

California's New Financial Privacy Law Not Preempted by FCRA

California has a new financial privacy law. Specifically, the *California Financial Information Privacy Act* (the Act), became effective July 1, 2004, and a federal judge recently ruled it was not preempted by the *Fair Credit Reporting Act* (FCRA). As a result, the American Bankers Association, the Financial Services Roundtable, and the Consumer Bankers Association joined in filing a suit in an attempt to block the implementation of the Act. Their efforts were to no avail, however, as a federal judge ruled on June 30 that the FCRA affects only consumer reports and not the sharing of consumer credit information among affiliates. Obviously, the financial industry organizations strongly disagree. The big question now appears to be to whom the Act applies.

The answer to that question is that it applies to financial institutions doing business in the state of California, including out-of-state institutions with branches in California. Institutions outside of California that may have customers/members in the state are encouraged to contact counsel for assistance in determining whether or how the law applies to them.

Background

Legislators debated the creation of the California financial privacy act for four years. Finally, the bill got to the Governor's office and was signed into law. It is usually described as the strongest privacy law in the nation. It bars financial institutions from sharing nonpublic personal information about consumers with nonaffiliated parties unless consumers give their consent (opt-in). Additionally, institutions cannot share nonpublic consumer information with affiliates without providing the consumer the chance to opt-out.

There is an exception that allows institutions to share among affiliates without requiring them to notify consumers or get their permission (a "no-opt") if they meet four criteria regarding corporate structure and lines of business. For example, one of the requirements to take advantage of this exception is that the financial institution sharing the information and the financial institution receiving it must both be principally engaged in the same line of business, i.e., insurance, banking, or securities.

Requirements

For those institutions to whom the law applies, there are very specific requirements that must be met. Those include the following:

- Using the form provided in the Act (or one approved by the institution's primary regulator) to notify consumers and allow a decision regarding the use of their information;
- The outside of the envelope containing the form shall clearly state in 16-point boldface type, "IMPORTANT PRIVACY CHOICES," unless the form is being sent in the same envelope with a bill, account statement, or application requested by the consumer.
- The consumer must be allowed a "reasonable" time to reply. The institution must comply with the consumer's decision within 45 days of receipt.
- Financial institutions with assets of more than \$25 million must include a self-addressed first class business reply return envelope with the notice. Those with assets of up to \$25 million may offer, in lieu of the first class envelope, a self-addressed return envelope with the notice and at least two alternative cost-free means of communication for consumers, such as calling a toll-free number, sending a fax to a toll-free number, or using electronic means.

No notice is required if a financial institution does not share nonpublic personally identifiable information.

Consequences of Noncompliance

For those institutions that do not comply, the decision can be quite costly. If an institution negligently discloses or shares nonpublic personal information, it will be liable for a civil penalty not to exceed \$2,500 per violation. If the disclosure or sharing results in the release of nonpublic personal information of more than one individual, the total civil penalty awarded shall not exceed \$500,000. If the institution “knowingly and willfully” obtains, discloses, shares, or uses nonpublic personal information, the civil penalty shall be not more than \$2,500 per **individual** violation.

Conclusion

The organizations that filed the original case contesting this new law may file an appeal to the federal judge’s decision that FCRA does not preempt the Act. Even if filed, it could take months for a decision. In the meantime, it is in the best interest of all financial institutions subject to the Act to comply immediately.