

Date of Hearing: April 8, 2021

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 335 (Boerner Horvath) – As Amended March 26, 2021

SUBJECT: California Consumer Privacy Act of 2018: vessel information

SUMMARY: This bill would clarify that a consumer's right to opt-out of the sale or sharing of their personal information (PI), provided by the California Consumer Privacy Act of 2018 (CCPA) and the California Privacy Rights Act (CPRA), respectively, does not apply to vessel or ownership information shared between a vessel manufacturer and dealer for the purpose of or in anticipation of a vessel repair covered by a warranty or recall conducted pursuant to federal law. Specifically, **this bill would:**

- 1) Specify that the right of a consumer to opt-out of the sale of their PI under CCPA, and the sale or sharing of their PI under CPRA, shall not apply to vessel information or ownership information retained or shared between a vessel dealer and the vessel's manufacturer if the information is shared for the purpose of, or in anticipation of, effectuating a vessel repair covered by a warranty or recall conducted pursuant to specified federal law.
- 2) Provide that the exemption specified in above applies only if the vessel dealer or vessel manufacturer with which that PI is shared does not sell, share, or use that PI for any other purpose.
- 3) Define "vessel dealer" to mean a person who is engaged wholly or in part in the business of selling or offering for sale, buying or taking in trade for the purpose of resale, or exchanging, any vessel or vessels, as defined in Section 651 of the Harbors and Navigation Code, and receives or expects to receive money, profit, or any other thing of value.
- 4) Define "vessel information" to mean the hull identification number, model, year, month and year of production, and information describing any of the following equipment as shipped, transferred, or sold from the place of manufacture, including all attached parts and accessories: an inboard engine; an outboard engine; a stern drive unit; or an inflatable personal floatation device approved under specified federal regulations.

EXISTING LAW:

- 1) Establishes the California Consumer Privacy Act of 2018 (CCPA) and provides various rights to consumers pursuant to the act. Subject to various exemptions, a consumer has, among other things:
 - the right to know what PI a business collects about consumers, as specified, including the categories of third parties with whom the business shares PI, and the specific pieces of information collected about the consumer;
 - the right to know what PI a business sells about consumers, as specified, including the categories of PI that the business sold about the consumer and the categories of third parties to whom the PI was sold, by category or categories of PI for each third party to whom the PI was sold;

- the right to access the specific pieces of information a business has collected about the consumer;
 - the right to delete information that a business has collected from the consumer; and
 - the right to opt-out of the sale of the consumer's PI if over 16 years of age, and the right to opt-in, as specified, if the consumer is a minor; and,
 - the right to equal service and price, despite exercising any of these rights. (Civ. Code Sec. 1798.100 et seq.)
- 2) Specifies that the obligations imposed on businesses by the CCPA shall not restrict a business's ability to do the following, among other things:
- comply with federal, state, or local laws.
 - comply with a civil, criminal, or regulatory inquiry, investigation, subpoena, or summons by federal, state, or local authorities.
 - exercise or defend legal claims. (Civ. Code Sec. 1798.145(a).)
- 3) Exempts from the right to opt-out of the sale of the consumer's PI under the CCPA the sharing of vehicle and ownership information shared between a new motor vehicle dealer and the vehicle's manufacturer, as defined, if the information is shared in order to effectuate, or in anticipation of effectuating, a vehicle repair pursuant to the specified federal law pertaining to safety defect and recall requirements, and prohibits the sale, sharing, or use of that information for any other purpose. (Civ. Code. Sec. 1798.145(g)(2).)
- 4) Defines "vehicle" to mean a device by which any person or property may be propelled, moved, or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks. (Veh. Code Sec. 670.)
- 5) Establishes, pursuant to Proposition 24 (2020), the California Privacy Rights Act (CPRA), which supplants the CCPA and establishes various new rights including expanding the right to opt-out of the sale of PI to include the *sharing* of PI regardless of whether valuable consideration is exchanged. (Civ. Code. Sec. 1798.100 et seq.)
- 6) Provides that the CPRA may be amended by a majority vote of the Legislature only if the amendments are consistent with and further the purpose and intent of the CPRA, as provided, which are generally to further protect consumers' rights, including the constitutional right of privacy. (Ballot Pamp., Primary Elec. (Nov. 3, 2020) Text of Proposed Laws, pp.74-75.)
- 7) Defines the following terms related to the operation and equipment of vessels:
- "vessel" to include every description of a watercraft or other artificial contrivance used or capable of being used as a means of transportation on water, excepting the following: (a) a seaplane on the water, or; (b) a watercraft specifically designed to operate on a permanently fixed course, the movement of which is restricted to a fixed track or arm to

which the watercraft is attached or by which the watercraft is controlled. (Harb. & Nav. Code Sec. 651(aa).)

- “manufacturer” to mean any person engaged in any of the following: (a) the manufacture, construction, or assembly of boats or associated equipment; (b) the manufacture or construction of components for boats and associated equipment to be sold for subsequent assembly, or; (c) the importation into this state for sale of boats, associated equipment, or components thereof. (Harb. & Nav. Code Sec. 651(l).)
- 8) Pursuant to federal law, requires generally that if a vessel or associated equipment that has left the place of manufacture either fails to comply with the minimum safety standards prescribed by the Secretary of Homeland Security, or contains a defect that creates a substantial risk of personal injury to the public, the manufacturer must both: (a) notify owners, purchasers, and dealers of the defect or noncompliance, as specified; and, (b) remedy the defect or noncompliance at the manufacturer’s cost and expense. (46 U.S.C. Sec. 4310.)
 - 9) Requires that recall notifications pursuant to the above section contain a clear description of the defect or failure to comply, an evaluation of the hazard reasonably related to the defect or failure, a statement of the measures to correct the defect or failure, and an undertaking by the recreational vessel manufacturer to take those measures only at the manufacturer’s cost and expense. (46 U.S.C. Sec. 4310(d).)
 - 10) Requires that recall notifications pursuant to the above section be sent to the first purchaser of the vessel or equipment for other than resale, and provides that the requirement for notification of the first purchaser shall be satisfied if the recreational vessel manufacturer exercises reasonable diligence in establishing and maintaining a list of those purchasers and their current addresses, and sends the required notice to each person on that list at the address appearing on the list. (46 U.S.C. Sec. 4310(c)(1)(A).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Purpose of this bill:** This bill seeks to clarify the extent of a consumer’s right to opt-out of the sale or sharing of their PI as it pertains to vessel and ownership information regulated by federal law in order to facilitate compliance by vessel dealers and manufacturers with the privacy rights guaranteed by the CCPA and the CPRA. This bill is sponsored by the National Marine Manufacturers Association (NMMA).

- 2) **Author’s statement:** According to the author:

As different parties have evaluated the implementation of consumer privacy laws, instances have emerged where clarification is necessary to ensure that businesses can maintain consumer data to protect consumer safety by recalling and repairing defective products. One of those circumstances involves federally mandated warranty and recall repairs, which require sharing of consumer data between a dealer and the manufacturer of a product.

Ambiguity about the ability to retain or share consumer information between a dealer and a manufacturer exposes companies to liability under the strict provisions of California’s

privacy laws. Auto dealers sought an explicit clarification because of the same concern (AB 1146, Berman, Ch. 751, Stats. 2019).

AB 335 allows manufacturers of recreational boats and marine engines to receive and retain specific contact information for buyers of its products for the limited and exclusive use of conducting product safety recalls and warranty verification.

- 3) **The CCPA and specified exemptions:** In 2018, the Legislature enacted the CCPA (AB 375, Chau, Ch. 55, Stats. 2018), which gives consumers certain rights regarding their personal information (PI), such as: (1) the right to know what PI is collected and sold about them; (2) the right to request access to the specific PI the business has retained about them; (3) the right to request the deletion of the PI that the business has collected about them; (4) the right to opt-out of the sale of their PI, or opt-in in the case of minors under 16 years of age; and (5) the right to pursue a cause of action against a business that has suffered a data breach in the event the consumer's PI has been impermissibly accessed.

Generally speaking, the CCPA includes various exemptions from the act, some of which exempt certain types of information more broadly, and others which apply to the extent that the CCPA would conflict with certain necessary actions of a business. For example, the CCPA specifically states that the obligations imposed by the act shall not restrict a business's ability to comply with federal, state, or local laws, or to exercise or defend legal claims. It also separately provides for certain broader exemptions, such as for medical information governed under the Confidentiality of Medical Information Act (CMIA) or federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), or for information covered under the Gramm-Leach-Bliley Act (GLBA) or the California Financial Information Privacy Act. These broader CCPA exemptions have largely been granted in recognition that there are already comprehensive state or federal laws providing privacy protections for that specific information, such as in the case of CMIA, HIPAA, or GLBA. The concern in those situations was that confusion could arise as businesses attempt to determine which law takes precedent under certain circumstances.

- 4) **Federal vehicle recall laws and AB 1146:** The National Highway Traffic Safety Administration (NHTSA) has the authority under federal law to require manufacturers to recall vehicles that have safety defects or do not meet safety standards. If a safety defect is identified, manufacturers are required to notify NHTSA, owners, dealers, and distributors, and correct the defect at no charge (unless the vehicle is more than 15 years old). (*See* 49 U.S.C. Sec. 30118-30120.) NHTSA notes that "[g]enerally, a safety defect is defined as a problem that exists in a motor vehicle or item of motor vehicle equipment that: (1) poses a risk to motor vehicle safety; and, (2) may exist in a group of vehicles of the same design or manufacture, or items of equipment of the same type and manufacture."¹

In 2019, this Committee passed, and the Governor signed into law, AB 1146 (Berman, Ch. 751, Stats. 2019), which established an additional exemption from the CCPA for vehicle and ownership information shared between a new motor vehicle dealer and the vehicle's manufacturer, as defined, if the information is shared in order to effectuate, or in anticipation

¹ NHTSA, *Motor Vehicle Defects and Safety Recalls: What every vehicle owner should know*, U.S. Department of Transportation, Updated Aug. 2017, <https://www-odi.nhtsa.dot.gov/recalls/recallprocess.cfm>, [as of Mar. 20, 2021].)

of effectuating, a vehicle repair pursuant to the specified federal law pertaining to safety defect and recall requirements. Importantly, the exemption pursuant to AB 1146 is limited to the consumer's right to opt-out of the sharing of that information between the dealer and the manufacturer, and prohibits either party from using the information for any secondary purpose apart from effective compliance with the federal law. This means that, despite this exemption, consumers fully retain their existing right under the CCPA to opt-out of the sale of their PI in any other circumstance and for any other purpose, as well as all other rights the CCPA guarantees, including the rights to access their PI, request deletion of their PI, know what PI has been collected and sold, and bring a cause of action upon impermissible access to their PI.

In this Committee's analysis of AB 1146, Staff noted that the CCPA arguably already adequately addressed this issue without including an explicit exemption, as follows:

Arguably, this is an issue that the CCPA addresses adequately, already. Specifically, no new motor vehicle dealer or manufacturer is required by the CCPA to delete a consumer's PI where doing so would impede their ability to comply with federal laws or regulations on warranties or auto-recalls. Similarly, the CCPA in no way precludes new motor vehicle dealers and manufacturers from sharing the information with one another where doing so would result in a violation of federal laws or regulations on warranties or auto-recalls. In the former instance, the right of deletion in the CCPA expressly provides that a business does not have to comply with a consumer's deletion request if retaining the information is necessary for the business to "comply with a legal obligation." (*See* Civ. Code Sec. 1798.105(d)(8).) In the latter instance, allowing the consumer to opt-out of the sharing of their information between the dealer and manufacturer in connection with a warranty or recall would "restrict a business's ability to comply with federal, state, or local" law, which the CCPA, again, explicitly exempts. (*See* Civ. Code Sec. 1798.145(a).)

Still, the more explicit exemption pursuant to AB 1146 provides some additional clarity to new motor vehicle dealers and manufacturers, who can be certain that they are shielded from liability under the CCPA due to their actions taken in compliance with federal recall laws, and to consumers, who can be more certain that their rights under the CCPA in this particular context are still available, apart from this narrow carve-out for compliance with federal law.

In addition to this clarity, though, the exemption for specified sharing of vehicle information has also led to some confusion. Because maintaining vehicle and ownership information in order to comply with federal law was likely already permissible under existing exemptions, the new exemption articulating this permission for new motor vehicles raised questions regarding the applicability of rights under the CCPA in relation to other information not subject to that exemption, but still subject to analogous federal recall laws. In particular, though vessels (i.e. boats and other watercraft) are subject to substantively similar recall and warranty requirements as vehicles under federal law (*see* 46 U.S.C. Sec. 4310), they do not fall under the definitions provided in the exemption pursuant to AB 1146. As a result, according to the bill's sponsor, vessel manufacturers, dealers, and consumers have all expressed uncertainty about the applicability of the CCPA to vessel information necessary to comply with federal law.

Seeking to rectify this uncertainty, AB 335 would provide an explicit exemption from a consumer's right to opt-out of the sale or sharing of information in circumstances in which vessel or ownership information is shared between a vessel dealer and vessel manufacturer exclusively for the purpose of, or in anticipation of, effectuating a warranty or recall repair pursuant to federal law, paralleling the exemption for vehicles. The language of this bill is modeled directly after the vehicle exemption as it is constructed in current law, and would likewise prohibit the use or disclosure of this retained vessel and ownership information for any other purpose.

The broad coalition of boat and equipment manufacturers supporting the bill writes:

We support AB 335 to ensure that there is no ambiguity in California's data privacy laws that would create liability for the data retention practices we must follow to comply with Federal recall and warranty laws [...] AB 335 would ensure that California's landmark consumer privacy law would allow manufacturers of recreational boats and marine engines to receive and retain specific contact information for buyers of its products, for the limited and exclusive use of conducting product safety recalls and warranty verification as required by federal law. By allowing the limited sharing and retention of information, the [L]egislature will ensure that consumers receive our announcements about important and timely safety recall information and can easily confirm warranty eligibility.

Staff notes that the broad exemption from liability in the event compliance with a consumer request under the CCPA would "restrict a business's ability to comply with federal, state, or local" law signals that the Legislature did not intend to create specific exemptions for every circumstance in which CCPA compliance and federal law are in conflict. Accordingly, adding an exemption pertaining to vessel recall laws does run the risk of encouraging requests for similarly tailored exemptions for other niche circumstances. It is unlikely it was the intent of the Legislature in passing AB 1146 to create such demand, and should not be the intent or expectation with respect to this bill. However, the particular similarities between the situations presented by vehicle and vessel recall laws represents a unique case in which the specific exemption for vehicle recall law compliance arguably created the need for additional clarification with respect to the analogous laws for vessels. Because AB 1146 has already been enacted, it may therefore be appropriate to provide this clarification.

- 5) **"Consistent with and further[ing] the purpose and intent of" the CPRA:** Last year, California voters passed Proposition 24, which, in addition to establishing certain new consumer privacy rights, renames the CCPA to the California Privacy Rights Act (CPRA). Of relevance to this bill, the CPRA expands the right to opt-out of the sale of PI under the CCPA to include the right to opt-out of the *sharing* of PI regardless of whether valuable consideration is received, and, because it resulted from a ballot proposition, generally constrains the ability of the Legislature to modify its provisions.

Unless otherwise specified within the proposition, the California Constitution prohibits legislative amendment of statutes created by ballot propositions unless a subsequent proposition is approved by the voting public to do so. (Cal. Const. art. II Sec. 10(c).) Proposition 24 permits changes to the CPRA by the Legislature if the amendment is passed "by a vote of a majority of the members of each house of the Legislature and signed by the Governor," but only if "such amendments are consistent with and further the purpose and

intent of this Act as set forth in Section 3 [of the proposition], *including amendments to the exemptions in Section 1798.145* if the laws upon which the exemptions are based are amended to enhance privacy and are consistent with and further the purposes and intent of this Act [...]" (Ballot Pamp., Primary Elec. (Nov. 3, 2020) Text of Proposed Laws, pp.74-75; Emphasis added.)

Proposition 24 briefly defines the purpose and intent of the CPRA as follows:

In enacting this Act, it is the purpose and intent of the people of the State of California to further protect consumers' rights, including the constitutional right of privacy. (*Id.*, at pp. 43-44.)

The proposition goes on to include several principles intended to guide the implementation of the CPRA, including with respect to consumer rights, the responsibilities of businesses, and the implementation of the law generally. These principles include the following guidance:

The law should be amended, if necessary, to improve its operation, provided that the amendments do not compromise or weaken consumer privacy, while giving attention to the impact on business and innovation. (*Id.*, at p. 44.)

Most provisions of the CPRA have yet to take effect, and, accordingly, this bill provides for amendment of both the CCPA as it is currently in effect, and the CPRA as it stands to take effect on January 1, 2023. Because this bill facially provides an exemption from consumer privacy rights afforded under the CPRA, it arguably demands scrutiny as to its compliance with the amendment provision of Proposition 24.

In assessing the bill's propensity to further the purpose and intent of the CPRA, it is worth noting that Proposition 24 explicitly permits amendments to the exemptions in the section this bill seeks to amend, so long as the exemptions serve to "enhance privacy and are consistent with and further the purposes and intent of [the CPRA]." (*Id.*, at pp.74-75, *supra.*) Here, the aforementioned guidance can be instructive in interpreting the permissibility of this amendment. (*See id.*, at p.44, *supra.*) Though the amendment to the CPRA suggested by AB 335 would indeed describe an additional exemption from the law, as previously discussed, it does not exempt any behavior that was otherwise impermissible under broader pre-existing exemptions, and is thus unlikely to be interpreted to "compromise or weaken consumer privacy." (*Ibid.*) Rather, by providing additional clarity for compliance with the CPRA as it relates to the sharing of vessel information in accordance with federal law and by further clarifying the rights still available to consumers in this context, the bill arguably serves to improve the operation of the CPRA, furthering the intent of the law as described. For this reason, the amendment to the CPRA proposed by AB 335 does not seem to violate the restrictions placed on amendments to the CPRA by Proposition 24, since it appears in accordance with the purpose and intent of the law, as described, and thus meets the requirements for amendment by an act of the Legislature.

6) **Prior legislation:** AB 1146 (Berman, Ch. 751, Stats. 2019) *See* Comment 4.

AB 375 (Chau, Ch. 55, Stats. 2018) *See* Comment 3.

SB 1121 (Dodd, Ch. 735, Stats. 2018) ensured that a private right of action under the CCPA applies only to the CCPA's data breach section on and not to any other section of the CCPA,

as specified, corrected numerous drafting errors, made non-controversial clarifying amendments, and addressed several policy suggestions made by the AG in a preliminary clean-up bill to AB 375.

REGISTERED SUPPORT / OPPOSITION:

Support

National Marine Manufacturers Association (sponsor)

Action Boats

Aktion Parks

Bass Cat

Bayliner

Boat Owner's Association of the United States

Boston Whaler

Brunswick Boat Group

Bryant

Centurion Boats

Chaparral

Chris-Craft

Correct Craft

Crestliner

Cypress Cay

Everglades Boats

Formula Boats

Harris

Heyday

Lowe Boats

Lund

Mercury Marine

Nautique

Parker

Pleasure Craft Engine Group

Princess Yachts America

Recreational Boaters of California

Regulator

Ranger Tugs

Sailfish Boats/Seminole Marine Group

SeaArk

SeaRay

Skeeter Boats

Sportsman Boats

Supreme Boats

Suzuki Marine

Thunder Jet

Tiara Yachts

Volvo Penta

Watercraft Group

Watershed

Yamaha
Yar Craft

Opposition

None on file

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