

ASSEMBLY THIRD READING

AB 335 (Boerner Horvath)

As Amended March 26, 2021

Majority vote

SUMMARY

This bill clarifies 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.

Major Provisions

- 1) Specifies 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) Provides that this exemption 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) Defines "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 Harbors and Navigation Code Section 651, and receives or expects to receive money, profit, or any other thing of value.
- 4) Defines "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.

COMMENTS

In 2018, the Legislature enacted the CCPA (AB 375 (Chau), Chapter 55, Statutes of 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.

In 2019, this Legislature passed AB 1146 (Berman), Chapter 751, Statutes of 2019, which established an 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 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.

In the Assembly Privacy and Consumer Protection 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* Civil Code Section 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* Civil Code Section 1798.145(a).)

The exemption for specified sharing of vehicle information has consequently 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 for 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, 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.

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. The language of this bill is modeled directly after the existing vehicle exemption, and would likewise prohibit the use or disclosure of this retained vessel and ownership information for any other purpose.

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.

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). 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 [...]"

Proposition 24 briefly defines the purpose and intent of the CPRA as "to further protect consumers' rights, including the constitutional right of privacy." 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.

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. 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]." Though the amendment to the CPRA suggested by AB 335 would indeed describe an additional exemption from the law, it does not exempt any behavior that was otherwise impermissible under broader pre-existing exemptions, and is thus unlikely to "compromise or weaken consumer privacy." 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.

According to the Author

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, Chapter 751, Statutes of 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.

Arguments in Support

A broad coalition of boat and equipment manufacturers argues:

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.

Arguments in Opposition

ACLU California Action, Consumer Federation of California, and Privacy Rights Clearinghouse argue:

The exemption sought here by the boat industry would *not* enhance consumer privacy. Rather, it would eliminate privacy rights that California consumers currently have to stop the sale of their personal information. [...] The CCPA in no way prevents consumers from receiving warranty information they desire. Rather, the CCPA enables consumers who want to stop the sale of their personal information between businesses – for boat warranties or any other purpose – from doing so. This bill would take that right away.

California voters have spoken, and they intend to make it harder to pass laws that erode their newly gained CCPA protections. [...] The amendment restrictions embedded in Proposition 24 were intended to prevent precisely this situation. [AB] 335 does *not* further the purposes and intent of Proposition 24, and does *not* strengthen consumer privacy.

FISCAL COMMENTS

According to the Assembly Appropriations Committee, possibly minor costs (Consumer Privacy Fund/General Fund (GF)) to the Department of Justice (DOJ) to revise regulations pertaining to enforcement and prosecution of the CCPA and the CPRA. Costs will be higher if DOJ is required to accept additional public comment on revised regulations.

VOTES

ASM PRIVACY AND CONSUMER PROTECTION: 11-0-0

YES: Chau, Kiley, Bauer-Kahan, Bennett, Carrillo, Cunningham, Gabriel, Gallagher, Irwin, Lee, Wicks

ASM APPROPRIATIONS: 14-0-2

YES: Lorena Gonzalez, Bigelow, Ward, Calderon, Carrillo, Chau, Megan Dahle, Davies, Fong, Gabriel, Levine, Quirk, Robert Rivas, Friedman

ABS, ABST OR NV: Eduardo Garcia, McCarty

UPDATED

VERSION: March 26, 2021

CONSULTANT: Landon Klein / P. & C.P. / (916) 319-2200

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