

Florida Consumer Data Privacy Act: A law that recognizes privacy rights in the information age

by Robert A. Stines

A FREEBORN & PETERS LLP CLIENT ALERT



ABOUT THIS CLIENT ALERT

The Florida Legislature is considering whether to enact the Consumer Data Privacy Act (SB 1670 and HB 963). Similar to California's recently enacted privacy act, it addresses concerns about companies collecting and selling personal consumer information. This alert discusses some of the questions companies should be asking about the proposed law.

Within the first week of the 2020 Legislative Session convening, senators introduced a bill (SB 1670 and HB 963) to increase the privacy rights of Florida residents. Anyone following the California Consumer Privacy Act, which was enacted in 2018 and became effective January 1, 2020, will notice the similarities. If adopted, the proposed act would impose significant new obligations on companies offering a website or online service to Florida residents.

As drafted, the proposed act is intended to prohibit the use of personal data contained in public records for marketing, soliciting, and contact without the person's consent. It also requires the operator of a website or online service that collects certain information from consumers in Florida to establish a designated request address, and provide

specified notice regarding the collection and sale of such information. Upon request of the consumer, the proposed act prohibits operators from making any sale of the consumer's information.

It should be noted that the introduced bill is an early draft and we expect changes, but here are some of the questions companies should be asking.

Who Is Covered Under the Proposed Act?

The proposed act is meant to regulate "operators." An operator means a person or company who:

- (a) Owns or operates a website or online service for commercial purposes.
- (b) Collects and maintains covered information from consumers who reside in this state and use or visit the website or online service.

- (c) Purposefully directs activities toward this state or purposefully executes a transaction or engages in any activity with this state or a resident thereof.

These three requirements seem clear, but one has to wonder if an operator has to meet all three requirements before being subject to the proposed act. It is probably an oversight that will be corrected, but the requirements are not separated by an "and," which creates confusion as to whether it is conjunctive or disjunctive. It is assumed that all three requirements must be satisfied to meet the definition of "operator."

Certain types of entities are excluded from the term “operator.” For example, financial institutions (subject to GLBA) and healthcare providers (subject to HIPAA) are excluded from the act.

What Information is Protected?

In the proposed act, the definition of “covered information” is broad. It includes personally identifiable information such as

1. A first and last name.
2. A home or other physical address which includes the name of a street and the name of a city or town.
3. An electronic mail address.
4. A telephone number.
5. A social security number.
6. An identifier that allows a consumer to be contacted either physically or online.
7. Any other information concerning a consumer that is collected from the consumer through the website or online service of the operator and maintained by the operator in combination with an identifier in a form that makes the information personally identifiable.

This could prove problematic for some companies because many websites are designed to save name and email addresses. Arguably, this definition is so broad it would also include IP addresses.



What is the Notice Requirement?

The notice requirement is where many companies may run afoul. The proposed act states that an operator must provide a notice, in a manner reasonably accessible to consumers, that:

- (a) Identifies the categories of covered information that the operator collects through its website or online service about consumers,
- (b) Provides a description of the process for a consumer to review and request changes to any of his or her covered information,
- (c) Describes the process by which the operator notifies consumers who use or visit the website or online service of material changes to the notice.
- (d) Discloses whether a third party may collect covered information about a consumer's online activities over time and across different websites or online services when the consumer uses the operator's website or online service.
- (e) States the effective date of the notice.

How is it Enforced?

The proposed act provides that the Department of Legal Affairs shall adopt rules to enforce it. Until then, it is unclear how the proposed act will be enforced.

There is a specific provision that states if the Department has reason to believe that an operator, directly or indirectly, has violated or is violating the act, the Department may institute an appropriate legal proceeding against the operator. Interestingly, the proposed act used “may” (instead of “shall”) which means enforcement is discretionary, not mandatory.

Upon a showing that the operator violated the act, a district court may issue a temporary or permanent injunction or impose a civil penalty not to exceed \$5,000 for each violation.

When the proposed act refers to “each violation” it begs the question of how a violation is assessed and calculated. Is a violation calculated by each consumer, sale, or defective notice? Also, what is the injunction intended to halt – collecting the information or selling the information?

Operators should be relieved to know that the proposed act does not establish a private right of action. This decreases the likelihood of consumer class actions for violations.

What to Expect?

California has taken the lead with its version of the consumer privacy law. Other states are expected to follow. It should not come as a surprise because consumers are becoming more sensitive about their privacy rights. There are growing concerns about companies collecting, using and selling consumer data. Under the circumstances, some might say this law is inevitable.

It is still early days for this proposed act, but it could become the law of Florida before the end of the year.

If you have questions about how the proposed act could affect your business, contact Robert Stines at rstines@freeborn.com or (813) 488-2928.

ABOUT THE AUTHOR



Robert Stines

Partner

Tampa Office
(813) 488-2928

rstines@freeborn.com

Robert is a Partner in the Firm's Tampa office and a member of the Litigation Practice Group and Emerging Technologies Industry Team. Robert is focused on business litigation, commercial disputes, professional liability defense and cyber law. He has litigated contract disputes, products liability claims, legal malpractice lawsuits, unfair trade practices, employment agreements, shareholder disputes, restrictive covenants, healthcare matters, insurance professional malpractice, and business torts. He is a certified IAPP US-law privacy professional.



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CHICAGO

311 South Wacker Drive
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(312) 360-6520 fax

NEW YORK

230 Park Avenue
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New York, NY 10169
(212) 218-8760
(212) 218-8761 fax

SPRINGFIELD

217 East Monroe Street
Suite 202
Springfield, IL 62701
(217) 535-1060
(217) 535-1069 fax

RICHMOND

901 East Byrd Street
Suite 950
Richmond, VA 23219
(804) 644-1300
(804) 644-1354 fax

TAMPA

1 Tampa City Center
201 North Franklin Street
Suite 3550
Tampa, FL 33602
(813) 488-2920

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