Client Alert | Financial Institutions Advisory

Key Regulatory Developments Impacting the California Lending and Payments Space

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The State of California is home to almost 40 million consumers and the world's fifth largest economy. It represents a key exposure to most financial services companies' US footprint. In recent years nonbank financial services companies have been subject to increased scrutiny by the California state legislature and the Department of Business Oversight ("**DBO**"), which regulates and supervises the financial services industry. As a result, companies that operate, or intend to operate, in California must often navigate a complex regulatory landscape, subject to swift change and transformation. In an effort to help companies adapt and respond to the state's rapidly evolving regulatory environment, we highlight in this survey recent and upcoming legislative and regulatory developments relevant to companies operating in the financial services sector in California. Notably, this survey reviews developments relevant to consumer financial protection regulation and enforcement, consumer and commercial lending, money transmission, data privacy and security, and cannabis banking.

Consumer Financial Protection: Governor's Budget Proposes Revamp of Financial and Consumer Protection Oversight

On January 10, 2020, California Governor Gavin Newsome introduced a draft state budget for 2020, which proposes to revamp the DBO into the Department of Financial Protection and Innovation ("**DFPI**"). The draft budget includes a US$10.2 million Financial Protection Fund and 44 new positions, with the expectation to increase these figures to US$19.3 million and 90 positions by the 2022-23 fiscal year. Initially, the costs would be covered by available settlement proceeds in the State Corporations and Financial Institutions Funds, with future costs covered by fees on newly-regulated industries (discussed below) and increased fees on existing licensees.

In addition to the existing duties of the DBO, the DFPI would be expected to establish and administer a new California Consumer Financial Protection Law ("**CCFPL**"), designed to protect consumers accessing financial services and products, and to exercise expanded licensing, supervisory and enforcement authorities over additional financial services providers, including debt collectors, credit reporting agencies and fintech

companies. While the text of the CCFPL has not been released, the budget proposal indicates that it would include the following responsibilities for the DFPI:

- Offering services to empower and educate consumers, especially older consumers, students, military service members and recent immigrants;
- Licensing and examining new industries that are currently under-regulated;
- Analyzing patterns and developments in the market to inform evidence-based policies and enforcement;
- Protecting consumers through enforcement against unfair, deceptive, or abusive acts or practices;
- Establishing a new Financial Technology Innovation Office to cultivate the responsible development of new consumer financial products; and
- Offering legal support for the administration of the CCFPL.

The DFPI and the CCFPL are respectively modeled after the federal Consumer Financial Protection Bureau ("**CFPB**") and the Consumer Financial Protection Act, which was adopted as part of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank Act**"). Notably, like the CFPB, the DFPI would be tasked with enforcing new unfair, deceptive or abusive acts or practices ("**UDAAP**") protections. As the CFPB has not yet elaborated on the definition of "abusive"— a concept originally introduced into law by the Dodd-Frank Act—the DFPI could play an important role in influencing the interpretation of the term not only in the state but nationwide.

Governor Newsome explicitly acknowledged the parallels between the proposed DFPI and the CFPB, saying that the revitalized agency would be expected to fill the gap left by what he perceives as the CFPB "pulling away" from its enforcement activities under the current administration. In addition, various former CFPB officials, including inaugural Director Richard Cordray, are reportedly contributing to the proposed CCFPL and the design of the DFPI. The California legislature is required to vote on the proposed budget by June 15, 2020. Thus, it is expected that inclusion of the proposal in the proposed budget is likely to guarantee that the proposal—at least in some form—will receive a vote by mid-year.

Governor Newsome's announcement is consistent with other states' initiatives to expand the authority of their respective consumer financial services regulators as a response to the CFPB's perceived rollback of its enforcement activities. Of note, New York Governor Andrew Cuomo recently announced the creation of a new Consumer Protection Task Force within the New York Department of Financial Services ("**NYDFS**").

Consumer Lending: California Legislature Caps Interest Rates on Certain Consumer Loans

On October 10, 2019, California enacted legislation to increase consumer protections on larger, unregulated consumer loans. The Fair Access to Credit Act ("**FACA**"),[1] which was first introduced in February 2019, imposes interest caps on larger, unregulated consumer installment loans and amends other aspects of the California Financing Law ("**CFL**"), including requirements related to credit reporting, consumer education, maximum loan repayment terms and prepayment penalties.

Specifically, the FACA imposes an interest cap of 36 percent plus the federal funds rate on all consumer-purpose loans greater than US$2,500 but less than US$10,000 ("**Covered Loans**"), including personal loans, car loans, auto title loans and open-end lines of credit. Consumer loans above US$2,500 previously had no express interest rate limitation under the CFL and were further exempt from the usury provisions of the California Constitution.[2] In addition to expanding the scope of loans subject to interest rate restrictions, the FACA also amends the CFL in the following ways:

- Credit reporting and consumer education. The FACA requires lenders originating Covered Loans to furnish to at least one national credit reporting agency the borrower's payment performance. Lenders

1 Assembly Bill No. 539 (2019-2020)/

2 Cal. Fin. Code § 22002.

must also offer borrowers, at no cost, a credit education program or seminar (whether provided in writing, electronically or orally) that has been reviewed and approved by the DBO Commissioner before disbursing the loan proceeds. The program or seminar must cover statutorily prescribed topics related to credit scores and credit reports, including ways to establish and improve a credit score as well as how to obtain a free credit report and dispute reporting errors.

- Maximum loan terms. The FACA establishes a minimum 12-month loan term for Covered Loans and amends loan term restrictions based on loan amount. The CFL previously restricted repayment of loans of US$3,000 to US$5,000 from exceeding a maximum term of 60 months and 15 days. The FACA expands this restriction to cover loans between US$3,000 and US$10,000. The maximum loan term of 60 months and 15 days does not apply, however, to a consumer loan secured by real property of at least US$5,000. Consumer loans greater than US$1,500 but less than US$3,000 remain subject to a maximum loan term of 48 months and 15 days.

- Prepayment penalties. The FACA prohibits a lender from charging, imposing or receiving any penalty for the prepayment of a Covered Loan originated under the CFL, unless the loan is secured by real property.

Amendments to the CFL come against the backdrop of increased regulatory scrutiny over interest rates and fees charged to California residents for consumer installment loans. In a study released in August 2019, the DBO found that nonbank, unsecured consumer loans above US$2,500 issued by CFL licensees increased markedly, with more than half bearing an annual percentage rate ("**APR**") of 100 percent or higher. By contrast, the total number and aggregate dollar amount of payday loans declined, with lenders increasingly moving towards larger installment loan offerings not subject to CFL limits.

This study follows a multiyear effort on the part of the DBO to ramp up enforcement of interest rate limits, including by bringing actions against lenders steering borrowers to take out loans above US$2,500 to avoid the CFL's rate caps. Last year, the California Supreme Court unanimously held that borrowers may use the unconscionability doctrine to challenge the interest rate on consumer loans greater than US$2,500, despite the fact that the CFL did not impose interest rate restrictions on such loans. While the DBO has yet to assert the unconscionability doctrine to curtail high-rate consumer loans, a prior statement in the enforcement context reflects that the California regulator may bring such claims under the state's Unfair Competition Law in the future.

While the FACA does not apply to banks, credit unions or other regulated financial institutions, the new law imposes significant costs and regulatory requirements on CFL licensees, who may thus choose to move away from smaller installment loan products going forward. Larger loans, however, remain subject to unconscionability challenges in light of the California Supreme Court's ruling. As the California legislature continues its efforts to curtail predatory lending practices, questions remain as to whether these new restrictions will impede subprime borrowers' ability to access credit.

Commercial Lending: California Legislature Imposes Consumer-Like Disclosures for Commercial Financings

On October 1, 2018, the California legislature adopted a first-of-its kind commercial financing disclosure law designed to improve transparency for recipients of certain commercial loans.[3] Notably, Senate Bill 1235 ("**Commercial Disclosure Law**") amended the CFL to require certain nonbank financial services providers to implement consumer-like disclosures in connection with a broad array of commercial financings, including small business loans, factoring and merchant cash advances. The Commercial Disclosure Law directs the DBO to adopt final implementing regulations, including sample disclosure forms, specifying the time, content and form of the mandated disclosures before such requirements become effective. Following an initial request for public comment issued on December 4, 2018, the DBO released draft regulations ("**Draft Regulations**") on July 26, 2019, as well as issued a second invitation for public comment.[4] The DBO has yet to initiate a formal rulemaking process to publish final regulations implementing the Commercial Disclosure Law.

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3 Senate Bill No. 1235 (2017-2018).

4 California Dep't of Bus. Oversight, Draft Regulations, *available at* https://dbo.ca.gov/wp-content/uploads/sites/296/2019/07/SB-1235-Draft-Regulations-7-26-19.pdf

Commercial Disclosure Law – Key Provisions

Unlike most US states, California requires nonbank lenders or brokers engaged in the business of making or brokering commercial loans in the state to obtain a CFL license from the DBO. California's existing framework governing commercial lending limits licensing requirements to providers or brokers of "commercial loans," defined as loans of US$5,000 or more or loans under an open-end credit program (whether secured or unsecured), the proceeds of which are intended by the borrower for use primarily for other than personal, family or household purposes. As a result, most forms of alternative business financings, including factoring and merchant cash advances, do not require licensure under the CFL.

The Commercial Disclosure Law's disclosure requirements are not limited to lenders or brokers of commercial loans licensed under, or subject to, the CFL. Rather, the new law broadly applies to a "provider" who facilitates "commercial financing" to a recipient in California for use primarily for other than personal, family, or household purposes. Given the law's broad wording, as further detailed below, entities otherwise exempt from CFL licensure will need to comply with the new mandated disclosures. For providers that are already licensed under the CFL, compliance with the Commercial Disclosure Law will be enforced as part of the DBO's standard oversight over CFL licensees. An overview of the scope and key provisions of the Commercial Disclosure Law follows.

Commercial Disclosure Law: Applicability and Key Provisions	
A "provider" of commercial financing means:	
Covered Entities	▪ A person who extends a specific offer of commercial financing to a recipient in California ▪ Certain bank-model program partners and sponsors ▪ Commercial lenders operating under the CFL
"Commercial financing" means:	
Covered Transactions	▪ Commercial loan ▪ Commercial open-end credit plan ▪ Accounts receivable purchase ▪ Factoring ▪ Lease financing ▪ Asset-based lending
The Commercial Disclosure Law does not apply to any of the following:	
Exemptions	▪ Depository institutions (including a bank, credit union, industrial loan company or a savings and loan association) ▪ Lenders regulated under the federal Farm Credit Act ▪ Commercial financing transactions secured by real property ▪ Closed-end commercial loans with a principal amount of less than US$5,000 ▪ Commercial financing transactions in which the recipient is a motor vehicle dealer or its affiliate or a vehicle rental company or its affiliate ▪ Any person who makes no more than one commercial financing transaction in California in a 12-month period ▪ Any person who makes five or fewer commercial financing transactions in California in a 12-month period, where the commercial financing transactions are incidental to the business of the person relying on the exemption ▪ Commercial financing transactions over US$500,000

The Commercial Disclosure Law mandates the following disclosures at the time the provider extends a commercial financing offer:	
Disclosure Requirements	▪ Total amount of funds provided ▪ Total dollar cost of financing ▪ Term or estimated term ▪ Method, frequency, and amount of payments ▪ Description of prepayment policies ▪ Total cost of the financing expressed as an annualized rate
Compliance with the Commercial Disclosure Law is required by:	
Effective Date	▪ Issuance by the DBO of final implementing regulations (no deadline specified in the Commercial Disclosure Law) ▪ Requirement to disclose the total cost of the financing expressed as an annualized rate will sunset on January 1, 2024

Draft Regulations

Consistent with the Commercial Disclosure Law, the DBO published Draft Regulations on July 26, 2019, and issued a second request for industry input. The Draft Regulations further detail certain definitions in the Commercial Disclosure Law and attempt to clarify various aspects of the new law, including methods for calculating the APR and estimated terms, as well as rules for disclosing payment options and determining the amount of a commercial financing offer for exemption purposes for offers above US$500,000. The Draft Regulations also exclude from the definition of "provider" nonbank entities that provide technology and support services to depository institutions, as long as the nonbank entity does not obtain an interest in the commercial financing extended by that institution. In addition to the above clarifications, the Draft Regulations are accompanied by specific instructions and model disclosures for six types of financing, namely (1) asset-based lending, (2) closed-end transactions, (3) general factoring, (4) lease financing, (5) sales-based financing and (6) open-end credit plan. The Draft Regulations do not specify, however, whether the use of such model disclosures will be mandatory or operate as optional safe harbors for providers.

The Commercial Disclosure Law does not mandate any deadline by which the DBO must issue final implementing regulations. Providers of commercial financing are not required to comply with the law's new mandated disclosures until the DBO's final regulations become effective. As of now, it is unclear whether the DBO will issue a third request for public comment or will directly initiate a formal rulemaking process after reviewing latest industry feedback. Alternatively, the DBO may choose to first test certain proposed disclosures before taking any additional steps. Given the challenge of creating a standardized regulatory framework governing different lending products, including conventional and non-conventional products, we do not expect any formal action to be taken until next year.

With the Commercial Disclosure Law, California becomes the first state to impose consumer-like disclosure requirements on a broad array of commercial lending products. Additional state legislatures may follow suit and commercial lenders should closely monitor states' legislative and regulatory developments in that area. In addition to state law, commercial lenders must continue to comply with certain federal consumer protection laws, such as the Equal Credit Opportunity Act and the Federal Trade Commission's prohibition on unfair or deceptive acts or practices, which may also apply to the commercial lending context.

Money Transmission: DBO to Clarify Scope of Exemption from Money Transmission Licensing

On February 8, 2019, the DBO announced that it will initiate a rulemaking to clarify the scope and applicability of the agent of the payee exemption ("**AOTP**") under California's Money Transmission Act ("**MTA**").[5] For that purpose, the DBO issued an invitation for comments, giving interested stakeholders until April 9, 2019, to weigh in. Until the DBO publishes its final regulations, this rulemaking initiative brings further uncertainty as to which payments-related arrangements are subject to licensing requirements under the state's money transmission law.

Background

Money transmission is regulated both at the federal and state levels. Federal law requires money services businesses, which include money transmitters, to register with the US Treasury's Financial Crimes Enforcement Network ("**FinCEN**") and comply with certain anti-money laundering requirements under the Bank Secrecy Act ("**BSA**"). With the exception of Montana, all US states and the District of Columbia also require businesses engaged in money transmission activities to obtain a license on a state-by-state basis from the relevant state agencies. While federal regulation focuses on preventing money laundering, state laws are designed to ensure the financial safety and soundness of nonbank money transmitters and the protection of state consumers.

While no single, uniform definition exists, "money transmission" is usually defined as either (1) selling or issuing payment instruments, (2) selling or issuing stored value, or (3) receiving monetary value for transmission. This last prong generally refers to any service that transfers money from one party to another. Originally enacted to regulate traditional remittance providers, state regulators often take advantage of the broad language of money transmission statutes to essentially capture any business moving money on behalf of consumers. This implicates, among others, e-commerce platforms, bill payment services, mobile wallets and payment processors or facilitators.

The regulatory burden associated with money transmission is significant. While FinCEN regulations impose substantial anti-money laundering requirements, state-specific licensing regimes also require money transmitters to comply with rigorous financial and reporting obligations. Notably, engaging in unlicensed activity may result in both civil and criminal penalties under state and federal law. Fortunately, businesses may be able to take advantage of limited exemptions from money transmission licensing. Such exemptions, which vary from state to state, are either statutorily entrenched or the result of regulatory guidance and interpretation. In the payments industry, businesses must pay particular attention to regulatory developments related to exemptions for payee-agency transactions, or the so-called AOTP exemption.

The AOTP Exemption: an Uneven Landscape

The AOTP exemption generally applies to transactions where a business acts as an agent-intermediary of a creditor to receive consumers' funds on behalf of, and for transmission to, such creditor. Delivery of the money to the agent-intermediary satisfies the consumer's obligation to the creditor. Partly in response to the development of new innovative payment solutions, FinCEN already provides an exemption from federal registration for companies facilitating payment for the purchase of goods and services through a clearance and settlement system that admits only BSA-regulated entities under an agreement with the seller. A growing number of states have taken legislative or regulatory action or issued guidance to provide similar relief in differing degrees. In effect, by assuming consumers' obligations to their creditors, the AOTP arrangement addresses consumer protection concerns that are at the core of state money transmission laws. Other states regulators, however, have yet to adopt a position or have instead taken an opposite direction.

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5 California Dep't of Bus. Oversight, Invitation For Comments On Proposed Rulemaking Money Transmitter Act: Agent Of Payee (Feb. 8, 2019), *available at* https://dbo.ca.gov/wp-content/uploads/sites/296/2019/03/PRO-07-17-Agent-of-Payee-Invitation-for-Comment-FINAL.pdf.

The AOTP Exemption in California

In 2014, California passed Assembly Bill 2209, which introduced a formal AOTP exemption from the MTA. The California AOTP exemption generally applies to transactions in which "the recipient of the money … is an agent of the payee pursuant to a preexisting written contract and delivery of the money … to the agent satisfies the payor's obligation to the payee." Following the enactment of Assembly Bill 2209, the DBO issued multiple opinion letters analyzing the applicability of the MTA's AOTP exemption to various business models. Early in 2018, however, the DBO declined to answer further opinion requests from industry participants in anticipation of a future rulemaking to clarify the scope of the exemption.

On February 8, 2019, the DBO issued an invitation for comments to seek input on rulemaking. Despite the broad and plain language of the statute, the DBO emphasized that the MTA's AOTP exemption was originally designed to exempt large online marketplaces that receive money from consumers (payor) on behalf of merchants (payee) for the provision of goods or services. The development of new and more complex payments services, and the entry of new participants in the payment chain, however, contributed to blur the scope of the AOTP exemption. Specifically, the DBO requested interested stakeholders to comment on the following items:

- What constitutes "goods or services"? Does the term encompass assets, rights, interest or benefits of any kind or nature, or does it only refer to the types of items and services typically available on online marketplaces? Does it include payments in satisfaction of debts to the government?
- What does it mean to "receive" goods (*i.e.*, as a "payor")? Does one "receive" goods only by being an end consumer, or is it sufficient to physically receive goods (*e.g.*, inventory) without consuming them or to receive title to such goods without ever physically possessing or using them?
- What does it mean to "receive" services (*i.e.*, as a "payor")? In addition to an end user of services, which squarely fits within the existing definition, the DBO asked whether a commercial entity also "receives" services when contractors perform contractual duties owed to the entity. For instance, the DBO inquired whether a ride-sharing platform "receives" services from a driver/contractor that is associated with the platform.
- Applicability to other commercial transactions? The DBO further requested industry stakeholders to weigh in on the full range of commercial transactions to which the AOTP exemption should apply, signaling that the state regulator may be willing to exempt a broader range of transactions based on agency law principles than those contemplated by existing California law.

The AOTP exemption may be a valuable exemption for any company involved in facilitating payments between senders and recipients of funds. After becoming the first state to introduce a formal AOTP exemption, California becomes the first state to also re-assess the scope and applicability of such exemption. Until the DBO publishes its final regulations, the applicability of the AOTP exemption to payments-related arrangements beyond simple, three-party online marketplace transactions, as originally contemplated by the MTA, remains uncertain. Accordingly, non-licensed companies operating in the payment space should closely monitor any development related to the DBO's initiative. Once issued, companies should further analyze whether their payments-related arrangements satisfy the AOTP exemption's criteria or are instead subject to regulation as money transmission.

Data Privacy & Security: Attorney General Publishes Proposed Regulations to Implement the California Consumer Privacy Act

On October 10, 2019, the Office of the Attorney General of California ("**CAG**") released proposed regulations under the California Consumer Privacy Act ("**CCPA**") which, with limited exceptions, takes effect on January 1, 2020.[6] Short of resolving all ambiguities of the CCPA, the proposed regulations nevertheless

[6] California Attorney General, Proposed Regulations, *available at* https://www.oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-proposed-regs.pdf. The proposed regulations are accompanied by an Initial Statement of Reasons, which outlines the CAG's rationale for the proposed regulations, *available at* https://www.oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-isor-appendices.pdf

provide useful operational guidance for affected businesses as they prepare for CCPA compliance. As part of the rulemaking process, the CAG solicited comments from interested stakeholders, and we expect the CAG to provide additional clarifications informed by public comments as it finalizes the proposed regulations in Q1 2020. Although the CAG is precluded from bringing enforcement actions for potential CCPA violations until July 1, 2020, affected businesses should carefully review the proposed regulations in an effort to mitigate any possible retroactive liability.

Background

On June 28, 2018, California became the first US state to enact a comprehensive framework designed to significantly expand the privacy rights of its consumers. Modeled in part after the European General Data Protection Regulation ("**GDPR**"), the CCPA grants California residents new rights regarding their personal information and imposes onerous compliance obligations on certain entities that collect, process and/or sell personal information in California. While the CCPA's exact scope and interpretation continue to evolve, the following chart provides a high-level overview of the law's applicability and key requirements.

CCPA: Applicability and Key Provisions	
Who is subject to the CCPA?	
Covered Businesses	1. Any for-profit entity doing business in California that meets *any* of the following thresholds: ▪ Receives gross revenue greater than US$25 million; ▪ Annually buys, receives, sells, or shares personal information of more than 50,000 consumers, households or devices for commercial purposes; or ▪ Derives 50 percent or more of its annual revenues from selling consumers' personal information 2. Any entity that *both*: ▪ Controls or is controlled by a covered business; and ▪ Shares common branding with a covered business, such as a shared name, service mark or trademark[7]
Who is protected by the CCPA?	
Consumers	The CCPA grants new rights and protections to "consumers," defined as California residents that are either: ▪ In California for other than a temporary or transitory purpose; or ▪ Domiciled in California but currently out of state for a temporary or transitory purpose

[7] Certain provisions of the CCPA also specifically apply to services providers and third parties that process information on behalf of a covered business.

What information is protected by the CCPA?	
Personal Information	The CCPA protects consumers' "personal information," defined as any information that directly or indirectly: ▪ Identifies, relates to, or describes a particular consumer or household; or ▪ Is reasonably capable of being associated with or could reasonably be linked, to a particular consumer or household The CCPA further provides a list of personal information categories.
Are there exemptions from the CCPA?	
Exemptions	The CCPA provides various exemptions for certain business circumstances and types of personal information. Notable exemptions include: ▪ The collection or sale of a consumer's personal information if every aspect of the commercial conduct occurs wholly outside California; ▪ The collection or sale of de-identified or aggregate consumer information; ▪ The sale of personal information as part of a larger merger or acquisition transaction; ▪ Information made lawfully available from federal, state, or local government records; and ▪ Entities that operate in specific business sectors covered by sector-specific privacy or data protection laws
What new rights are granted by the CCPA?	
Data Transparency Requires covered businesses to provide detailed information in their privacy policies regarding their use of personal information (collection, processing, transfer and/or sale)	**Data Security & Breach Disclosure** Requires covered businesses to implement and maintain reasonable security procedures and practices to safeguard consumers' personal information
Right to Opt Out Requires covered businesses to provide consumers a right to opt out from the sale of their personal information	**Right of Access and Deletion** Requires covered businesses to provide the consumer with a right to request access to their personal information and to request the business delete that information

What are the penalties for noncompliance?	
Penalties	○ Private right of action. The CCPA provides consumers with a limited private right of action for certain data breaches involving a sub-set of personal information. Starting January 1, 2020, consumers may seek the greater of actual damages or statutory damages ranging from US$100 to US$750 per consumer per incident. ○ Businesses are entitled to a 30-day notice and cure period before a plaintiff can initiate any individual or class action. ▪ Enforcement by the CAG. The CCPA grants regulatory and enforcement authority to the CAG. The CAG may bring actions for an injunction and civil penalties of US$2,500 per violation, or up to US$7,500 per intentional violation. Businesses are entitled to a 30-day notice and cure period. ○ CAG enforcement will begin on the earlier of July 1, 2020, or six months after the CAG publishes final regulations.

The CAG's proposed regulations

The CCPA directly authorizes (and in some cases directs) the CAG to adopt regulations to implement California's new privacy regime. A prior CCPA amendment passed by the California legislature extended the CAG's deadline to publish final implementing regulations to July 1, 2020.[8] On October 10, 2019, the CAG released proposed regulations, which provide the following notable clarifications, among other things:

1. Consumer notices. The proposed regulations clarify the scope and content of the various notices that covered businesses must provide to consumers pursuant to the CCPA, such as when collecting consumer personal information or informing consumers of their right to opt out of the sale of personal information. In each instance, the CAG lays out the required format, language, accessibility, accompanying disclosures and the applicability of any exemptions. In addition to the CCPA's notice requirements, businesses remain subject to any applicable notice requirements under other federal and/or state privacy laws.

2. Online privacy policy. The CCPA requires covered businesses to maintain an online privacy policy designed to inform consumers about their rights and the business's specific practices. The proposed regulations clarify the content of the privacy policy as well as how it must be presented online to consumers.

3. Handling of consumer requests. The proposed regulations detail the procedures covered businesses should have in place to process consumer requests to exercise their rights under the CCPA. Specifically, the proposed regulations contain requirements for receiving, processing and responding to consumer requests to know, delete and opt-out of the sale of personal information, including the timeframe to respond to each request. Of note, covered businesses will need to provide at least two methods for consumers to submit requests, one of which must reflect the manner in which the business primarily interacts with the consumers (*i.e.*, online or offline). The proposed regulations also prohibit covered businesses from disclosing certain sensitive personal information (*e.g.*, social security number, driver's license number) to prevent identity theft.

4. Verification procedures. The CCPA requires covered businesses to verify the identity of the consumer making a request. In instances in which consumers do not have or cannot access their password-protected accounts, the proposed regulations create a two-tiered process whereby businesses must confirm a consumer's identity to either a "reasonable degree of certainty" or a "reasonably high degree of certainty," depending on the request type and sensitivity of the personal information collected about that consumer.

5. Training and recordkeeping. The proposed regulations require that all individuals responsible for handling consumer inquiries about a business's privacy practices or a business's CCPA compliance

[8] Senate Bill No. 1121 (2017-1018)

undergo training. In addition, the proposed regulations direct covered businesses to maintain records of consumer requests made pursuant to the CCPA for at least 24 months.

6. Metrics for larger businesses. The proposed regulations require covered businesses that, alone or in combination, annually buy, sell, receive, or share for commercial purposes the personal information of more than four million consumers, to include certain metrics in their privacy policies. Specifically, these larger businesses must post the median number of consumer requests that they receive annually, as well as the number of days within which the business responded to such requests.

As reflected above, the proposed regulations provide useful technical guidelines for covered businesses to comply with important requirements under the new law, but fall short of addressing and resolving certain of the CCPA's key ambiguities. For instance, the proposed regulations do not attempt to clarify what constitutes a "sale" of personal information under the CCPA, which triggers onerous notice obligations for covered businesses.[9] Given the CCPA's broad definition of "sale," businesses will have to continue to interpret this provision in the context of sharing personal information among affiliates, subsidiaries, service providers and other business counterparties.

Of note, the proposed regulations also do not offer further clarifications as to the scope and applicability of the CCPA's exemption for personal information collected, processed, sold and disclosed pursuant to the federal Gramm-Leach-Bliley Act ("**GLBA**"). Under this exemption, data obtained by financial institutions in connection with the offering of a consumer financial product would not be subject to the CCPA. The GLBA exemption, however, would not apply to data collected in the context of commercial financial products. This distinction creates significant operational challenges for financial institutions with multiple or complex business lines that may collect both CCPA-exempt and non-exempt data in a consumer and commercial context. Without further guidance from the CAG, financial institutions may consider maintaining procedures for segmenting or tracking how each piece of information was originally obtained to determine the scope of their CCPA compliance obligations.

Legislative amendments

In addition to the release of the CAG's proposed regulations, the California legislature passed several amendments to the CCPA, which were signed into law on October 11, 2019. These amendments add clarity to specific provisions of the CCPA and are intended, in part, to provide relief to certain businesses or business circumstances.

- FCRA exemption expanded. The California legislature broadened the CCPA exemption for information collected pursuant to the Fair Credit Reporting Act ("**FCRA**") to a range of activities performed by consumer reporting agencies, furnishers of consumer credit information, and users of consumer reports. This exemption only applies to the extent that such information is not used, communicated, disclosed or sold except as authorized under FCRA. Information collected pursuant to FCRA, however, remains subject to the CCPA's private right of action for data breaches.
- Temporary exemption for HR data. The California legislature temporarily excluded information from employee, job applicants, independent contractors and agents from the scope of the CCPA until January 1, 2021. This amendment provides relief for business-to-business companies that do not otherwise handle the personal information of California consumers. This amendment does not, however, exempt employers from the CCPA's notice requirements. Employers further remain subject to the CCPA's private right of action for data breaches.
- Relief for online-only businesses. The CCPA requires all businesses to provide two designated methods for consumers to exercise their request rights. The California legislature clarified that a business operating exclusively online is only required to provide an email address for submitting such requests.

[9] The CCPA broadly defines a "sale" of personal information to include the "selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means" the personal information of a consumer to another business or third party "for monetary or other valuable consideration." The CCPA does not offer further clarifications on what constitutes "other valuable consideration."

- Personal information. The California legislature narrowed the scope of the CCPA by excluding "publicly available information" from the definition of "personal information," and clarifying that de-identified or aggregate information does not constitute "personal information."
- Data broker registration. Businesses that "knowingly collect and sell to third parties the personal information of a consumer with whom the business does not have a direct relationship" will need to register as a "data broker" with the CAG by January 31 following each year in which a business meets that definition. Exempt from registration are consumer reporting agencies covered by FCRA, financial institutions covered by GLBA, and entities covered by the Insurance Information and Privacy Protection Act.

Considerations

The CAG's proposed regulations address some but not all of the uncertainties and opened questions resulting from the CCPA. Despite their ambiguities and shortcomings, the proposed regulations nevertheless provide useful guidelines for businesses in understanding their obligations and responsibilities under the law. Given the broad applicability and extraterritoriality of the CCPA, covered businesses should continue to monitor regulatory and legislative developments going forward and actively engage with the CAG to address any statutory compliance questions. To add further uncertainty to the California privacy landscape, a projected 2020 ballot initiative would create a dedicated state privacy protection agency, expand the CCPA's protections to other types of sensitive information and provide transparency around automated decision-making.[10] While it is too early to tell whether and in what form this initiative might proceed, businesses should keep abreast of any related developments, which stand to have a significant impact on consumers and businesses in California.

While the CCPA is forcing changes to businesses' data privacy practices, companies dealing with California consumers should also continue to consider other state privacy requirements that may apply to their activities (such as the California Shine the Light Law or the California Online Privacy Protection Act) as part their overall compliance strategy. The enactment of the CCPA also inspired legislators in several other states to pass similar legislation aimed at protecting the privacy rights of their residents. Such copycat legislations, if successful, would create a complex patchwork of varying state privacy compliance requirements. This concern has renewed the debate for the need of a comprehensive federal privacy law that would preempt state laws and provide a single set of compliance obligations. While there has been no shortage of proposals in the federal Congress, enactment of a federal privacy law in the near future remains unlikely.

DBO Offers Guidance on Cannabis Banking

On October 2, 2019, the DBO issued guidance for state-chartered banks and credit unions serving state-legal cannabis-related businesses ("**CRBs**").[11] Taking the form of an extensive questionnaire, the guidance is designed to assist financial institutions in managing risks appropriately and ensuring their compliance with the BSA. Of particular note, the guidance confirms that the DBO will not bring enforcement actions against financial institutions solely on the basis that they provide banking services to CRBs. The DBO's guidance also comes on the heels of a federal movement towards allowing CRBs access to the banking system through the Secure and Fair Enforcement Banking Act ("**SAFE Banking Act**"), which passed the US House of Representatives in September 2019, but to date has not received a vote in the Senate.

Background

The use of cannabis for medical and recreational purposes has been legal in California since 1996 and 2016, respectively. In addition, the majority of other US states authorize and regulate the use of cannabis in certain forms. Nevertheless, the manufacturing, sale, distribution and possession of cannabis remain illegal under federal law due to its classification as a Schedule I controlled substance under the Controlled Substances Act. Disparate treatment at the state and federal levels has created uncertainty about how federal criminal and

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10 The California Privacy Rights and Enforcement Act of 2020, *available at* https://uploads-ssl.webflow.com/5aa18a452485b60001c301de/5d8bc3342a72fc8145920a32_CPREA_2020_092519_Annotated.pdf.

11 California Dep't of Bus. Oversight, Cannabis Banking Guidance (Oct. 2, 2019), *available at* https://dbo.ca.gov/wp-content/uploads/sites/296/2019/10/FINAL-DBO-Cannabis-Banking-Guidance-Memo.pdf.

anti-money laundering statutes may be enforced with regards to financial institutions providing banking services to CRBs. In turn, limited access to banking services has incentivized CRBs to operate on a cash-only basis, raising significant public safety and security concerns, as well as challenges with tracking cannabis-related funds for tax and money laundering purposes.

The SAFE Banking Act constitutes Congress's latest attempt to address such concerns. If passed, this bill would create federal protections for financial institutions that serve CRBs in states where cannabis is legal.[12] Meanwhile, certain state regulators are also seeking to improve CRBs' access to banking by way of regulatory guidance or public statements. For instance, the New York Department of Financial Services released guidance in July 2018 encouraging New York state-chartered banks and credit unions to offer banking services to state-licensed medical CRBs. The DBO guidance is consistent with this trend.

The DBO Guidance

This guidance is part of the DBO's continued effort to support state-chartered banks and credit unions that serve CRBs in California. Specifically, the guidance covers a range of topics designed to assist financial institutions in the build-out of their compliance infrastructure, which must include, among other components, a comprehensive risk management program, CRB due diligence, federal monitoring and filing requirements, board training and identification of potential red flags. In addition, the guidance emphasizes the need for financial institutions to have a contingency plan in the event of changes to federal or state guidelines.

The DBO guidance builds upon prior guidelines issued by FinCEN in 2014, which reflect the federal agency's BSA expectations for financial institutions dealing with CRBs. The guidance also encourages financial institutions to monitor adherence to the eight priorities found in the Department of Justice's now-rescinded Cole memorandum, which include preventing the distribution of cannabis to minors and ensuring that profits do not go to criminal enterprises.

While the cannabis business has grown rapidly in California since 2016, many state-legal CRBs have encountered difficulties in securing basic banking services due to financial institutions' lingering concerns with violating federal law. The confirmation that the DBO will not bring enforcement actions based solely on a financial institution's relationship with a CRB may alleviate some of these concerns. Until there is a final resolution at the federal level, however, we expect that banks and credit unions will continue to be wary of providing banking services to state-legal CRBs.

[12] For further information on the SAFE Banking Act, please refer to our October 11, 2019, article, *available at* http://clsbluesky.law.columbia.edu/2019/10/11/white-case-discusses-cannabis-banking-bills-implications-for-financial-services.

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