

Morrison & Foerster Client Alert.

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California's "Shine the Light" Law: Is Your Company in Compliance?

By Christine Lyon and David McDowell

In the past month, plaintiffs' lawyers have filed a number of class action lawsuits alleging that companies' websites fail to provide notices regarding disclosure of personal information under California's "Shine the Light" law. None of these suits allege that the companies are misusing personal information. All simply assert that the companies fail properly to identify a method for obtaining a disclosure of how the company shares information. The costs of non-compliance could be substantial—the statute provides for penalties of \$500 or \$3,000 per violation, depending on whether the violation is willful, plus attorney's fees. Given that plaintiff's lawyers appear to be looking through websites looking for violations, it is time for companies to do a quick check of their statutory compliance.

WHAT YOU SHOULD KNOW ABOUT THE SHINE THE LIGHT LAW

California's "Shine the Light" law (Section 1798.83 of the California Civil Code)¹ regulates the sharing of personal information about California customers with affiliated or unaffiliated third parties for third-party direct marketing purposes. The law is not limited to personal information collected online, making it necessary to consider data sharing practices with respect to customer data collected offline as well as online. A covered business must comply with detailed notice requirements under the Shine the Light law, unless it has made a commitment in its privacy policy either to (a) obtain a customer's opt-in consent to disclose his or her personal information to affiliates or other "third parties" for their direct marketing purposes (an "Opt-In Approach") or (b) allow customers to opt out from such disclosures of their personal information (the "Opt-Out Approach").² The Shine the Light law became effective on January 1, 2005, although enforcement actions have been rare until now.

¹ Links to the Shine the Light law, as well as other state, federal, and international privacy laws, are available through Morrison & Foerster's free online privacy library at www.mofoprivacy.com.

² Cal. Civ. Code 1798.83(c)(2) ("If a business that is required to comply with this section adopts and discloses to the public, in its privacy policy, a policy of not disclosing personal information of customers to third parties for the third parties' direct marketing purposes unless the customer first affirmatively agrees to that disclosure, or of not disclosing the personal information of customers to third parties for the third parties' direct marketing purposes if the customer has exercised an option that prevents that information from being disclosed to third parties for those purposes, as long as the business maintains and discloses the policies, the business may comply with subdivision (a) [of Cal. Civ. Code 1798.83] by notifying the customer of his or her right to prevent disclosure of personal information, and providing the customer with a cost-free means to exercise that right.")

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Is Your Business Covered by the Shine the Light Law? The Shine the Light law was designed to apply to any business that has:

- at least 20 employees, whether full-time or part-time;³
- an established business relationship with a California resident,⁴ primarily for personal, family, or household purposes (a “customer”); and
- within the immediately preceding calendar year, disclosed personal information⁵ to “third parties,” and knows or reasonably should know that the third parties used the personal information for the third parties’ direct marketing purposes.⁶

The Shine the Light law does provide certain exemptions for financial institutions regulated under federal or California law.⁷

Who Is a “Third Party”? Notably, the Shine the Light law defines “third parties” to include affiliates as well as unrelated third parties. Under the Shine the Light Law, a “third party” is any of the following:

- a business that is a separate legal entity from the business that has an established business relationship with a customer;
- a business that has access to a database that is shared among businesses, if the business is authorized to use the database for direct marketing purposes, unless the use of the database is exempt from being considered a disclosure for direct marketing purposes pursuant to [Cal. Civ. Code 1798.83](d);
- a business not affiliated by common ownership or common corporate control with the business required to comply with this law.

The Shine the Light law contains limited exceptions for certain disclosures, such as disclosures between businesses offering jointly-offered products or services, disclosures between financial institutions and businesses offering a private label credit card, affinity card, retail installment contract, or co-branded card program; disclosures between a licensed agent and its principals; and disclosures among affiliated entities that share the same brand name.⁸

What Is Required? Unless a covered business has adopted an Opt-In Approach or Opt-Out Approach as described above, it must provide customers with the following information upon request: (a) the categories of personal information

³ Cal. Civ. Code 1798.83(c)(1) (“A business with fewer than 20 full-time or part-time employees is exempt from the requirements of this section.”)

⁴ Cal. Civ. Code 1798.83(a).

⁵ “Personal information” is defined to include nearly all identifying information about the customer, including but not limited to information related to name and contact information, physical characteristics, education and occupation, race and religion, political party affiliation, children, medical condition and treatments, property or products obtained by the customer, and financial condition and creditworthiness. Cal. Civ. Code 1798.83(e)(7) (“Personal information” as used in this section means any information that when it was disclosed identified, described, or was able to be associated with an individual....”)

⁶ “Direct marketing purposes” is defined as “the use of personal information to solicit or induce a purchase, rental, lease, or exchange of products, goods, property, or services directly to individuals by means of the mail, telephone, or electronic mail for their personal, family, or household purposes. The sale, rental, exchange, or lease of personal information for consideration to businesses is a direct marketing purpose of the business that sells, rents, exchanges, or obtains consideration for the personal information.” Cal. Civ. Code 1798.83(e)(2). However, “Direct marketing purposes” does not include the use of personal information (A) by bona fide tax exempt charitable or religious organizations to solicit charitable contributions, (B) to religious organizations to solicit charitable contributions, (C) by a third party when the third party receives personal information solely as a consequence of having obtained for consideration permanent ownership of accounts that might contain personal information, or (D) by a third party when the third party receives personal information solely as a consequence of a single transaction where, as a result of the transaction, personal information has to be disclosed in order to effectuate the transaction.” *Id.*

⁷ Cal. Civ. Code 1798.83(b)(2); Cal. Civ. Code 1798.83(h).

⁸ Cal. Civ. Code 1798.83(d); Cal. Civ. Code 1798.83 (f)(1).

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disclosed to third parties for the third parties' direct marketing purposes during the prior calendar year,⁹ (b) the names and addresses of all of the third parties that received personal information during the preceding calendar year and, if the name does not indicate the nature of the third party's business, a "reasonable indication" of the third party's business.¹⁰ This information may be provided in a standardized format; it does not need to be specific to the individual.¹¹ A customer may make such a request no more than once during each calendar year.¹²

A business subject to the Shine the Light law also must designate a mailing address or email address to which customers can send requests for these disclosures. (Alternatively, the business can choose to receive these requests by telephone or facsimile, by providing a toll-free telephone or facsimile number for customers to use.) This method of contact must be announced by at least one of the following steps:

- (1) Notifying all agents and managers who directly supervise employees who regularly have contact with customers¹³ of the designated addresses or numbers or the means to obtain those addresses or numbers, and instructing those employees that customers who inquire about the business' privacy practices or compliance with this law shall be informed of the designated addresses or numbers or the means to obtain the addresses or numbers;¹⁴
- (2) Adding to the business' home page a link to a page titled "Your Privacy Rights" or adding the words "Your Privacy Rights" to the home page's link to the business' privacy policy. The link must comply with specified formatting requirements. The "first page of the link" shall describe the customer's rights under this law and provide the designated mailing address, email address, or toll-free-telephone or fax number as appropriate. If the business complies with all of the specified requirements for this approach, the business need not respond to requests that are not received at one of the designated addresses or numbers;¹⁵ or
- (3) Making the designated addresses or numbers, or means to obtain the designated addresses or numbers, readily available upon request of a customer at every place of business in California where the business or its agents regularly have contact with customers.¹⁶

Companies planning to rely on options (1) or (3) as their notice method, rather than providing this information in their website privacy policy, should take care to ensure that they qualify for these notice methods. The class action lawsuits

⁹ The law specifies the categories that must be included: name and address; email address; age or date of birth; names of children; email or other addresses of children; number of children; age or gender of children; height; weight; race; religion; occupation; telephone number; education; political party affiliation; medical condition; drugs, therapies, or medical products or equipment used; kind of product purchased, leased, or rented; real property purchased, leased, or rented; kind of service provided; Social Security number; bank account number; credit card number; debit card number; bank or investment account, debit card, or credit card balance; payment history; information pertaining to creditworthiness; assets; income or liabilities. Cal. Civ. Code 1798.83(e)(6)(A). Additionally, if a list, description or grouping of customer names or addresses is derived using any of these categories, and is disclosed to a third party for direct marketing purposes in a manner that permits the third party to identify, determine, or extrapolate any other listed categories of personal information from which the list was derived, those categories are considered personal information as well. Cal. Civ. Code 1798.83(e)(6)(B).

¹⁰ Cal. Civ. Code 1798.83(a).

¹¹ Cal. Civ. Code 1798.83(b)(3).

¹² Cal. Civ. Code 1798.83(c)(1).

¹³ The law defines the concept of "employees who regularly have contact with customers" as employees whose contact with customers is not incidental to their primary employment duties, and whose duties do not predominantly involve ensuring the safety or health of the business' customers. It includes employees whose primary employment duties are as cashier, clerk, customer service, sales, or promotion. It does not include employees whose primary employment duties consist of food or beverage preparation or service, maintenance and repair of the business' facilities or equipment, direct involvement in the operation of a motor vehicle, aircraft, watercraft, amusement ride, or similar equipment, security, or participation in a theatrical, literary, musical, artistic, or athletic performance or contest. Cal. Civ. Code 1798.83(e)(4).

¹⁴ Cal. Civ. Code 1798.83(b)(1)(A).

¹⁵ Cal. Civ. Code 1798.83(b)(1)(B).

¹⁶ Cal. Civ. Code 1798.83(b)(1)(C).

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challenge when a business can rely on forms of notice other than the website privacy policy.

The business must respond within 30 days to requests submitted to the designated addresses or numbers. Requests received by the business other than through the designated addresses or numbers must be provided within a reasonable period in the circumstances, not to exceed 150 days.¹⁷

CONCLUSION

Plaintiffs' lawyers are looking at your disclosures—you should as well. A quick review of your disclosure today could well protect against expensive and protracted class action litigation tomorrow. As Ben Franklin is credited with saying: An ounce of prevention is worth a pound of cure.

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

¹⁷ Cal. Civ. Code 1798.83(b)(1)(C).