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An attorney with Orrick, Herrington & Sutcliffe LLP and a law professor at UC Hastings College of the Law in San Francisco examine California's new privacy law and discuss jurisdictional issues raised by such a statute, zeroing in on the potential impact for foreign businesses.

INSIGHT: Regulating Data Privacy in an Interconnected World: How Far Does California's New Law Reach?

By Jennifer R. Martin and Chimene I. Keitner

In the absence of a comprehensive U.S. federal data privacy law, laws designed to protect consumers' data privacy have largely been enacted by state legislatures. As of this year, all 50 states have adopted state breach notification laws requiring companies to notify impacted individuals when their personal information is compromised. In addition to breach notification laws, states have been promulgating security requirements to ensure that companies doing business in their states have taken ''reasonable'' precautions to protect consumer data. More recently, following on the footsteps of the European Union's General Data Protection Regulation (GDPR) coming into force, California is the first state to enact a comprehensive data protection act, the California Consumer Privacy Act of 2018, which focuses on the sale and disclosure of consumer data collected by a particular set of businesses. It is likely that other states will follow suit; moreover, even if they do not enact their own similar state laws, California law may become the *de facto* national standard, in part because it is difficult for businesses to implement different data collection, use, and sharing requirements and technical operational systems, on a state-by-state basis.

The recent enactment of the California Consumer Privacy Act, which will take effect on January 1, 2020, coupled with the growing patchwork of state laws governing privacy and security, has resulted in foreign (non-U.S.) businesses questioning whether new requirements under the California privacy law, and other state privacy laws, extend to their activities and under what circumstances. Accordingly, it is worth revisiting some of the basic tenets of U.S. foreign relations law with respect to jurisdictional reach. In this article, we focus on California state laws, by way of example, to explore issues regarding a state's jurisdiction to regulate foreign entities doing business in that state, and whether such businesses are subject to enforcement actions brought by state agencies.

California State Law's Nexus to Regulate Foreign Entities

Most state law privacy initiatives define their coverage based at least in part on the identity of the *user* (or ''data subject'') rather than the physical location of the company. California's existing data breach notification law, for example, requires ''a person or business that conducts business in California, and that owns or licenses computerized data that includes personal information,'' to disclose certain breaches affecting the personal information of California residents. The state's ''Shine the Light'' law applies to businesses that have ''an established business relationship'' with a customer who is a resident of California, and who provides personal information to that business for certain purposes.

Similarly, the California Consumer Privacy Act creates new obligations for businesses that collect personal information from California consumers, regardless of where those businesses are located.

In addition to satisfying other threshold criteria, a company will be subject to the obligations imposed by the new law if it ''does business in the State of California'' (or if it controls or is controlled by such a business, and shares common branding with that business). A ''consumer'' protected by the Act means a natural person who is a California resident (as defined by a provision of the California Code of Regulations). Provided these requirements are satisfied, the California law is intended to apply to a company's activities regardless of where the company is headquartered or incorporated.

International Law

It seems clear that many companies that are not headquartered in California nonetheless ''do business'' in the state, as that term is generally understood, and may collect personal information from California residents. As an initial matter then, to understand California's jurisdictional reach, it is important to understand what is meant by the term ''jurisdiction'' in the context of foreign relations law.

U.S. foreign relations law, as set forth in the American Law Institute's Restatement (Fourth) of the Foreign Relations Law of the United States § 101 (Tentative Draft No. 3, March 10, 2017), divides jurisdiction into three categories:

- jurisdiction to *prescribe*, i.e., the authority of a state to make law applicable to persons, property, or conduct;
- jurisdiction to *adjudicate*, i.e., the authority of a state to apply law to persons or things, in particular through the processes of its courts or administrative tribunals;
- jurisdiction to *enforce*, i.e., the authority of a state to exercise its power to compel compliance with law.

Notably, authority over persons, property, or conduct might not be coextensive under each of these categories. As a general matter, there are relatively few limits on prescriptive jurisdiction, whereas there are practical barriers to exercising adjudicative and enforcement jurisdiction. U.S. law also contains both statutory and constitutional limits on the exercise of adjudicatory jurisdiction.

Prescriptive Jurisdiction

Although it might seem burdensome to suggest that foreign companies are subject to California law in addition to the laws of all the other places in which they do business, it is fairly routine for legislatures to *prescribe* rules governing the activities of foreign entities. Specifically, customary international law ''permits exercises of prescriptive jurisdiction if there is a genuine connection between the subject of the regulation and the state seeking to regulate.'' Restatement (Fourth) § 211. Moreover, even if one state has a stronger claim to regulate the activities of a particular business, that does not preclude other states from regulating the same aspect of a business's conduct. So long as one state's laws do not require conduct that would violate another state's laws, each state will expect the business to comply with applicable regulations.

In the case of the California law, the connections necessary to exercise prescriptive jurisdiction appear to be based on several factors, including the business's activities on California's territory (''doing business'' in the state), the presumed effects on California's territory of out-of-state activities (assuming that the company's activities impact consumers in California), and the identity of affected individuals as California residents (called the ''passive personality'' basis for jurisdiction). Although ''passive personality'' alone tends to be disfavored as an exclusive basis for exercising jurisdiction, the new California law applies only to a company or legal entity that ''does business'' in the State of California as an additional territorial link. Moreover, the law only applies to those businesses that satisfy one or more of the following thresholds:

(A) Has annual gross revenues in excess of twenty-five million dollars ($25,000,000) [after adjustments].

(B) Alone or in combination, annually buys, receives for the business' commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices.

(C) Derives 50 percent or more of its annual revenues from selling consumers' personal information.

Whether the connection required by the statute, or some lesser nexus with a state, is sufficient to establish a ''genuine connection'' for exercising prescriptive jurisdiction over a foreign business could prove a focal point for pushing back against the reach of state consumer privacy laws.

Adjudicative and Enforcement Jurisdiction

Although international law only requires a ''genuine connection'' for a state to exercise prescriptive jurisdiction, additional questions arise about whether a particular foreign entity comes within the jurisdiction of a country's administrative, criminal, or civil authorities for purposes of adjudication and enforcement. The answer generally turns on limits imposed by U.S. domestic, rather than international, law.

Various U.S. legal doctrines limit the extraterritorial reach of state and federal laws as a practical matter. Federal and California criminal procedure law generally require the personal presence of the defendant in order for a case to proceed. Accordingly, federal criminal charges filed against foreign nationals often will not proceed to trial unless and until the defendants are extradited or otherwise apprehended.

With respect to privacy-related enforcement actions, including actions to combat unfair or deceptive practices under Section 5 of the Federal Trade Commission Act, the Federal Trade Commission (FTC) has statutory authority with respect to acts or practices involving foreign commerce that (i) cause or are likely to cause reasonably foreseeable injury within the United States; or (ii) involve material conduct occurring within the United States. State authorities may also take action in conjunction with the FTC, or initiate actions on their own. Specifically, the California Attorney General has authority under the California Civil Code to bring actions to assess civil penalties under certain statutes, e.g., the Confidentiality of Medical Information Act, and authority under the Business and Professions Code to bring actions for injunctive and other relief to enforce the Unfair Competition Law.

The ability of agencies to initiate proceedings in federal and state courts is also limited by personal jurisdiction requirements, specifically, the due process requirements of the Fifth (for federal proceedings) and Fourteenth (for state proceedings) Amendments. General personal jurisdiction gives a court the authority to adjudicate any claim against the defendant, regardless of subject-matter. Specific personal jurisdiction gives a court the more limited authority to adjudicate particular claims that have a sufficient connection to the forum. The Supreme Court stated in *Goodyear Dunlop Tires Operations S. A. v. Brown*, 564 U.S. 915 (2011) that a defendant may be subject to general personal jurisdiction if it is ''essentially at home'' in the forum state; however, a defendant that is *not* subject to general jurisdiction will only be subject to specific jurisdiction if there is a sufficient connection between the forum (here, the state of California) and the claim.

Based on these requirements, because the California Consumer Privacy Act only extends protections to California residents with whom foreign businesses are transacting business, the California law likely provides a sufficient connection for establishing personal jurisdiction. That said, establishing personal jurisdiction also requires effective service of process on the defendant, as addressed recently by the Supreme Court in *Water Splash Inc. v. Menon,* 137 S.Ct. 1504 (2017). Moreover, even where personal jurisdiction exists, any adverse judgment or penalties could be difficult to enforce unless a particular defendant has assets within the forum or in another jurisdiction that is willing to enforce a foreign judgment under the enforcing state's domestic law.

Conclusion

Given that new state efforts to protect residents' consumer data are likely enforceable against foreign businesses when the business has a sufficient commercial connection to the state, absent some federal law to harmonize requirements, businesses operating in multiple state jurisdictions will increasingly be subject to a variety of regulatory frameworks, regardless of the physical location of the business's primary operations.

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