

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 335 (Boerner Horvath)
Version: March 26, 2021
Hearing Date: June 8, 2021
Fiscal: Yes
Urgency: No
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SUBJECT

California Consumer Privacy Act of 2018: vessel information

DIGEST

This bill exempts from the California Consumer Privacy Act's right to opt out certain information related to vessels that is retained or shared between a vessel dealer and the vessel's manufacturer, if the information is shared in connection with a vessel repair covered by a vessel warranty or a recall, as specified.

EXECUTIVE SUMMARY

The California Consumer Privacy Act of 2018 (CCPA) grants consumers certain rights with regard to their personal information, including enhanced notice, access, and disclosure; the right to deletion; the right to restrict the sale of information; and protection from discrimination for exercising these rights. (Civ. Code § 1798.100 et seq.) It places attendant obligations on businesses to respect those rights. In the November 3, 2020, election, voters approved Proposition 24, which established the California Privacy Rights Act of 2020 (CPRA). The CPRA amends the CCPA, limits further amendment, and creates the California Privacy Protection Agency (PPA).

The author and sponsor assert that there is ambiguity about the ability to retain or share consumer information between dealers and manufacturers of various watercraft and other water-based transportation vessels. This bill addresses their concern by exempting from the CCPA right to opt out 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 effectuating or in anticipation of effectuating a vessel repair covered by a vessel warranty or a recall.

The bill is sponsored by the National Marine Manufacturers Association. It is supported by a number of vessel dealers and manufacturers, and various groups including the

Recreational Boaters of California. It is opposed by ACLU California Action, Privacy Rights Clearinghouse, Common Sense, and the Consumer Federation of California.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the CCPA, which grants consumers certain rights with regard to their personal information, including enhanced notice, access, and disclosure; the right to deletion; the right to restrict the sale of information; and protection from discrimination for exercising these rights. It places attendant obligations on businesses to respect those rights. (Civ. Code § 1798.100 et seq.)
- 2) Grants a consumer the right to request that a business that collects personal information about the consumer disclose to the consumer the following:
 - a) the categories of personal information it has collected about that consumer;
 - b) the categories of sources from which the personal information is collected;
 - c) the business or commercial purpose for collecting or selling personal information;
 - d) the categories of third parties with whom the business shares personal information; and
 - e) the specific pieces of personal information it has collected about that consumer. (Civ. Code § 1798.110.)
- 3) Provides consumers the right to request that a business that sells the consumer's personal information, or that discloses it for a business purpose, disclose to the consumer the following:
 - a) the categories of personal information that the business collected about the consumer;
 - b) the categories of personal information that the business sold about the consumer and the categories of third parties to whom the personal information was sold, by category or categories of personal information for each third party to whom the personal information was sold; and
 - c) the categories of personal information that the business disclosed about the consumer for a business purpose. (Civ. Code § 1798.115.)
- 4) Provides a consumer the right, at any time, to direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information. It requires such a business to provide notice to consumers, as specified, that this information may be sold and that consumers have the right to opt out of the sale of their personal information. (Civ. Code § 1798.120.)

- 5) Provides that the above opt-out provision does not apply to vehicle information retained or shared between a new motor vehicle dealer and the vehicle's manufacturer, if the vehicle or ownership information is shared for the purpose of effectuating, or in anticipation of effectuating, a vehicle repair covered by a vehicle warranty or a recall conducted pursuant to federal law, provided that the new motor vehicle dealer or vehicle manufacturer with which that vehicle information or ownership information is shared does not sell, share, or use that information for any other purpose. (Civ. Code § 1798.145(g).)
- 6) Prohibits a business from discriminating against a consumer because the consumer exercised any of the consumer's rights under the CCPA. (Civ. Code § 1798.125(a)(1).)
- 7) Defines "personal information" as information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. The CCPA provides a nonexclusive series of categories of information deemed to be personal information, including identifiers, biometric information, and geolocation data. (Civ. Code § 1798.140(o)(1).)
- 8) Provides various exemptions from the obligations imposed by the CCPA, including where they would restrict a business' ability to comply with federal, state, or local laws. (Civ. Code § 1798.145.)
- 9) Establishes the CPRA, which amends the CCPA and creates the PPA, which is charged with implementing these privacy laws, promulgating regulations, and carrying out enforcement actions. (Civ. Code § 798.100 et seq.; Proposition 24 (2020).)
- 10) Permits amendment of the CPRA by a majority vote of each house of the Legislature and the signature of the Governor provided such amendments are consistent with and further the purpose and intent of this act as set forth therein. (Proposition 24 § 25 (2020).)
- 11) Defines "vessel" to include every description of a watercraft or other artificial contrivance used or capable of being used as a means of transportation on water, except a seaplane on the water or a watercraft specifically designed to operate on a permanently fixed course, the movement of which is restricted to a fixed track or arm to which the watercraft is attached or by which the watercraft is controlled. (Harb. & Nav. Code § 651(aa).)
- 12) Defines "manufacturer" as any person engaged in any of the following:
 - a) the manufacture, construction, or assembly of boats or associated equipment;

- b) the manufacture or construction of components for boats and associated equipment to be sold for subsequent assembly; or
- c) the importation into this state for sale of boats, associated equipment, or components thereof. (Harb. & Nav. Code § 651(l).)

This bill:

- 1) Provides that Section 1798.120 shall not apply to vessel information or ownership information retained or shared between a vessel dealer and the vessel's manufacturer, as defined in Section 651 of the Harbors and Navigation Code, if the vessel information or ownership information is shared for the purpose of effectuating, or in anticipation of effectuating, a vessel repair covered by a vessel warranty or a recall conducted pursuant to Section 4310 of Title 46 of the United States Code.
- 2) Provides that the vessel dealer or vessel manufacturer with which the vessel information or ownership information is shared does not sell, share, or use that information for any other purpose.
- 3) Defines "vessel dealer" as 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 Section 651 of the Harbors and Navigation Code, and receives or expects to receive money, profit, or any other thing of value.
- 4) Defines "vessel information" as 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:
 - a) an inboard or outboard engine;
 - b) a stern drive unit; and
 - c) an inflatable personal flotation device, as provided.
- 5) Defines "ownership information" as the name or names of the registered owner or owners and the contact information for the owner or owners.

COMMENTS

1. Stated intent of the bill

According to the author:

Currently, boat and marine engine dealers send a buyer's contact information to the product's manufacturer. Manufacturers use this

information to verify warranty eligibility and to conduct safety recalls. Dealers use these data to verify the products' ownership and eligibility at the point of repair.

AB 335 will provide manufacturers the legal certainty they need to collect and retain this information and to use it to perform safety recalls while benefiting consumers who purchase these products with this limited use of data.

By allowing this limited sharing of information, consumers who buy products, such as vessels or marine engines, will receive important and timely safety recall information and easily confirm warranty verification. AB 335 would, specifically, [not] allow the use of this information for other purposes.

2. Exemptions for personal information related to warranties and recalls

The CCPA provides adult consumers the right, at any time, "to direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information. This right may be referred to as the right to opt-out." (Civ. Code § 1798.120(a).) Changes made by the CPRA extend this is opting out of the "sharing" of the personal information as well. A business is thereafter prohibited from selling (or sharing) that information unless consent is subsequently provided. A business that sells personal information to third parties is required to notify consumers that this information may be sold and that they have the right to opt out of such sales. (Civ. Code § 1798.120(a).)

The CCPA also grants consumer the right to request that a business delete any personal information about the consumer the business has collected from the consumer. (Civ. Code § 1798.105(a).) However, a business is not required to comply with such a request to delete if it is necessary for the business to maintain the consumer's personal information in order to carry out certain obligations or other conduct. (Civ. Code § 1798.105(d).)

a. Vehicle information

In 2019, AB 1146 (Berman, Ch. 751, Stats. 2019) was introduced in response to concerns about how the rights provided by the CCPA might interfere with the warranty and recall processes connected to motor vehicles. The concern was that if a car owner exercised their right to delete certain relevant information or opted out of the sale of that information, then the communication line between manufacturers and car dealers (and consumers) could be broken. AB 1146 therefore provided that a business is not required to comply with a consumer's request to delete the consumer's personal information if it is necessary for the business or service provider to maintain the

consumer's personal information in order to fulfill the terms of a written warranty or product recall conducted in accordance with federal law. (*See* Civ. Code § 1798.105(d)(1).)

It further provided that the CCPA right to opt out did not apply to vehicle information or ownership information retained or shared between a new motor vehicle dealer and the vehicle's manufacturer, as those terms are defined in the Vehicle Code, if the vehicle or ownership information is shared for the purpose of effectuating, or in anticipation of effectuating, a vehicle repair covered by a vehicle warranty or a recall conducted pursuant federal law. "Vehicle information" is defined as the vehicle information number, make, model, year, and odometer reading. "Ownership information" means the name or names of the registered owner or owners and the contact information for the owner or owners.

To ensure that this personal information was still afforded protection and the change did not allow a loophole for other secondary uses, the bill specifically provided that the new motor vehicle dealer or vehicle manufacturer with which the relevant vehicle information or ownership information is shared is prohibited from selling, sharing, or using that information for any other purpose.

b. Vessel information

The National Marine Manufacturers Association, the sponsor of this bill, explains the need for and the operation of the bill:

AB 335 uses the exact same language and framework as the Berman bill. Just as with cars, federal law requires recreational boat and engine manufacturers to be able to contact boat and marine engine owners regarding warranty and product safety recalls and to provide the instructions they need to have their boat or engine repaired without charge.

Currently, boat and marine engine dealers send a buyer's contact information to the product's manufacturer. Manufacturers use this information to verify warranty eligibility and to conduct safety recalls. Dealers use these data to verify the products' ownership and eligibility at the point of repair. In order for the process to work, the vessel manufacturer must know who bought the vessel or engine that is subject to a recall.

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 this limited sharing and retention of information, the [L]egislature will ensure that consumers receive important and timely safety recall information and can easily confirm warranty eligibility.

The bill provides that Section 1798.120, the section granting consumers the right to opt out of the sale (or sharing) of their personal information shall not apply to vessel information or ownership information retained or shared between a vessel dealer and the vessel's manufacturer, as defined in Section 651 of the Harbors and Navigation Code, if the vessel information or ownership information is shared for the purpose of effectuating, or in anticipation of effectuating, a vessel repair covered by a vessel warranty or a recall conducted pursuant to Section 4310 of Title 46 of the United States Code. That section of federal law provides:

If a recreational vessel or associated equipment has left the place of manufacture and the recreational vessel manufacturer discovers or acquires information that the manufacturer decides, in the exercise of reasonable and prudent judgment, indicates that a recreational vessel or associated equipment subject to an applicable regulation prescribed under [46 U.S.C. § 4302] either fails to comply with the regulation, or contains a defect that creates a substantial risk of personal injury to the public, the manufacturer shall provide notification of the defect or failure of compliance as provided . . . within a reasonable time after the manufacturer has discovered the defect. (46 U.S.C. § 4310.)

It also provides for such notices based on defects or compliance failures identified by the Secretary of Homeland Security. The notices must contain an undertaking by the recreational vessel manufacturer to take the corrective measures only at the manufacturer's cost and expense.

The bill prohibits the vessel dealer or vessel manufacturer with which the relevant vessel information or ownership information is shared from selling, sharing, or using that information for any other purpose.

The sponsors of the bill assert that this is a federal mandate and the CCPA must be amended to accommodate these communications. However, it should be noted that the CCPA already has broad exemptions. It specifically provides that the obligations it imposes on businesses cannot restrict a business' ability to comply with federal law. (Civ. Code § 1798.145(a)(1).)

3. Furthering the purpose and intent of the CPRA

Section 25 of the CPRA, passed by voters in November 2020, requires any amendments thereto to be "consistent with and further the purpose and intent of this act as set forth in Section 3." Section 3 declares that "it is the purpose and intent of the people of the

State of California to further protect consumers' rights, including the constitutional right of privacy." It then lays out a series of guiding principles. These include various consumer rights such as:

- consumers should know who is collecting their personal information;
- consumers should have control over how their personal information is used; and
- consumers should benefit from businesses' use of their personal information

Section 3 also includes a series of responsibilities that businesses should have. These include:

- businesses should specifically and clearly inform consumers about how they use personal information; and
- businesses should only collect consumers' personal information for specific, explicit, and legitimate disclosed purposes.

The section also lays out various guiding principles about how the law should be implemented.

This bill simply states: "The Legislature finds and declares that this act furthers the purposes and intent of The California Privacy Rights Act of 2020." The author argues that ultimately the bill effectuates a change to law that promotes consumer protections and therefore furthers the purpose and intent of the CPRA.

Writing in opposition, a coalition of groups including ACLU California Action, Privacy Rights Clearinghouse, and the Consumer Federation of California argue the bill is an impermissible amendment of the CPRA:

The fundamental purpose and intent of Proposition 24 was to protect consumer privacy and to stop further attempts to weaken privacy law in California in the future. This is evident from the text of Proposition 24 and direct statements from the authors, including those in the ballot summaries distributed to the electorate ahead of the 2020 election. Indeed, the authors of Proposition 24 published thirty-seven separate press releases between June 25 and November 4, 2020, and each and every one stressed that the initiative would prevent amendments to weaken privacy protections in the future. Any amending legislation therefore must strengthen consumer privacy and better protect consumers.

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. A new exception to California's privacy law is not necessary for interested Californians to get warranty information for their vessels.

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 intended to make it harder to pass laws that erode their newly gained CCPA protections. The purposes and intent of Proposition 24 were not ambiguous. The amendment restrictions embedded in Proposition 24 were intended to prevent precisely this situation. SB 335 does not further the purposes and intent of Proposition 24, and does not strengthen consumer privacy.

At root, this bill is limiting a right grant to consumers by the CCPA. Given the strength of the language in the CPRA restricting further amendment, this change to the CCPA arguably runs afoul of it and may be the subject of future litigation for the reasons articulated by those in opposition. Generally, adding provisions that facilitate critical safety measures that protect consumers, as recalls and repairs of defective products surely are, certainly furthers consumer protection. However, as pointed out by the opposition, consumers already have the choice to allow such communications to take place, and in fact that is the default. What this bill does is removes the ability of consumers to decide that they no longer wish for their personal information to be retained and shared in this manner.

In addition, if the goal is to ensure that manufacturers can communicate recall information to consumers, there are other methods that can be used to accomplish this that are not as susceptible to legal challenge and that do not take away consumer control. For instance, as with many other consumer products, such as infant car seats, consumers can be given the option of providing their contact information directly to manufacturers to receive all relevant recall information. This can be accomplished at the point of purchase and may even be a more reliable method of communication.

4. Support for the bill

Writing in support, a coalition of manufacturers explain their support:

With more than 745,600 registered boats, California is the third largest boating state, and Californians bought \$718 million in new boats, engines and trailers in 2018. The recreational marine industry supports 41,500 jobs and 2,800 businesses. Most certainly the manufacturers of those vessels should be able to verify warranties and contact owners in the event of a safety recall.

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.

Recreational Boaters of California writes in support:

Boaters as Californians value the privacy of their personal information that is protected by our state's California Consumer Privacy Act [CCPA]. At the same time, boaters are interested in having relevant information about their vessels, and expect that the manufacturers of their vessels should be able to verify warranties and contact owners in the event of a safety recall.

RBOC supports AB 335 that would ensure that the CCPA allows manufacturers of recreational boats and marine engines to receive and retain specific contact information for buyers of their products, for the limited and exclusive use of conducting product safety recalls and warranty verification as required by federal law. This will help ensure that boaters as consumers receive announcements about important and timely safety recall information and that their warranty eligibility can easily be confirmed.

SUPPORT

National Marine Manufacturers Association (sponsor)

Action Boats

Aktion Parks

Bass Cat

Bayliner

BoatUS

Boston Whaler

Brunswick Boat Group

Byrant

Centurion Boats

Chaparral

Chris-Craft

Correct Craft

Crestliner

Cypress Cay

Everglades Boats

Formula Boats

Harris

Heyday

Lowe Boats
Lund
Marine Recreation Association
Mercury Marine
Nautique
Parker
Pleasure Craft Engine Group
Princess Yachts America
Ranger Tugs
Recreational Boaters of California (RBOC)
Regulator
Sailfish Boats/Seminole Marine Group
Sea Ray
SeaArk
Skeeter Boats
Sportsman Boats
Supreme Boats
Suzuki Marine
Thunder Jet
Tiara Yachts
Volvo Penta
Water Craft Group
Watershed
Yamaha
Yar Craft

OPPOSITION

ACLU California Action
Common Sense
Consumer Federation of California
Privacy Rights Clearinghouse

RELATED LEGISLATION

Pending Legislation:

SB 746 (Skinner, 2021) amends the CCPA to require businesses to disclose whether they use the personal information of consumers for political purposes, as defined, to consumers, upon request, and annually to the Attorney General or the PPA. This bill is currently on the Senate Inactive File.

AB 694 (Assembly Committee on Privacy and Consumer Protection, 2021) makes various changes to the CCPA. This bill is currently in the Senate Judiciary Committee.

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AB 1490 (Chau, 2021) requires appointments of members of the PPA to be made from among Californians with expertise in privacy, technology, and consumer rights. This bill is currently on the Assembly Inactive File.

Prior Legislation:

AB 1146 (Berman, Ch. 751, Stats. 2019) *See* Comment 2.

AB 375 (Chau, Ch. 55, Stats. 2018) established the CCPA.

PRIOR VOTES:

Assembly Floor (Ayes 74, Noes 1)

Assembly Appropriations Committee (Ayes 14, Noes 0)

Assembly Privacy and Consumer Protection Committee (Ayes 11, Noes 0)
