

New California Law Affects Businesses that Share Consumer Information with Third Party Marketers

EXECUTIVE SUMMARY

A new California law imposes certain disclosure requirements on businesses that transfer consumers' personal information to third parties for the third parties' own direct marketing purposes. The law, Senate Bill 27 (codified at Civil Code Section 1798.83), takes effect on January 1, 2005. It requires a covered business (or non-profit) to give a California resident, upon his or her request, an explanation of how the business disclosed consumers' personal information to third parties for marketing purposes during the prior year. A business can avoid having to provide this notice by giving consumers the ability to opt out of having their information shared with third parties for marketing purposes. A brief overview of the law's applicability and requirements is set forth below.

1. DOES THE LAW APPLY TO YOUR BUSINESS?

To determine whether or not the law applies to your business, consider whether you: (1) disclose personal information; (2) to a third party; (3) for the third party's own direct marketing purposes.

- **Do you disclose personal information?**

The law defines "personal information" broadly. It means any information, collected online or offline, that identifies or describes an individual California resi-

dent with whom you have an established business relationship. An "established business relationship" is a relationship based on a voluntary, two-way communication between you and the consumer, with or without a purchase or other exchange of consideration. If your relationship with the consumer is not ongoing, it nonetheless continues to exist for purposes of the law if the consumer purchased, rented or leased from you within the preceding 18 months.

"Personal information" does not generally include information collected in the course of a business-to-business relationship.

- **Do you disclose personal information to a third parties for their own direct marketing purposes?**

Third parties include affiliates of your business, if they are separate legal entities. If an affiliate has the same brand name as your business, then the compliance requirements apply to certain limited categories of information only.

If the third party does not use the personal information for its own direct marketing purposes, then the law's requirements do not apply. This means, for example, that the law does not apply to disclosures to service providers that are contractually prohibited from using the personal information for their own marketing purposes. Nor does the law apply to disclosures made in connection with certain joint marketing activities.

2. WHAT DOES THE LAW REQUIRE?

- **Notice to consumers**

If the law applies to your business, then you must provide a California consumer, upon his or her request, a notice that details how you disclosed consumers' personal information to third parties for marketing purposes during the prior calendar year. The notice must include the types of information shared and the identities and addresses of the entities with which it was shared, along with examples of their goods or services, if not obvious. The notice does not have to be specific to the requesting consumer; rather, it can be standardized to cover all applicable disclosures you made during a given year. The notice must be provided within 30 days of the request.

- **Opt out alternative**

You can avoid having to provide the notice described above by allowing consumers to opt out of having their personal information shared with third parties for marketing purposes. The opt-out mechanism must be free. You must notify consumers that they have the right to opt out by designating a contact point for their use – that is, an address, an e-mail address or a tollfree phone or fax number. You must provide this contact information: (1) at your California retail locations or other locations where you have regular contact with California customers; (2) through an appropriately labeled link on your web site's home page; or (3) by your employees or agents who have regular contact with California customers.

3. WHAT ARE THE PENALTIES FOR VIOLATION?

The law leaves enforcement to private

plaintiffs, who may seek injunctions, attorneys' fees and damages of up to \$3,000 for each willful, intentional or reckless violation. Alleged violators are given a 90-day cure period for other violations.

FOR MORE INFORMATION

For more information on this development, please contact one of our team members at (202) 342-8400 or via email:

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