The Surplus Line
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BULLETIN #1390

Re: CCPA Applicability to Surplus Line Brokers

The California Consumer Privacy Act (CCPA), which went into effect January 1, 2020, can apply to surplus line brokers in one of three ways: (1) directly because the broker entity falls within the CCPA definition of a "business"; (2) indirectly because the entity falls with the definition of a "service provider" under proposed regulations; or (3) indirectly as a matter of contract with an entity which is a "business" under the CCPA. Because the application of the CCPA is fact-specific, we recommend that you seek legal advice if you are unclear as to whether it applies to your operations. The California Attorney General can begin enforcing the CCPA July 1, and has indicated that he will not delay or curtail enforcement of the CCPA and related regulations due to the Coronavirus emergency orders.

1. Direct Applicability

An entity is directly subject to the provisions of the CCPA if it is a "business" under the statute. A "business" is broadly defined as an entity that:

(i) is operated for profit,

(ii) collects California consumers' (natural person residing in California) personal information or has such information collected on its behalf,

(iii) determines the purposes and means of processing this personal information,

(iv) does business in the state of California, **and**

(v) satisfies at least one of the following three criteria:

(a) has at least $25 million in annual gross revenues;

(b) buys, sells, shares and/or receives the personal information of at least 50,000 California consumers, households, or devices per year; **or**

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(c) derives at least 50% of its annual revenue from selling California consumers personal information.

If a surplus line broker is a "business" then it must comply with the full scope of the CCPA, including but not limited to numerous notice requirements, obligations to tell consumers what information is being collected and how it is used, and obligations to delete consumer information upon request (subject to certain limitations).

2. Regulations

The California Attorney General has proposed three different versions of implementing regulations which, when finalized, will take July 1, 2020. The regulations are presumed to be in at least near-final form at this point, and therefore provide insight into the Attorney General's currently contemplated enforcement positions and should be carefully considered when structuring compliance programs.

The regulations define a "service provider" to include an entity that does not qualify as a "business", but is directed by a "business" to collect personal information from California consumers on behalf of that business. For example even if a brokerage does not have $25 million in annual gross revenues but collects personal information of California consumers on behalf of an entity that is itself a "business," then the brokerage is a "service provider" under the draft regulations. Service providers have two primary obligations or limitations.

First, service providers may use personal information gathered from a California consumer solely to provide services to the business for which the information was collected. The personal information received for one or more businesses may be combined, but only to the extent necessary to detect data security incidents or protect against fraudulent or illegal activity. Second, if a service provider receives a request from a consumer to know what information is being collected or a request to delete his or her information, the service provider must either (a) comply with the request, or (b) notify the consumer that it is not complying with request and explain the basis for the denial. The service provider must also inform such consumer that the consumer should submit the request directly to the business on whose behalf the service provider collects and processes the information, and provide the business contact information.

3. Contractual Obligations

Finally, and related to the definition of a "service provider", certain "businesses" are adding contractual requirements with respect to brokers even though the brokers might not be directly subject to the CCPA and might not qualify as a "service provider". In particular, brokers can expect contractual provisions

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similar to the following to be inserted into agreements with a "business" subject to the CCPA:

> CCPA: California enacted enhanced privacy protections for its residents with the California Consumer Privacy Act (CCPA). Under the law, California residents have certain rights to request businesses to disclose the information that business collects about the consumer, the categories of sources from which that information is collected, the business purpose for collection and sharing information, and the categories of third parties with which the information is shared. To comply with business use provisions of the CCPA, we have added a CCPA compliance clause to our Agreement. The CCPA compliance clause requires each broker to affirmatively confirm that: (a) it will not sell any personal information for profit that the insurer(s) share with the broker; and (b) the broker will use personal information only for the business purpose for which it has been shared (broker-insurer services in this case).

This clause appears intended to capture the service provider concept, but might be inserted into agreements even though the broker is technically not a service provider under the proposed regulations.

Summary

The CCPA is bringing sweeping changes to data collection, use, and destruction for many entities doing business in California, including surplus line brokers. The obligations can arise directly from the statutes, from not-yet-finalized regulations, or contractually. Brokers should identify which, if any, CCPA obligations apply to them, and seek legal counsel if any potential applicability is not clear.