OAL) approved in final form the regulations implementing the California Consumer Privacy Act (CCPA) (10 CCR Section 999.300 *et seq.)*. The OAL's regulatory action became effective on August 14, 2020; thus, the final regulations are now live and in effect.

The regulations the OAL adopted are substantively very similar to the "final" regulations the Attorney General issued on June 1, 2020 (Final Prop. Reg.). However, the OAL did re-organize and renumber some of subsections so citations to certain provisions may have changed. Additionally, the OAL withdrew the following provisions from the AG's regulations. Thus, the provisions identified below are not effective and will not apply.

Additional Notice and Consent – Final Prop. Reg. Section .305(a)(5). This provision would have required a business to notify the consumer and obtain their explicit consent if the business intended to use personal information (PI) for a purpose that was materially different from what the business disclosed in its Notice at Collection (NAC). The OAL removed this provision entirely. Thus, businesses will not be subject to this notice and consent provision if it intends to use PI for a materially different purpose. That said, it may remain prudent to exercise caution when using PI for a purpose that was not previously disclosed because UDAP issues could be raised.

Offline Opt-Out Notices – Final Prop. Reg. Section .306(b)(2). This provision would have required a business that substantially interacted with consumers offline to provide the CCPA's opt-out notice through an offline method. The OAL removed this provision entirely. Thus, a business in this situation will no longer have to provide an offline version of its opt-out notice.

Opt-Out Request Methods – Final Prop. Reg. Section .315(c). This provision would have required a business to set up its opt-out request method in a manner that: (i) would be easy for consumers to execute; and (ii) required minimum steps to allow the consumer to exercise the opt out. The OAL removed this provision entirely. While businesses that sell PI are no longer explicitly subject to this provision, it may be good idea to keep it in mind as a general rule of thumb when setting up an opt-out request method. This point may be obvious, but a business would not want to be seen as setting up an opt-out method that was difficult for consumers to execute or required excessive or unnecessary steps.

Verifying Authorized Agents – Final Prop. Reg. Section .326(c). This provision would have provided that a business could deny a request

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to know (RTK) or request to delete (RTD) from an authorized agent if the authorized agent did not submit proof that the consumer had authorized the agent to act on the customer's behalf. The OAL removed this provision entirely. Thus, it seems that the authorized agent's failure to submit this proof, without more, is no longer a sufficient basis to deny the request outright. The OAL's removal of this provision puts businesses in a difficult position when attempting to verify an RTK or RTD submitted by an authorized agent.

As proposed, the rule would have given businesses a right to deny requests from purported agents if an agent failed to submit proof of its authorization to act for the consumer. This would have been helpful because an agent's refusal to submit proof of authorization would have been an obvious basis for concern. Now businesses cannot use a refusal of an agent to submit proof as an automatic basis to deny a request. However, this should not prohibit a business from denying a request if it cannot otherwise verify the agent or the consumer in a manner Article 4 of the regulations requires. Indeed, a lack of "proof" would seem to need to be appropriately accounted for in a business's general verification procedures, even though it cannot be the sole basis to deny a request. How this will play out in practice remains to be seen. At this point the law firm can only suggest that clients contact us before either denying an RTK or RTD under the CCPA or responding to one from a purported agent who does not submit proof of the agent's authorization.

Institutions should contact Robert K. Olsen **ROlsen@ABLawyers.com** or John M. Davis **JDavis@ABLawyers.com** with questions on the CCPA.

Dealing with Face Mask Guidance, Orders and Policies

Financial institutions have had to adjust their internal operations in a variety of unprecedented ways in the wake of COVID-19. These operational changes have been necessary to accommodate everything from an increase in remote working to new safety measures implemented to protect employees and customers where financial services are being provided in-person at physical retail locations. One adjustment that has shown to be somewhat tricky is the enforcement of mask policies with respect to customers and the general public who may enter an office or branch location of an institution.

State and federal regulators have issued guidance on face mask policies. In its July 2020 bulletin (DBO Bulletin) the California Department of Business Oversight stated that it would be monitoring institutions for compliance with the face-covering guidance issued by Governor Gavin Newsom and the California Department of Public Health (CDPH Mask Guidance). The DBO Bulletin states that those who refuse to wear masks and do not meet the exemptions outlined in the CDPH Mask Guidance should not be allowed to enter banks, credit unions and other places of business.

However, there remains a question of whether an institution may or is required to ask for a doctor's note or some sort of proof that a person has a condition which exempts the person from wearing a mask under the CDPH Mask Guidance before letting that person enter the premises without a mask. As an initial matter, there is nothing in the CDPH Mask Guidance which explicitly requires a person to show proof they have the requisite medical condition or disability that exempts them from the mask order.

That said, institutions need to consider that while California has issued general guidance on this, there are also local county and city orders that may impose separate and more strict requirements with respect to mask requirements. Additionally, institutions need to be cautious when addressing or dealing with a person who claims they are exempt from a mask order or policy due to a medical condition or disability, as privacy and discrimination issues could be implicated.

Local orders. Local county and city orders may also need to be considered in this regard. For instance, the health officer of San Francisco County issued a face-covering order which includes an exemption for persons that can "show" a medical professional has provided a written exemption to the face covering requirement. (See Order of the San Francisco County Health Office No. C19-12c, section 3.g.) This language is a bit more restrictive than the CDPH Mask Guidance as it explicitly indicates the person must show that a medical professional has qualified them for the exemption. Thus, institutions should consider whether there may be a more restrictive local face mask order which imposes some sort of "showing" or "proof" requirement on persons claiming medical exemptions. (The law firm is available to assist BCG members in this regard.)

Privacy and discrimination issues. Complicating matters further, however, is that privacy and discrimination issues could be raised when dealing with persons who may be exempt from a mask order or guidance due to a medical condition or disability.

- **Privacy considerations.** Even where a local order may impose some sort of proof requirement, asking or obtaining medical, health or information related to someone's disability should be viewed as highly sensitive in nature. Institutions should be cognizant that a customer may have a strong reaction to what could be perceived as a request to reveal sensitive information about an underlying condition, which may be something of a closely guarded secret. Thus, institutions should be extra careful in how it communicates its mask policy to these persons.

The California Consumer Privacy Act (CCPA) should also be considered as the institution could be viewed as collecting personal information of a California resident which triggers various requirements under the CCPA. This includes a requirement to provide the consumer a Notice at Collection (Civil Code Section 1798.100(b); 10 CCR 999.305) at or before the point of collection.

- **Discrimination issues.** Additionally, the Americans with Disabilities Act (ADA) and California's Unruh Act should also be taken into account when developing a mask policy. The ADA prohibits places of public accommodation from discriminating against individuals on the basis of a disability and requires businesses to make "reasonable accommodations" to customers to allow for access to public accommodations, such as banking services. 42 USC Section 12182. California Unruh Act similarly prohibits discrimination based on a disability or medical condition. California Civil Code Section 51.

Thus, these anti-discrimination laws must be considered when developing a mask policy. While the point may seem obvious, institutions need to make an effort to develop reasonable accommodations for customers who cannot wear masks due to a disability. Additionally, turning a customer away for not wearing a mask (even if required by local order) could be viewed as discrimination.

What this means is that each institution needs to make a number of risk-based decisions on how to enforce its mask policy as required by state and local orders. These are all difficult questions and there is no clear cut answer. Institutions should contact the law firm for more information.