

Franchise Businesses Face Compliance Hurdles From California Consumer Protection Act

Featuring John Gotaskie of Fox Rothschild LLP

Welcome to FoxCast. We're talking today with John Gotaskie in Pittsburgh about the California Consumer Protection Act. John is a Partner and litigator with Fox Rothschild and is editor of the firm's Franchise Law Update blog. He represents clients in a variety of corporate, venture finance, franchising, licensing and distribution matters as well as in commercial litigation. Today we'll recap his recent International Franchise Association panel discussion about the California Act's impact on privacy and data protection in franchising. John, good morning.

John Gotaskie: Thank you. Good morning.

Question: It just seems that so much of information technology management is being driven by a market that is always moving faster and faster in a more compressed timeframe than ever.

John Gotaskie: That's true. People are more aware about what's happening with their private information. They're concerned about it. And they're responding in different ways. Companies and governments are responding in different ways as well. What California has done is move in a very strong direction to protect the privacy rights of individuals. Now, Europeans have already done this with General Data Protection Regulation, or GDPR. The major difference is in the approach. The European model is a right-to-be-forgotten whereas the California model is more of the public's right to tell a company to forget them.

Question: How has this played out so far?

John Gotaskie: Over the past few months, every time you go to a new website, you'll likely see a new bar across the bottom. It says things like they use cookies, and then you have the question "I accept." And usually, you can't get too far with these websites, unless you agree to accept. They're there because of GDPR and CCPA to protect these new rights of consumers, both in the European Union and now in California. California claims extra territorial application to apply beyond the California market. It's well-intentioned and I think it has its heart in the right place. But I believe it's a flawed model, and creates a lot of issues by imposing a host of rules on companies that gather, use and share personal data.

Question: So I get how the Act provides social benefits. What's happening now?

John Gotaskie: There are proposed regulations from the California attorney general that were published for comment in October. And there were proposed amendments to those draft regulations that were published in February. More than eleven thousand public comments have been filed.

Question: What types of businesses will be most impacted by the CCPA?

John Gotaskie: It applies to any for-profit organization that collects and controls personal information of California residents, does business in California and satisfies one of three conditions. First, the business has to have annual gross revenue in excess of \$25 million in the aggregate, not just revenues derived from California sales or residents. Second it applies if the business annually buys, sells, collects, receives or shares the personal information of 50,000 or more consumers, households, or devices. Third, if the business derives 50% or more of its annual revenue from selling that personal information.

Question: So a company doesn't have to be physically located within California.

John Gotaskie: That's right. The idea was to protect California residents and to keep companies from setting up shop across the border in, say, Reno or Las Vegas, and then continue collecting personal data from Californians but claiming an exemption because they're in Nevada. Another key point is that the CCPA is applicable to "affiliates," although that term is not yet defined. But it sure sounds a lot like franchise companies, particularly because the CCPA requires all entities that use a common brand or service mark and that control or are controlled by a business to comply.

Question: Is any guidance available in the absence of clear definitions?

John Gotaskie: Yes, we can look at something called the California Financial Information Privacy Act, or FIPA. Under FIPA, California has concluded that "control" means the power to exercise a controlling influence or the management or policies of a company. So under FIPA, franchisors are deemed to be affiliates of their franchisees. And franchisees in California are deemed to be affiliates of their out-of-state franchisors. Under FIPA, if you have a multi-unit franchisee who has the same owner and is sharing information within the entity, then under FIPA they're considered to be affiliates. You can see here that this gets pretty broad pretty fast, right? If a franchisor is out-of-state but has franchisees in California, it's impacted. Or vice versa.

Question: What sorts of franchise programs or activities might trigger the Act?

John Gotaskie: We've looked at this, and we're thinking about loyalty programs, for one. Let's say you have an online loyalty program and you inadvertently collect data on California residents and it begins to aggregate to a large number. California is a big state, about 40 million people live there. It doesn't take long before you get to 50,000.

Marketing arrangements are another. While your marketing partners and vendors are not affiliates, the sharing of information could result in you – inadvertently – receiving substantial information on California residents. Which means that franchisors will have to check their vendor contracts to see what's being done with that information and make sure that the vendor is in compliance. Here's an example. Let's say you are simply policing franchisee computer systems as allowed under your operating agreement or operations manual. You want to make certain that they are in compliance with your IT requirements – really common concern. You should be aware that if you're touching the data of California residents which resides on a

franchisee's computer system, you could be responsible and considered an affiliate partner for compliance.

Question: What else?

John Gotaskie: Another big one is multi-unit and multi-brand franchisees. Let's say they share common back office operations. So if you're a large entity with franchises in California and other states, and that customer data comes into a back office located somewhere else, that could be a trigger as well.

Question: Does the CCPA explicitly define what it means by "personal information"?

John Gotaskie: Yes, but "personal information" is very broadly defined under the Act and the regulations. It's any information that identifies, relates to, describes or is capable of being associated with or can reasonably be linked to a particular consumer. It is so broad that pretty much any information collected on an individual or a member of a household applies. If you can identify an individual or a household with the data, it's enough to bring it within the Act. Other issues are: biometric information; internet browsing or search history; geolocation data (how many people use apps that geolocate where that person is at the time?); professional or employment information; or one's educational details.

Question: What disclosures have to be made to comply with the Act?

John Gotaskie: The business has to make certain disclosures in their privacy notice. That's why you're seeing that banner pop up. One of things they want you to click, they're giving you the option to click on, is their privacy notice. We all have the privacy notices right on our websites now. At some point the consumer has to have been given these disclosures. It's not an opt-in but they have to be given the disclosures. So there's the description of the right to request data. Because consumers have to be able to request to know what data you have collected on them.

Question: Such as?

John Gotaskie: The categories of personal information they've collected already in the last 12 months. The categories that were sold in the last 12 months. And the information that was disclosed for any other business purpose in the last 12 months.

Moreover, the modified regulations now make it explicit that the opt-out process must be easy to execute and require "minimal effort." The regs encourage the use of both "Do Not Sell My Personal Information" and "Do Not Sell My Info" buttons on a website. If buttons are used, they must be approximately the same size and design as other buttons on the business' website.

Question: How does the consumer get their personal information?

John Gotaskie: The Act directs that consumers have to be able to submit what is called a "verifiable request" for information from the business. And what does that mean? It means the request has come from a consumer whom the business can reasonably verify and about whom



the business has collected personal information. One concession that California made is that the request must come directly from the consumer. The amended regs say that initial confirmation of a request must be completed within in 10 business days, and a full response to a right to know or delete request must be completed within 45 days. Meanwhile, a business must respond to an opt-out request in 15 business days.

Thank you John, unfortunately we're out of time today. Listeners, please check out our companion International Franchise Association podcast with officials from Ablak Holdings about how to accurately reflect costs of tech innovation in franchise disclosure documents. To confidentially discuss how your franchise may need to respond to the California Consumer Protection Act, please contact John Gotaskie at 412-394-5528 or at jgotaskie@foxrothschild.com.

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