

Consumer Finance Monitor (Season 3, Episode 12): A Look at How the Latest Modifications to the Proposed CA Consumer Privacy Act Regulations Impact the Debt Industry

Speakers: Stefanie Jackman, Kim Phan, and Lauren Valenzuela

Stefanie Jackman:

Welcome to the Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers and the industry. I'm your host, Stefanie Jackman, and I'm a partner in the Atlanta office of Ballard Spahr. I'll be moderating today's program. For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We have been hosting that blog since 2011, so there is a lot of great relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. To subscribe to our blog or to get on the list for our webinars, please visit ballardspahr.com. And if you like our podcast today, let us know, leave us a review on Apple Podcasts, Google Play or wherever you get your podcast.

Stefanie Jackman:

Today, we're going to be discussing the modified proposed regulations put out by the California Attorney General in February relating to the California Consumer Privacy Act or CCPA, as you know it. Joining me today are two people. First is Kim Phan, who is a partner in Ballard Spahr's DC office and a Chamber's recognized expert in areas of data protection and cyber security, as well as Lauren Valenzuela, who is Corporate Counsel with Performant Financial. Performant is a leading provider of outsourced recovery and cost containment solutions and services. While they serve their clients across the financial services receivable industry, they focus in particular on government collections, healthcare collections and commercial collections. Kim and Lauren, thank you for joining us today.

Kim Phan:

Thanks Stefanie.

Lauren Valenzuela:

Thank you. I'm so happy to be here with Ballard Spahr today.

Stefanie Jackman:

So Lauren, I read a series that you put out. It started with your first publication on February 19th of 2020 in Inside Arm that we're talking about the revised proposed CCPA regulations. I thought you really put out a great series. It was a three-part series that made it very understandable, especially for someone like me, who certainly is not a data privacy and security expert by any means, to understand what was going on in California. I'm hoping that maybe you can bring back a little bit of that magic here for our listeners to share your thoughts on what is most helpful to the industry, as well as where are some challenges or things we need to still be thinking about may remain. And again, just at a high level.

Lauren Valenzuela:

Sure, sure. Thank you so much for highlighting the article. It was the revised regulations, there were a lot of them. I would say many of the revisions were very meaningful and really show that the California Attorney General has been carefully listening

to the feedback that he's been receiving on the CCPA. Overall, I think the revisions infuse some practicality into the proposed regulations, which will definitely help organizations operationalize the law. However, there are still some gray areas when it comes to how the CCPA overlays with the financial services industry and, in particular, what we do when it comes to data and privacy.

Lauren Valenzuela:

I was really excited to see revisions in the definition of personal information. I was really excited to see revisions in expectations of service providers. I really liked the simplified privacy policy requirements and the very much improved guidance on how to process requests from households and authorized third party agents. So overall, I've definitely appreciated the revisions. I think there's still some room for clarity when it comes to the financial services industry. We'll see how the final ones come out. We're all eagerly waiting for the final ones to be published.

Stefanie Jackman:

Kim, pegging off of what Lauren just said, what are your thoughts? Do you share her views? Do you see some other areas where you think they got it right? Maybe they haven't quite gotten it yet. I'd just like to hear your thoughts.

Kim Phan:

Well, I very much agree with Lauren that it's encouraging to see the California Attorney General is very much taking into account the public comments that were submitted with regard to the first round of the draft proposed regulations and has made some appropriate changes to the proposal that reflect some of the challenges that industry would have faced if those changes hadn't been made. I agree very much with Lauren, I think that's very encouraging, but I also agree with her that there are still some outstanding areas where there are opportunities for the California Attorney General to offer further clarity and to ease the burden for industry to get into compliance with the CCPA.

Kim Phan:

For example, Lauren mentioned the simplified privacy policy requirements. That's great, but those privacy policies still, under the definition of privacy policy in the proposed regs, would still need to be required to capture not only online collection practices, but now offline collection practices. That's a big change from the way that industry had previously approached online privacy policies and, of course, the definition of sale remains very much open the air. The Attorney General has chosen neither in the first round of drafting nor the second round to try to offer any illumination on how that particular definition is going to be interpreted by his office. So like Lauren, I'm very much looking forward to seeing how and in what form the final regulations take. I think there is some expectation that those final regulations will be released at some point in the summer, but I also wouldn't be surprised if the Attorney General sees a third round of public comments. There's a lot still going on here and, of course, CCPA 2.0 is still a possibility this year as well, so a lot of moving parts in California.

Stefanie Jackman:

So Kim, staying with you for a minute, I know you had some thoughts on how the changes that the AG put out in the proposed regulations in February impact indirect collection by collection agencies. Might you be able to share with our listeners what your thoughts are, what that is, what you're thinking the impacts could be to help us understand that?

Kim Phan:

Well, for the collection industry, to the extent that CCPA applies at all, because understanding that there are some pretty broad exemptions say, for example, under the Gramm-Leach-Bliley Act for industry activity in the collection space to the extent that it applies. I think that the changes to the provision addressing indirect collection are going to be challenging. So what I'm referring to when we talk about the provision with regard to indirect collection is the section of the proposed regulations that discussed companies that or businesses that receive personal information from other businesses, B2B businesses, and are not

collecting information directly from the consumer, say, for example, a collection agency that receives personal information from the originating creditor and not from the consumer.

Kim Phan:

The original proposal for the CCPA regulations had stated that that type of indirect collection did not require that the collection agency provide the consumer with a Notice at Collection, information about what information is being collected and how it's being used. Now, the Attorney General has modified that language to now limit the scope of that language to apply only to registered data brokers in the state of California, so other entities that, again, are receiving personal information, not from the consumer, but indirectly from other businesses now have to find a path forward providing that Notice at Collection, which I think will be challenging for some of the industry

Stefanie Jackman:

Lauren, as somebody who works at a company that might have to be thinking about some of those things, do you have anything to add to Kim's comments on those impacts?

Lauren Valenzuela:

No, other than that we need to really, I would say, think about our policies and our procedures as we operationalize this law.

Stefanie Jackman:

So Lauren, one of the things that you mentioned, you thought the California AG had been listening to the industry on and maybe is getting right are the expectation of service providers. So tell me more about how you view the changes to service provider provisions as being either more helpful or possibly causing more confusion in some areas. What are your overall thoughts? It seems like you like them.

Lauren Valenzuela:

I do. I think they were very helpful. For example, the AG removed the requirement that a service provider is expected to respond to a request to know or delete that they may receive directly from a consumer. I think that caused a lot of confusion. When you think about, for example, when you think about service providers, let's say, for example, a letter vendor or even a system of record, a software that we use as a CRM, if they were to receive a request to know or delete directly from the consumer, I'm sure service providers, such as a letter vendor or a CRM, would kind of be like, "What do I do with this?" so it was really helpful that the AG clarified that a service provider is not required to respond directly to that request or process that requests, I should say, they're not required to process that request, but they can instead either elect to respond on behalf of the business or respond and let the consumer know that they cannot act upon the request because it needs to be sent directly to the business. I think that is a very important clarification.

Lauren Valenzuela:

Another revision that I feel like made some practical changes to what service providers may or may not do with personal information is that they clarified that service providers can, without traversing into the realm of being a third party, service providers can use personal information that they get for the services that they provide, they can use that information for retaining and employing other service providers as subcontractors, just so long as those subcontractors meet the requirements for a service provider. I think that's a helpful clarification. They also clarified that service providers can use personal information for their own internal use, such as building or improving the quality of their services, so I think that's a very helpful clarification. I would also say that they made very clear that a service provider can use personal information to detect security incidents and protect against fraudulent or illegal activity. That seems very obvious, but that was important enough to clarify in the revisions and I'm glad that they did.

Stefanie Jackman:

Kim, do you have any thoughts to add?

Kim Phan:

Well, I agree with Lauren that I absolutely approve of the amendments that, as Lauren was describing, allow service providers to make use of personal information for their own purposes. I know that previously the limitations had been that the service provider could only use personal and information received on behalf of the business for the purposes of providing services to that business. And while you could have argued that data security incidents, preventing fraud and improving the services really are for the benefit of providing services to say an originating creditor or another business, it's helpful that it is laid out expressly in the new proposal.

Stefanie Jackman:

So Kim, staying with you for a minute and thinking about service providers. Something that I think is still not entirely clear or may not be entirely clear is whether a debt collector, when they're a service provider to a nonprofit, and nonprofits aren't subject to the CCPA, whether the nonprofit should still execute a CCPA addendum with its debt collector service provider because of what the regulations state that a business that provides services to an organization that is not a business may still be required to follow the CCPA. What do you think about that? Is there a way forward? Is there an answer or is this one of the places that we still need California to clarify?

Kim Phan:

Well, certainly I think it's challenging and for collection agencies that work with nonprofits, including governmental entities for those who collect for on behalf of the government, those who collect on behalf of nonprofit organizations or even entities that function on a not-for-profit basis, those service providers are in a difficult situation. Their underlying obligation is generally to comply and to support the compliance of their customer, the actual entity that's a business, but if the entity for whom they're providing services is not a business, what are they supposed to do? One thing I think that collection agencies should really be thinking closely about is if they're in that position, what obligations do they have themselves as a business outside of being a service provider? So the CCPA regulations state pretty clearly that if a service provider that is also a business in California, they still have to comply with the CCPA outside of their role as a service provider.

Kim Phan:

So say, for example, a collection agency is large enough in California that they're collecting information independent of those services, say, for example, on their website, there's plenty of consumers who might wander onto a collections agencies website that is not actually a debtor for whom they are actively collecting information. To the extent that a collection agency is a business, separate from a service provider role, it still must comply with CCPA. So if a company, a collection agency, is already putting into place those CCPA compliance mechanisms, that's something they might also want to bring to bear if they're providing services to a nonprofit because, again, that's outside of their normal role under CCPA as a service provider.

Stefanie Jackman:

Lauren, I know that your company focuses in particular on healthcare collections and government collections and healthcare can have a lot of not-for-profits and Kim also mentioned government. Do you have any thoughts on how you're approaching this issue that you're willing?

Lauren Valenzuela:

It's really going to come down to collaborating with our clients and figuring out the best approach. This is definitely, I think, a tricky situation, just like Kim said, in figuring out how to best meet the letter of the law and also the intent of the law. I don't really see any... I can't see any downsides of executing a CCPA addendum in order to be very conservative, but Kim, can you see any downsides of taking a more conservative approach and executing a CCPA addendum with a non-profit that isn't subject to the CCPA?

Kim Phan:

I think it's actually prudent. I don't see why a nonprofit would take issue with any of the CCPA provisions that a collection agency would want to put into place, for example, the limitation on the ability to use that personal information for purposes other than providing the services. Again, a nonprofit should want that kind of protection in place already. I think it's absolutely prudent for a collection agency to minimize their risk exposure to put those addendums or contract exhibits or however else they want to renegotiate those contracts with their nonprofits clients.

Lauren Valenzuela:

That makes a lot of sense. And from a practical matter and my observations in speaking with others in the industry, there might be a certain level of educating that we have to do with our clients who maybe ignore the CCPA, thinking, "Hey, this doesn't apply to us. I don't have to worry about it," so there might be a little bit of educating and collaborating with our clients, partnering with them as we navigate compliance with this law. I also think it's also forming a lot of best practices, which aren't bad. We'll see how this transpires.

Stefanie Jackman:

So Lauren, another thing you had mentioned was a perspective that the California AG have made it easier to process requests from households and third parties. Tell us more about that. What are the new procedures that have been established by the updated proposed regulations for household requests?

Lauren Valenzuela:

Yeah. There were a lot of concerns. I attended as many as the CCPA forums that the AG provided during the early days where they were... before the proposed rules came out and there were a lot of concerns about protecting people's privacy that lived in the same household. So for example, let's say you have roommates, they're not part of the same family, they just are part of the same household. Could, all of a sudden, could the roommate request information about their other roommate and their activities, online activities, for example? That could certainly be an invasion of privacy in that household. It was really helpful when the AG came out and said, "Hey, we're going to give you some practical guidance on how to approach household requests."

Lauren Valenzuela:

The first thing that they did that I found helpful was they really revamped the definition of household itself. In the proposed regulations, they're saying, "Hey, we're thinking a household as one, someone that resides at the same address. Two, they share a common device or share the same service provided by the business. And three, they are identified by the business as sharing the same group account or unique identifier. They have to meet all three of those things, those elements, in order to be considered a household. I think that in and of itself is going to be very helpful when we look at household requests. The second thing that they did was they also clarified that if you do get a household request, the business can do a couple of things when they are kind of verifying, I guess you could say, are authenticating the household's identity.

Lauren Valenzuela:

They said, "Hey, a business can require that all consumers in the household jointly request the access." Two, that the businesses able to individually identify each household member. And three, that the business can verify or must verify that each member making the request is currently a member of the household. I feel like that is very helpful guidance in how we should be approaching household requests because you have all kinds of situations where maybe people are going through a divorce or maybe they're roommates or this, that and the other, so this guidance, I feel like, gives us something very practical to work with when we are approaching household requests and are really going to inform our procedures as we adapt compliance with household requests.

Stefanie Jackman:

So Kim, let's talk about whether you think anything in the updated proposed regulations will impact the ability of financial institutions to rely on GLBA, FCRA or other exemptions that are included in the CCPA. You'd mentioned earlier that there can be such exemptions. Can you tell us more about your thoughts on how, if at all, there's an impact on financial institutions here?

Kim Phan:

Stefanie, fortunately I don't think there's anything in the proposed regulations that will impair financial institutions for being able to continue relying on some of the broad exemptions that were already in place in the CCPA. Gramm-Leach-Bliley act, which is the primary federal statute for privacy and data security on a federal level for financial institution, that exemption remains intact. The Fair Credit Reporting Act exemption for collection agencies will still be able to utilize those types of consumer reports in their collection activities, as well as skip tracers and others that are regulated under the FCRA. The Driver's Privacy Protection Act, again, another exemption that I think is important for the collection industry in seeking out and tracking down debtors. These are all exemptions that remain untouched by the proposed regulations.

Kim Phan:

Now, while some of them have been amended recently, for example, the Fair Credit Reporting Act was amended by statute in October of 2019, they remain unscathed under the proposed regulations, so that's a big sigh of relief for the industry.

Stefanie Jackman:

Can we have a similar sigh of relief that we now know what to do with artificial intelligence data?

Kim Phan:

I'd have to say no on that one, Stefanie.

Stefanie Jackman:

Why don't we talk about that a little bit more? Maybe we'll start... Kim, since you spoke first, maybe you can tell us a little bit more about what is artificial intelligence data? Because I do sense from some of our discussions in preparing today's podcast, this is one of the areas where things very much remain unsettled at this time.

Kim Phan:

So Stefanie, thank you for asking that question. I wanted to step back a little bit to talk about why artificial intelligence is even relevant at all for this conversation. The definition of personal information under the CCPA is extremely broad. And as Lauren discussed earlier, that definition has been scaled back a little bit and in some respects under the proposed regs, but the personal information definition goes beyond what we traditionally think of as personal information, your name, your address, your social security number, to also include inferences, things that you draw... conclusions you might draw about someone based on other pieces of personal information.

Kim Phan:

Specifically under California, the consumer's preferences, their characteristics, their psychological trends, their predispositions, behavior, attitudes, all of that is now defined as personal information under CCPA. When you're talking about artificial intelligence and the ability to take large data sets to draw inferences, conclusions, other types of, we'll call, soft data about a consumer, not hard data like where they live, the inclusion of that type of data is very troubling because how do you address that? Is it actually about that consumer? Is it about a person who's liked that consumer or is it about debtors of that particular consumer type? It's those types of challenges as to how to address AI that I think are going to be troubling for the industry.

Lauren Valenzuela:

I would tend to agree completely. I know that something that I'm thinking about is, "Hey, how do we...." For example, when we use AI, when our industry uses AI to inform a collection strategy based on a consumer's behavior and the data that that AI creates, okay, does that now become personal information that we have to disclose when we get a request to know what information is collected about the consumer? It's interesting and it's going to be interesting to see how this... I would say how the definition of personal information when it's an inference kind of gets shaped as we go along with the CCPA.

Stefanie Jackman:

That makes a lot of sense and I can understand how that... that is a question that we would appreciate guidance on because it's an important part of our business model and how we're using data and have to manage data. Let's switch gears entirely for a minute. A question that's come up a few times and on which I'd love to hear your thoughts is the extent to which you think an opt-out request under the CCPA should also be treated as a Cease Request under the FTCPA, a stop communication, cease and desist?

Stefanie Jackman:

My instinct as a litigator, who's done some work in that space, is I don't think so because these are entirely different statutory regimes meant to monitor and control and regulate on entirely different issues in the collection's context. It's how you can go about collecting and interacting with consumers and responding to them. In the data privacy, CCPA world, it's just what you can do with data that you might get through that process in some way, shape or form or consumer data you may have. I don't see a lot of natural interconnection there such that I would feel inclined to advise you treat an opt-out under CCPA as a CCE under the FTCPA or anything else, but do either of you have any thoughts? Kim, start with you.

Kim Phan:

Sure Stefanie. The CCPA does create a lot of different rights. There's the right to opt out of the sale of personal information, there's the right to request that information be deleted. While those new controls over a consumer's personal information are created, again, keep in mind that the collection agencies will have lots of reasons to assert why that information should not be deleted, whether under GLBA, whether or not to carry out a transaction request by the consumer, whether or not to assert and defend legal rights to collect on that information, all of those are a lot of reasons why FDCPA operational data would not necessarily be subject to those opt-out requests or requests to delete under CCPA. But even if they were to set aside GLBA and some of these other exemptions, even if someone did come in and request, "Please delete my data," that doesn't mean the next day that you couldn't send out an FDCPA related communication. It's just not the same thing as a cease and desist request and shouldn't be treated as such in my mind.

Stefanie Jackman:

Lauren, do you have any different thoughts?

Kim Phan:

No, I agree completely. I think the opt-out in the CCPA is specific to the sale of information. It's very narrow. It's a very narrow opt out, but I wouldn't put it past consumer plaintiffs to try to make that argument at some point down the road.

Stefanie Jackman:

No, I suspect you're right on that, so it's something we should keep in the back of our mind, even if all of us think at first blush that it doesn't seem... it seems like maybe a square peg in a round hole because it is California after all and there is a pretty broad collection statute, the California Rosenthal Act. We're just about out of time, but thinking about in our last few minutes, I had one more question that I thought might be germane to our audience and what they're thinking about. To what extent do licensed attorneys have to be treated as service providers under the CCPA? Or in kind of a similar vein, is information that's exchanged with other professionals, like auditors, CPAs, tax firms, subject to the CCPA, how do we reconcile those types of individuals or service providers within the CCPA as it currently stands?

Kim Phan:

Sure. I can tackle that Stefanie. The fact that auditors, attorneys, others that would provide services to businesses in California are subject to professional codes of conduct and other legal restrictions and prohibitions and requirements is irrelevant for the purposes of CCPA and CCPA is an overlay that overrides every business and across all entities in commerce in California. Attorneys are still service providers. They are providing services to their clients. And while there are, again, there are likely exemptions for certain activities under CCPA... For example, for attorneys, there is an exemption to exercise or defend legal claims or to comply with federal, state or local laws. So again, lots of different exemptions that may be asserted for any particular activity, but none of that gets those types of entities broadly outside the scope of CCPA.

Kim Phan:

It's just not the way CCPA is structured. It's structured in a way that everyone is in, there are no broad based entity based exemptions, only exemptions that apply to particular pieces of personal information or pieces or specific activities involving that personal information.

Stefanie Jackman:

Well, thank you. I want to take a moment just to say a very sincere thank you to you Kim and you Lauren for tackling what is a very dense and evolving topic, for doing such a nice job of breaking it down to where we are now, where we have made some advancements and where we still have to be thinking towards the future for some additional clarity. Thank you very much for taking the time today to join me on the podcast.

Lauren Valenzuela:

Oh, sure. My pleasure.

Kim Phan:

Thanks Stefanie.

Stefanie Jackman:

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