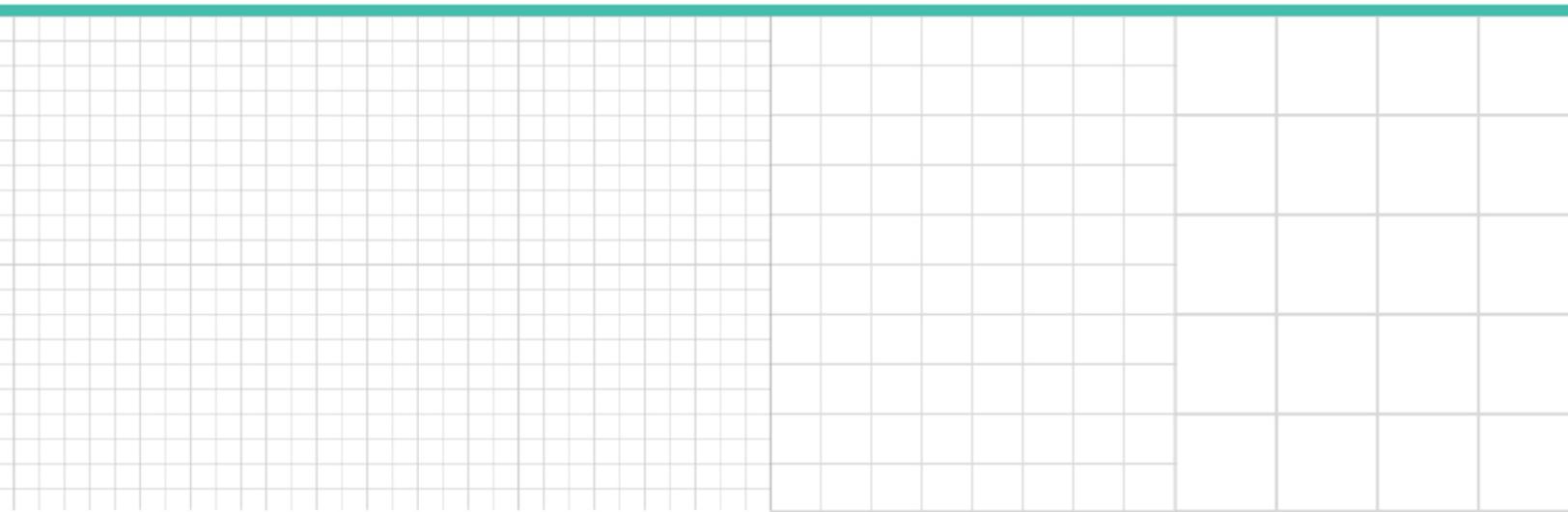


Professional Perspective

**Financial Institutions
and the CCPA:
What Remains After the
Law's Exceptions**

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Financial Institutions and the CCPA: What Remains After the Law's Exceptions

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While the California Consumer Privacy Act sweeps into its grasp a diverse array of businesses in a range of industries, including even businesses that are not consumer-facing, financial services companies subject to the GLBA are treated somewhat differently under the CCPA. The CCPA's exception for personal information that is covered by the federal Gramm-Leach-Bliley Act takes the edge off the California Consumer Privacy Act, [Cal. Civ. Code §§ 1798.100-199](#) for financial institutions, and this has led some in the financial industry to hope that they can de-prioritize their CCPA compliance efforts.

However, the CCPA does apply to some personal information that financial institutions handle. Thus, financial institutions should examine the compliance burdens that even financial institutions have under the CCPA, and evaluate whether, how, and how fast, those compliance burdens can be met.

The CCPA will become operative on Jan. 1, 2020. It will impose privacy disclosure requirements on businesses that handle data relating to residents of California, and will provide those individuals with broad rights with respect to that data. The law also requires that businesses revisit some service provider agreements, and train personnel to comply.

Legislative amendments that have been signed by the California Governor, including Assembly Bills 25 and 1355, narrow, for one year, the CCPA's requirements with regard to personal information of a business's employees and their emergency contacts and benefits beneficiaries, among others, as well as some (but not all) personal information gleaned from the business's business-to-business relationships. (AB 1355 also clarifies the CCPA's exception for consumer report information under the Fair Credit Reporting Act, which is another variety of personal information that is regularly used by financial institutions. For financial institutions, this information may be exempted by both the GLBA exception and the FCRA exception.)

The CCPA provides for an exception for personal information that is subject to the GLBA. (The CCPA also provides for an exception for personal information that is subject to California's Financial Information Privacy Act, CA Financial Code sec. 4050. CFIPA's definitions of "consumer" and "non-public personal information" are different from both the CCPA's and the GLBA's definitions, and may provide additional slivers of personal information that are excepted from the CCPA.)

All this said, the GLBA exception is not an entity-level exemption. It applies to a certain category of data, not to financial institutions as entities. As a result, even with AB 25 and AB 1355 enacted, the CCPA is still likely to cover some personal information that financial institutions handle in the course of their business. Furthermore, these amendments also leave businesses with a duty to inform their employees and associated individuals of the kinds of personal information they collect about them, and the purposes for which they use that information.

Businesses also have to afford representatives of businesses a right to opt-out of the sale of their personal information, and not treat them with less-favorable terms by virtue of their having exercised such an opt-out. And finally, if AB 25 and AB 1355 are not extended beyond their initial one year of effectiveness, then, as of Jan. 1, 2021, the CCPA will be likely to cover, in full, a material amount of personal information that financial institutions handle.

Broad Scope and GLBA Carve-Out

The CCPA applies to any enterprise that, among other triggering criteria, does business in California and has annual gross revenues in excess of \$25 million. See [Cal. Civ. Code § 1798.140\(c\)](#). As applicable to such covered businesses, it is a uniquely broad U.S. privacy law for a number of reasons, primarily relating to its definitions of "personal information" and "consumer." The CCPA imposes obligations on the handling of consumers' personal information by businesses, including required disclosures to consumers; consumer access, deletion, and opt-out rights; and an individual private right of action relating to a failure to maintain reasonable security procedures and practices leading to a security breach, as defined by the CCPA.

And as has been widely noted, under the CCPA, a “consumer” is “a natural person who is a California resident,” which means the potential scope of the law includes the personal information of any person residing in California for state personal income tax purposes—not only actual customers of a business. So, for example (and subject to some limitations of AB 25 and AB 1355), the CCPA could cover employees and job applicants, individuals associated with other businesses that the financial institution interacts with, visitors to physical offices and facilities, and so on.

The definition of covered “personal information” is similarly expansive in that it includes information that “identifies, relates to, describes, references, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household.” See [Cal. Civ. Code § 1798.140\(o\)\(1\)](#). “Personal information” includes 11 enumerated categories of information that come within the definition if they meet this standard. This information includes “purchasing or consuming histories or tendencies,” internet activity, such as browsing or search history or a consumer’s “interaction” with a website, and “inferences drawn” from any of the other enumerated categories of personal information.

Set against broad categories of covered businesses, individuals, and information, is an exemption from the CCPA for “personal information collected, processed, sold, or disclosed pursuant to” the GLBA. [Cal. Civ. Code § 1798.145\(e\)](#). Even this exemption, however, still does not affect the CCPA’s private right of action arising from a certain security breaches. And, perhaps more significantly, it is not an entity-level exemption but rather an exemption for personal information—not for consumers or activities—that is collected pursuant to the GLBA.

Thus, the applicability to a financial institution of the full array of the CCPA’s disclosure and consumer-rights provisions will likely depend on the extent to which the enterprise collects, obtains, uses, discloses, or otherwise handles information that is not covered by the GLBA. That is, information that is not “Non-Public Information,” i.e., that is not personally identifiable financial information obtained, among other avenues: in connection with applications for and providing retail financial products and services to consumers; or from another financial institution relating to that other financial institution’s retail customer.

For purposes of the GLBA, a “consumer” is defined as “an individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes,” [15 U.S.C. § 6809\(9\)](#). Therefore, the GLBA definition of NPI relates only to personal information processed in the context of the provision of financial services used primarily for personal, family, and household purposes.

Since the GLBA covers a narrower scope of data than the CCPA, information that financial institutions collect could still be subject to CCPA. This means that financial institutions may still face obligations with respect to California “consumers” with whom they interact. Therefore, financial institutions should evaluate the information they collect that may be outside of the GLBA and therefore still be subject to the CCPA. Below we consider some possibilities.

Who and What Could Still Be Subject to the CCPA?

In general, it appears that the CCPA will apply to financial institutions with respect to information that is not collected for a GLBA purpose (i.e., not in the context of the provision of financial services primarily used for personal, family, or household purposes) and therefore is not collected “pursuant to” the GLBA. One way to conceptualize how the CCPA could apply to a financial institution, therefore, is by considering people, activities, and information that could fall outside of the GLBA and therefore be subject to the CCPA.

People Not Covered by GLBA

Due to the broad definition of a consumer under the CCPA, a number of individuals who interact with a financial institution could be deemed consumers under the CCPA, though they would not be “consumers” under the GLBA. That is, any person with whom a financial institution interacts (or receives information about) who is not seeking or obtaining a consumer financial product or service from the financial institution for personal, family, or household purposes could be a consumer under the CCPA and therefore covered by the CCPA.

This list could include individuals associated with service providers, suppliers, business customers and clients, customers who obtain commercial products (institutional clients), holders of corporate credit cards, company employees (as well as temporary employees, contract employees, and potential employees) and their family members (e.g., with respect to

benefits provision), and visitors to company offices and facilities who are not “consumers” under the GLBA. In some cases, amendments AB 25 and AB 1355 delay the applicability of the CCPA to these individuals for one year.

The types of interactions with people in these categories that could trigger CCPA-related obligations are varied and could include, for example, third parties to which a financial institution refers its clients for ancillary or related services (such as a wealth management-focused financial institution referring clients to estate lawyers or accountants). The types of information associated with these persons can also be varied and could include, for example, information required to be collected for know-your-customer or customer due diligence purposes, as well as other anti-money laundering compliance program purposes, in connection with institutional accounts.

Activities Not Covered by the GLBA

Financial institutions engage in activities involving the collection or use of personal information outside of providing consumer financial products and services, and such activities—generally not subject to the GLBA—could be subject to the CCPA. Possible examples include when financial institutions interact with individuals (e.g., prospective customers) prior to or independent of the individual seeking a consumer financial product or service, such as, in some contexts, prospective clients, or when an individual visits the financial institution's website or contacts the company. Other activities in which a financial institution could engage with individuals outside of the GLBA could include reaching out to prospective customers, collecting information for surveys, sweepstakes, or joining mailing lists.

Furthermore, financial products and services that are not offered to consumers (e.g., but rather to commercial or institutional customers, as referred to above) would not be subject to the GLBA.

Information Not Covered by the GLBA

Finally, certain types of information that a financial institution may obtain may not be subject to the GLBA, in the sense that the information is not collected in connection with the provision of financial services primarily used for family, household, or personal purposes. For example, under the CCPA's broad definition of personal information, data such as IP address, cookies, other unique identifiers, and other website information collected from a website visitor, as well as geolocation information, could be subject to the CCPA, but may or may not be collected in connection with the provision of a financial product or service. This may include information such as persistent identifiers that are collected for purposes of online behavioral advertising or other reasons, but not for a consumer's applying for or obtaining a financial product or service.

What's Next?

The CCPA is a sweeping privacy law. Though the GLBA sweeps broadly as well, the nature of the CCPA exemption for financial institutions will likely not be enough to enable these types of companies to avoid having to consider the implications of the CCPA for their activities, similar to other businesses. Thus, if they haven't already, financial services companies that have personal information of individuals who reside in California should consider evaluating the personal information they collect that may be subject to the CCPA, the types of “consumers” they interact with as defined under the CCPA as a result, and what they need to do to be ready for the law when it becomes operative.