HUNTON& WILLIAMS

CLIENT ALERT

September 2008

Contacts

Lisa J. Sotto
200 Park Avenue
New York, NY 10166
(212) 309-1223
lsotto@hunton.com

Elizabeth H. Johnson
One Bank of America Plaza
Suite 1400
421 Fayetteville Street
Raleigh, NC 27601
(919) 899-3073
ehjohnson@hunton.com

Additional Lawyers
Cédric Burton
James A. Harvey
Jörg Hladjk
Natalie Hunt
Christopher Kuner
Ryan P. Logan
Manuel E. Maisog
Melinda McLellan
Randall S. Parks
Olivier Proust
Boris Segalis
Aaron P. Simpson
Rachel M. St. John
Bridget C. Treacy
Mason Weisz
John W. Woods, Jr.

Centre for Information Policy Leadership
Martin E. Abrams*
Paula J. Bruening
Fred H. Cate
Orson Swindle*

*Not a lawyer

California Affiliate-Sharing Restrictions Upheld

The Ninth Circuit recently upheld a provision of the California Financial Information Privacy Act (or "S.B. 1") that requires financial institutions to provide California consumers with an opportunity to opt out of sharing personal information with affiliates. In American Bankers Association v. Lockyer, the Ninth Circuit upheld but narrowed that affiliate-sharing provision of S.B. 1 to exclude the regulation of consumer report information as defined by the Fair Credit Reporting Act ("FCRA").

Affiliate-Sharing Restrictions of California S.B. 1

In 2003, the California legislature enacted S.B. 1, which regulates disclosures by financial institutions of California consumers' nonpublic personal information. S.B. 1 provided, in relevant part, that financial institutions could not share with their affiliates any nonpublic personal information about California consumers unless they had first "clearly and conspicuously notified the consumer annually in writing" and provided the consumer with a "reasonable opportunity" to object to the disclosure. By contrast, the Gramm-Leach-Bliley Act ("GLBA"), which also restricts disclosures of nonpublic personal information by financial institutions, imposes a requirement to provide an opt-out opportunity only with respect to disclosures to non-affiliates.

Legal Challenges to S.B. 1

Soon after S.B. 1 was enacted, the American Bankers Association, the Financial Services Roundtable and the Consumer Bankers Association sued the Attorney General of California, contending that the law's restrictions on affiliate sharing were preempted. The source of potential preemption was the FCRA, which governs the collection, use and disclosure of consumer report information, including an affiliate-sharing notice and opt-out regime, and provides that no state can impose any requirement or prohibition "with respect to the exchange of information among persons affiliated by common ownership or common corporate control."

The District Court initially held that no part of S.B. 1 was preempted by the FCRA. On appeal, however, the Ninth Circuit Court of Appeals overruled that decision and found that the FCRA preempted S.B. 1's affiliate-sharing provision only with regard to consumer report information, defined to include information regarding consumers' "credit worthiness, credit standing, credit capacity, character, general reputation,

personal characteristics, or mode of living," used to establish eligibility for credit, insurance or employment, among other permissible purposes.

Consequently, the Ninth Circuit remanded the case to the District Court to determine whether any portion of S.B. 1's affiliate-sharing provision survived preemption and whether such surviving portions could be severed from the portions that did not survive. On remand, the District Court ruled that no portion of the affiliate-sharing provision survived preemption and that, even if some aspect had survived, the court lacked the power to sever only those aspects that were preempted by the FCRA.

In a second appeal, the Ninth Circuit again reversed and held that, based on precedent and the intent of the California legislature, S.B. 1's affiliate-sharing provision survived to the extent not preempted by the FCRA, and further held that preempted aspects of S.B. 1 could be severed from the statute. As such, under the Court's interpretation of S.B. 1, financial institutions must provide their California consumers with notice and an opportunity to opt out of affiliate sharing of nonpublic personal information, but only to the extent such information is not consumer report information subject to the FCRA.

Implications of the Decision

Going forward, financial institutions (which is a term broadly defined under GLBA) need to revise their privacy notices and revisit their sharing of nonpublic personal information regarding millions of California consumers. Financial institutions that do business with California residents should carefully consider the types of information they collect, whether each type meets S.B. 1's definition of nonpublic personal information and, if so, whether that same information could be considered consumer report information for FCRA purposes. The outcome of that analysis will dictate which law's disclosure restrictions apply to each type of information. That analysis may well reveal that the majority of information financial institutions collect regarding California consumers may be shared with affiliates only after these consumers are provided with notice and an opportunity to opt out, either because the information constitutes nonpublic personal information subject to S.B. 1, or consumer report information subject to the FCRA. In either case, an opt-out opportunity must be provided for a financial institution to be able to share personal information with affiliates.

We Can Help

Hunton & Williams' Privacy and Information Management practice assists clients in developing, implementing and evaluating privacy and information security programs. We frequently advise on strategic information management in the face of evolving legal obligations. If you would like assistance in reviewing your entity's privacy practices or developing new policies or training programs, please contact us.