

Calif. Smart-Meter Data Law Hints At Privacy Bills To Come

By Erin Coe

Law360, San Diego (January 24, 2014, 10:47 PM ET) -- A new California law requires businesses to obtain consent before sharing consumers' electrical or gas consumption data with a third party, as well as disclose who will receive the information and how it will be used — a sign that more state legislation is on the horizon to regulate companies' use of the data they collect, lawyers say.

A.B. 1274, which took effect on Jan. 1, extends privacy requirements on utilities to Internet service providers and other businesses with access to customers' smart-meter data, barring these businesses from giving the data to a third party without customer consent. They need to mention who will receive the data and how they plan to use it in addition to putting reasonable procedures in place to properly secure and dispose of it. The measure further allows customers to bring a private right of action seeking actual damages of up to \$500 for each willful violation of the law.

Smart meters can help customers better manage their energy consumption, but they can also track individuals' daily patterns of activity, how much energy they use, and when they may or may not be home. This has raised questions about how the information could be used by third parties such as law enforcement and marketers. While the new law addresses concerns over smart meters, it also suggests that more industry-specific bills addressing particular devices and information-gathering practices could follow in California, said Morgan Lewis & Bockius LLP partner W. Reece Hirsch.

"The issues with smart meters are the same issues with grocery club cards that transmit data on consumers' purchases, smart DVRs that track what consumers are viewing and smartphones that send out GPS data on users' daily physical movements," he said. "I think A.B. 1274 is probably a sign of legislation to come."

He said the new California law is the first step toward regulating "the Internet of things" — a phrase coined by Federal Trade Commission Chairwoman Edith Ramirez that refers to connected devices that can communicate with consumers, transmit data back to companies and collect data for third parties. While privacy legislation has generally focused on limiting the disclosure of sensitive information, Hirsch said that A.B. 1274 hints that there could be future measures seeking to regulate how companies use data as consumer awareness grows about the kinds of information various devices collect.

"So many devices are transmitting complex and detailed data sets about individual behavior, and we'll probably see more of a focus down the road on making sure that data doesn't fall into the wrong hands," Hirsch said. "Legislators are likely to struggle with [questions like:] ... When does a business know too much about you, or if it knows information, what should the business be doing with it?"

Justine Phillips, special counsel at Sheppard Mullin Richter & Hampton LLP, said she could see legislation like A.B. 1274 being proposed for the mobile application industry, especially in light of the California attorney general's push over the last year for companies to post privacy policies for their mobile apps.

"I do think the mobile app industry will be legislated more heavily," she said. "Not all app providers disclose what they are doing with the massive data they collect and with whom they're sharing it."

Consumers often don't realize they've enabled all kinds of applications on their mobile devices that are tracking their location and habits, but recent events like high-profile data breaches at Target Corp. and Neiman Marcus Group Ltd. LLC could make consumers increasingly sensitive to how their private information is being maintained and by whom, Phillips said.

"When consumers realize that a company knows a lot more about them than they are comfortable with and the public starts to object, that tends to be when the issue becomes politically popular and legislation starts to gain traction," Hirsch said.

But Tanya Forsheit, a founding partner of InfoLawGroup LLP, said she was not so sure A.B. 1274 was going to be a jumping-off point for additional industry-specific legislation. At the state level, she said, legislators have been busy churning out privacy laws that apply across industry sectors, such as one measure mandating that operators who collect personal information disclose whether they honor Web browser do-not-track signals, and another requiring websites and mobile apps to permit minors to delete their photos and other potentially embarrassing postings.

"I don't think picking and choosing particular industries and continuing to create a complicated patchwork quilt of laws is the way to go for protecting consumers or for providing guidance for organizations to comply," she said. "I think that the self-regulatory efforts that many different industries are engaged in ... are probably more important than attempts to push down broad-based legislation or industry-specific legislation that will make compliance more complicated and costly."

The federal government also has started to look more closely at the information collected by consumer devices, with the FTC in November holding a conference on the concept of "the Internet of things." And while the FTC may end up addressing information-gathering devices through guidance documents rather than regulation, the absence of federal rules has never stopped the California Legislature from taking action and driving the debate over privacy issues, according to Hirsch.

"I think this new law is just another example of California leading the nation when it comes to legislation favoring consumer privacy and data security," Phillips said.

--Editing by Elizabeth Bowen.