REGISTERED FUNDS AND CONSUMER DATA

The California Consumer Privacy Act and Beyond…

ROPES & GRAY

January 2020

AGENDA

- Background
- Application
- Exemptions
- Definitions
- Practical Steps
- And Beyond. . .

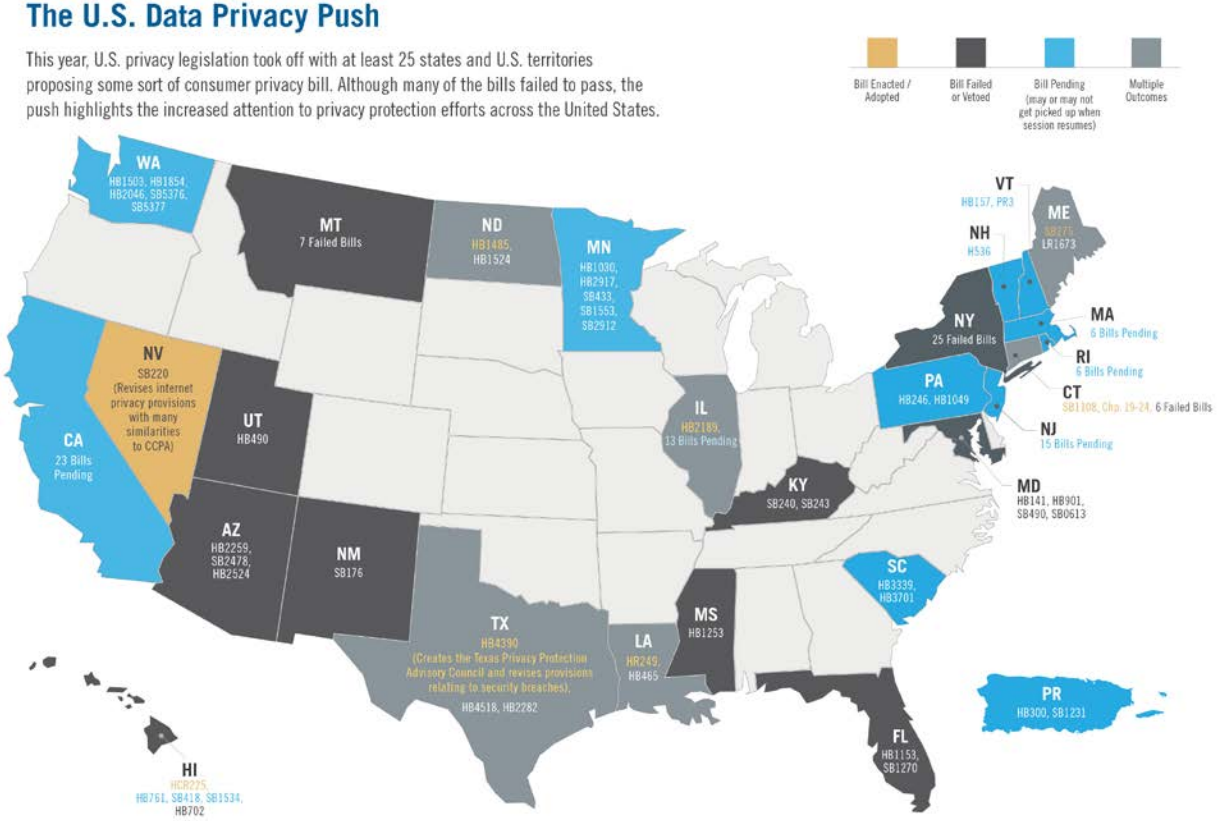
AGENDA

- **Background**
- Application
- Exemptions
- Definitions
- Practical Steps
- And Beyond. . .

Regulatory Proliferation

- Personal information protection laws are by no means new and have evolved over recent years to cover a broader set of information in a growing number of jurisdictions
- For example: General Data Protection Regulation or “GDPR” in the European Union and the California Consumer Privacy Act or “CCPA”, but also regulations in Australia, Canada, China, Hong Kong, among others, as well as laws currently being considered by numerous other states in the U.S.

What states are next?



What is different about these laws?

- Historically, data privacy laws were more akin to “silos” – focused on particular industries or types of data
- New laws, such as GDPR and CCPA, are omnibus laws with much broader impact

- These laws also tie into cybersecurity more broadly and the need to protect from hackers

Data Privacy Landscape

- While we will talk about the CCPA and its application today, the practical implications and steps we will discuss go beyond California
- A business may be able to avoid the requirements of the CCPA, but compliance with the next privacy law may be unavoidable
- If you have taken some initial steps, you may avoid playing catchup later

California Consumer Privacy Act (CCPA)

What is the CCPA?

- California law designed to protect the privacy and data of any natural person who is a California resident (“consumers”) by establishing new consumer privacy rights and expanding liability for data breaches involving California consumer information

What does it do?

- The Act requires businesses to tell consumers what data it is collecting and gives consumers the right to say no to the sale of their personal information.
- It also allows consumers to sue companies if their personal data is breached.

Private Right of Action

- Significantly, the CCPA provides consumers with a private right of action
  - Consumers who experience any unauthorized access and exfiltration, theft, or disclosure ***as a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices*** appropriate to the nature of the information to protect the Personal Information may institute a civil action
  - Critically, the CCPA provides for ***statutory damages*** of between $100 to $750 per consumer per incident (or actual damages, whichever is greater).

Evolution of the CCPA

- Signed into law **June 28, 2018**
- Several amendments passed California legislature in **September 2019**
- California AG published proposed regulations on **October 11, 2019**
- Went into operation **January 1, 2020**
  - A private right of action is available as of January 1, but the provisions of the CCPA will not be enforced by the California Attorney General until July 1, 2020
- CCPA 2.0 – a 2020 ballot initiative in California seeking to substantially expand CCPA's protections for consumers and obligations on businesses

Today's Agenda

The CCPA was not drafted with mutual funds in mind, and so it is not clear in all cases how to interpret its provisions. We will consider questions raised by the CCPA such as:

- Application: What is the scope of the CCPA and what does it require?
- Exemptions: What exemptions may apply? What information is left?
- Definitions: If no exemption is available, who is subject to the CCPA?
- Practical Steps: What proactive steps should advisers to registered funds be taking?
- And Beyond…: What might the future hold for consumer personal information.

AGENDA

- Background
- **Application**
- Exemptions
- Definitions
- Practical Steps
- And Beyond. . .

Application

- Law imposes notice and other obligations on the processing of ***Personal Information*** of ***Consumers*** by ***Businesses***
- **Notice requirements**
  - Provide information at point of collection
- **Consumer rights**
  - Right to Know
  - Right to Access/Portability
  - Right to Erasure
  - Right to Opt Out of “Sales”
- **Data breach**
  - Private right of action

AGENDA

- Background
- Application
- **Exemptions**
- Definitions
- Practical Steps
- And Beyond. . .

Exemptions

- Although the scope of the CCPA is broad, there are exemptions that are available to registered funds and their advisers with respect to at least some of the consumer information they collect.

- It is important to note that these exemptions do not remove a consumer's private right of action under the CCPA.

Key exemption: GLBA

- One critical exemption to the CCPA's scope applicable to registered funds and their advisers is the exclusion for personal information collected, processed, sold, or disclosed pursuant to the Gramm-Leach-Bliley-Act ("GLBA") and its implementing regulations (such as Regulation S-P)

- The GLBA protects non-public personal information (NPI) that (i) a consumer provides to a financial institution, (ii) results from a transaction with the consumer or any service performed for the consumer, or (iii) the entity otherwise obtains.

Key exemption: GLBA

- Regulation S-P defines “consumer” as an individual who obtains or has obtained a financial product or service that is to be used primarily for personal, family, or household purposes, or that individual’s legal representative.
- Financial products and services are not defined in the GLBA itself, however Regulation S-P defines “financial product or service” to mean any product or service that a financial holding company [not defined] could offer by engaging in an activity that is financial in nature or incidental to such a financial activity under certain provisions of the Bank Holding Company Act.

Key exemption: GLBA

- CCPA “personal information” vs. GLBA “NPI”
- What is *not* NPI under the GLBA but *is* personal information for purposes of the CCPA?
  - Commercial transactions
  - Marketing
  - Prospects / Potential investors
- However, information may be considered NPI if "otherwise obtained" in connection with providing a financial service
  - Certain cookies
  - Managing, servicing and onboarding

Key Exemption: B2B Communications

- Another key exemption relates to personal information collected during communications or transactions with another business or government agency ("B2B transactions").
- Exempts from most of CCPA's provisions personal information about an employee, owner, director, officer or contractor of a business as part of B2B transactions in the context of conducting due diligence or providing products or services to the business or agency.
- Limitations include:
  - Does not apply to Right to Opt-Out of sale
  - May not apply to certain marketing communications
  - Subject to one-year expiration date and private right of action

Key Exemption: Employee Data

- Another exemption to the CCPA's scope is the exclusion of employee-related information from the definition of "consumer," including:
  - Information on job applicants, employees, owners, directors, officers, medical staff members or individual contractors
  - Emergency contact information
  - Information necessary to administer benefits
- There are still several obligations to keep in mind:
  - Limitation on use of employee information
  - Notice to employees: categories and purpose
  - Subject to one-year expiration date and private right of action

AGENDA

- Background
- Application
- Exemptions
- **Definitions**
- Practical Steps
- And Beyond. . .

Definitions - Business

To the extent the exemptions do not cover certain pieces of data collected regarding California consumers, registered funds, their advisers and third parties providing services will need to determine whether they meet the CCPA definitions.

- ***Business*****:** For-profit companies that (1) collect consumers' personal information (or on behalf of which such information is collected) and that determine the purposes and means of the processing of such information, that (2) do business in the State of California and (3) satisfy at least one of three thresholds:
  - Annual gross revenue exceeds $25m;
  - Annually sells or receives for a commercial purpose, alone or in combination, the Personal Information of 50,000 or more consumers, households, or devices; or
  - Derives 50% or more of its annual revenues from selling consumers' Personal Information.

Definitions – Doing Business

- What it means to be “doing business” in California is not defined in the statute and it is unclear what definition would apply

- There are likely a limited set of circumstances where a fund or adviser that is not physically operating in California is “doing business” in California and collecting data that is outside the scope of the exemptions we have described

Definitions - Collecting

- ***Collecting*:** This is defined to capture "buying, renting, gathering, obtaining, receiving, or accessing any personal information pertaining to a consumer by any means"
  - This includes receiving information actively or passively from a consumer or by simply observing a consumer's behavior

- ***Selling:*** Defined broadly to include transactions that provide "monetary or other valuable consideration"

Definitions – Control Entities

- ***Control Entities*:** The definition of business also includes entities that control or are controlled by a business and that share "common branding" with such business.
- Control is defined for purposes of the CCPA as more than 50% ownership of the shares of any class of voting security, control in any manner over the election of a majority of the directors or the power to exercise a controlling influence over the management of a company (controlling influence is not defined)

Definitions – Service Providers vs. Third Parties

- To avoid definition of “sales,” fit vendors within ***service provider*** exemption
- ***Service Provider:*** a for-profit legal entity that processes information on behalf of a business and to which the business discloses a consumer’s personal information for a business purpose pursuant to a written contract. The important point here is that a service provider’s contract prohibits the entity receiving the information from retaining, using, or disclosing the personal information for any purpose other than for the specific purpose of performing the services specified in the contract for the business, including retaining, using, or disclosing the personal information for a commercial purpose other than providing the services specified in the contract with the business
- ***Third Parties***: Entities that receive personal information but are not a “business” (e.g., the fund or adviser itself) or “service provider” (e.g., a distributor operating within a written contract as described above)

AGENDA

- Background
- Application
- Exemptions
- Definitions
- **Practical Steps**
- And Beyond. . .

Practical Steps for Advisers to Registered Funds

- California privacy law will continue to be a moving target for the foreseeable future. This issue may not settle unless / until we get a federal law in 2021 at the earliest.
- Take proactive steps now to prepare for the CCPA's implementation:
  - *Data Inventory*
    - Advisers can take an inventory of what data they collect, how they get it, what they use it for, who they give it to (and what they receive in return – tangible or intangible)
  - *Data Protection Policies and Procedures*
    - Businesses have a duty "to implement and maintain reasonable security procedures and practices appropriate to the nature of the information
  - *Privacy Policy Amendments*
    - Notices provided by the privacy policy should include broad "omnibus" language that applies to everyone (including non-investors and non-employees)
  - *Amendments to contracts with Service Providers*
    - To include requirements regarding retention, use and disclosure
  - ."

Policies & Procedures: Reasonable Security Procedures

- The CCPA's private right of action does not require that the consumer demonstrate actual damage, but rather only that the breach resulted from a violation of a duty "to implement and maintain reasonable security procedures and practices appropriate to the nature of the information."

- So what are "reasonable security procedures"?
  - There is no one generally accepted legal definition of what reasonable security procedures and practices are, and the current California AG has not provided a definition in connection with the CCPA. However, this is not a new concept.
  - In 2016, then-California AG Kamala Harris gave limited guidance on the subject, referencing the 20 controls described in the Center for Internet Security's Critical Security Controls; further, information security regulations in Massachusetts provide helpful data points as do international standards and SEC guidance from prior actions

Privacy Policy and Notice

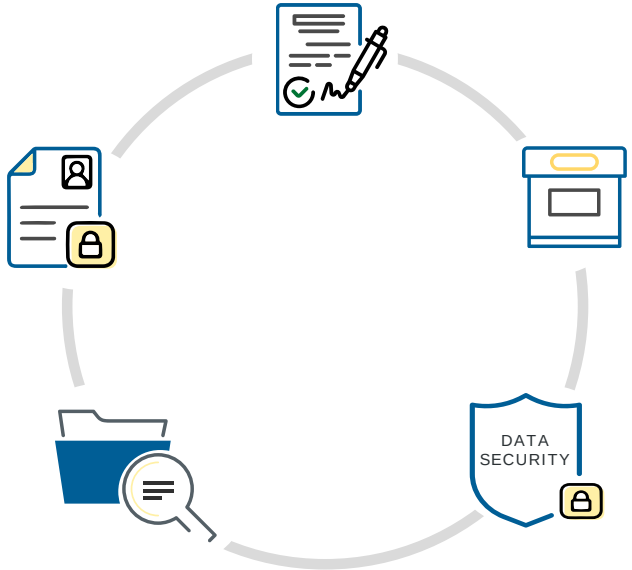
- CCPA requires updates to online (and employee) privacy notices
- Must include information about:
  - California Privacy Rights
  - Collection and Use of Personal Information
    - Categories of information collected
      - Reference categories listed in definition of personal information
    - Categories of sources of information
    - Purpose for collecting or selling information
    - Categories of third parties with whom share information
  - Sales and disclosures of Personal Information
    - *Must state whether or not business "sells" information*

Contracts

- To avoid definition of “sales,” fit vendors within ***service provider*** exemption:
  - Contract must state that vendor cannot use data except for performing specified services for business
  - What about uses to “improve services”?
- Consider including other provisions to address CCPA issues:
  - Cooperation on consumer requests to be forgotten and other rights
  - Restrictions on “discrimination”
  - Data security and breach
  - Restrictions on use of service providers
  - Other privacy best practices

Considerations for HR Department

- Most provisions do not apply to “personal information” collected from prospective or current employees, so long as that information is only used in the context for which it was collected
- Compliance takes time; in light of one-year expiration time, it is best to prepare ***soon***
- Consider assessing:
  - Employee Privacy Notice
  - Vendor agreements
  - Record of processing
  - Data security program
  - Monitoring activities



Creating a Truly Global Compliance Program

DSARs and Responding to Consumers

- Individuals in Andorra, Argentina, Australia, California, Canada, Cayman, Europe, Faroe Islands, Guernsey, Hong Kong, Israel, Isle of Man, Japan, Jersey, Mexico, New Zealand, Singapore, South Korea, Switzerland, Uruguay, and certain other jurisdictions may have certain data subject rights.
- These rights vary, but they may include the right to: (i) request access to and rectification or erasure of their personal data; (ii) restrict or object to the processing of their personal data; and (iii) obtain a copy of their personal data in a portable format. Individuals may also have the right to lodge a complaint about the processing of personal data with a data protection authority.

The Common Core of Privacy Principles

- Respect for Personal Autonomy, Freedom of Expression, and Intellectual Freedom
- Transparency: Right to know how data is used
- Control: Controls over how information is used
- Access: Reasonable access to consumer information
- Correction: Rectification of incorrect information
- Deletion: Right to deletion,
  - legitimate need to retain (right to remember)
- Portability: Reasonable portability across platforms

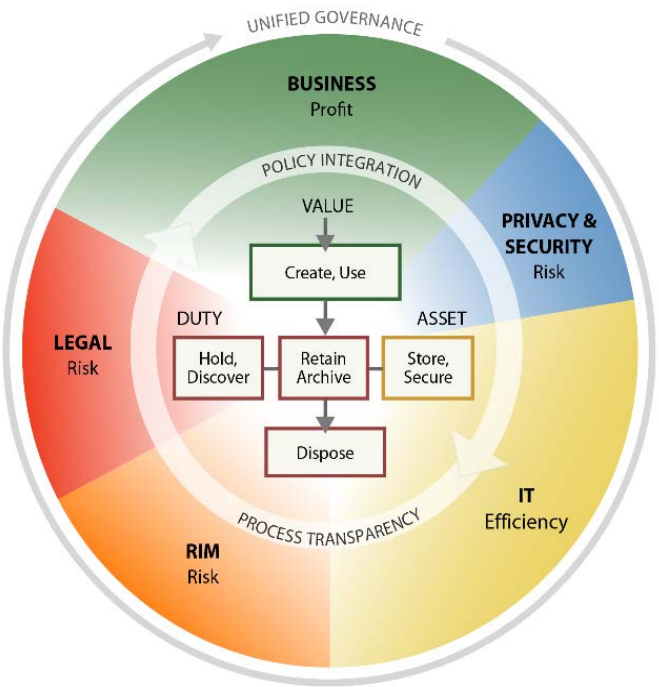
An Internalized, Systematic Approach is Crucial

What Is Information Governance?

"Information governance is the discipline of managing information *according to its legal obligations and its business value*, which enables defensible disposal of data and lowers the cost of legal compliance."

Compliance, Governance and Oversight Council,
Information Governance Benchmark Report in Global 1000 Companies 6 (2011)

Information Governance Reference Model



Stakeholders:

1. Business
2. Legal
3. RIM
4. IT
5. Privacy & Security

AGENDA

- Background
- Application
- Exemptions
- Definitions
- Practical Steps
- **And Beyond. . .**

And Beyond…

- Personal information protection laws are not new, but they are evolving rapidly to deal with the changing data landscape.
- Steps taken now should be viewed as part of an process rather than a one-time “upgrade”

Ropes resources

- Visit Ropes' California Consumer Privacy Act microsite for quick access to Ropes' analysis of the law, together with useful resources and FAQs:
  - https://www.ropesgray.com/ccpa

Questions?

Ed McNicholas, Partner
202-508-4779
edward.mcnicholas@ropesgray.com

Paulita Pike, Partner
312-845-1212
paulita.pike@ropesgray.com

Jessica Reece, Counsel
617-235-4636
jessica.reece@ropesgray.com