A meeting of the California Law Revision Commission was held in Sacramento on February 7, 2003.

Commission:

Present:  David Huebner, Chairperson
          Diane F. Boyer-Vine, Legislative Counsel
          Joyce G. Cook
          Desiree Icaza Kellogg
          Edmund L. Regalia
          William E. Weinberger

Absent:   Frank Kaplan, Vice Chairperson
          Bill Morrow, Senate Member

Staff:    Nathaniel Sterling, Executive Secretary
          Brian P. Hebert, Staff Counsel

Consultants:  None

Other Persons:

Genevieve Diane Colborn, Personal Insurance Federation of California, Sacramento
Diana Dorame, State Bar Family Law Section, Executive Committee, Napa
Donna Ferebee, Victim Compensation and Government Claims Board, Sacramento
John Hancock, State Bar Business Law Section, Financial Institutions Committee, Oakland
Robert Herrell, Office of Senator Jackie Speier, Sacramento
Elizabeth A. Huber, State Bar Business Law Section, Consumer Financial Services Committee, El Segundo
Kia Jorgensen, Wallace, Puccio & Garrett, Sacramento
Gene Mansfield, Advocate, Sacramento
S. Guy Puccio, Executive Council of Homeowners, Wallace, Puccio & Garrett, Sacramento
Stan Wieg, California Association of Realtors, Sacramento
Garrett Williams, State Farm Insurance Company, Sacramento
Dana Winterowd, Department of Consumer Affairs, Office of Privacy Protection, Sacramento
Minutes of December 13, 2003, Commission Meeting

The Commission approved the Minutes of the December 13, 2002, Commission meeting as submitted by the staff, subject to the following correction:

On page 4, line 14, “1378(b)” should be “1378.070(b)”.

Administrative Matters

Commission Membership

The Executive Secretary reported that Julia Sylva resigned her appointment to the Commission immediately prior to the December 13, 2002, meeting. The Governor has not yet named a replacement.

The Executive Secretary reported that the Governor’s appointments of Frank Kaplan, Desiree Icaza Kellogg, Edmund L. Regalia, and William E. Weinberger to the Commission were this day confirmed by the Senate.

Commission Budget

The Commission discussed the Governor’s budget proposal that would eliminate the general fund allocation for the Commission. The Commission agreed it would seek the necessary budget allocation through the regular legislative budget process. The Commission also directed the staff to consider the possibility of a public-private collaboration; this would have to be done in such a way that it would not affect the Commission’s neutrality. The public-private alternative should be a low priority; the focus should remain on the regular legislative budget process.
Commission Member Per Diem Allowances  
Commission members present at the meeting expressed an interest in waiving their per diem allowances ($100 for each day’s attendance at a Commission meeting) for the remainder of the fiscal year, in consideration of the state’s fiscal situation and in the interest of reducing meeting expenses (see discussion immediately below). The Commission directed the staff to prepare and send to Commission members the necessary paperwork to enable them to waive their per diem allowances.

Meeting Schedule  
The Commission considered its meeting schedule for 2003 in light of demands on staff time, in the interest of minimizing expenses, and in light of Budget Letter 03-02 (relating to annual meetings for state advisory boards and commissions). Of the meetings previously scheduled for 2003, the Commission decided to reduce the March meeting to one day, eliminate the April meeting, and make the June meeting a two-day meeting in Los Angeles. The Commission will consider the remainder of the 2003 meeting schedule at a later time, when the situation for the next fiscal year becomes more clear.

With these revisions, the meeting schedule for the remainder of the current fiscal year is:

<table>
<thead>
<tr>
<th>Month 2003</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>March 2003</td>
<td>Sacramento</td>
</tr>
<tr>
<td>March 7 (Fri.)</td>
<td>10:00 am – 5:00 pm</td>
</tr>
<tr>
<td>April 2003</td>
<td>No Meeting</td>
</tr>
<tr>
<td>May 2003</td>
<td>No Meeting</td>
</tr>
<tr>
<td>June 2003</td>
<td>Los Angeles</td>
</tr>
<tr>
<td>June 5 (Thur.)</td>
<td>10:00 am – 5:00 pm</td>
</tr>
<tr>
<td>June 6 (Fri.)</td>
<td>9:00 am – 4:00 pm</td>
</tr>
</tbody>
</table>

Employee Matters  
The Commission held a closed session with the Executive Secretary to consider employee matters. The Executive Secretary reported that he does not plan to initiate layoff proceedings as a result of the Governor’s budget proposal, since he anticipates that the Commission will receive a sufficient budget allocation in the legislative budget process. The Commission approved the Executive Secretary’s plan to fill the vacant Assistant Executive Secretary
position at the full time level without change of classification, by promotion from within the agency.

STUDY B-400 – FINANCIAL PRIVACY

The Commission considered Memorandum 2003-1, relating to financial privacy. The Commission also heard general comments of the Personal Insurance Federation of California, a written copy of which is attached to the First Supplement to Memorandum 2003-1.

The Commission made the following decisions with respect to the issues raised in the memorandum.

Scope of Project

General

The Commission decided that, at least initially, it would limit the scope of this study to transactions that would be subject to the Gramm-Leach-Bliley Act and the Fair Credit Reporting Act. The staff will prepare material for the next meeting that elaborates the scope of coverage of those statutes. The staff should also suggest whether there is a general standard that might be used to distinguish “financial” from other commercial transactions.

Attorneys and Others in a Confidential Relationship

With respect to possible exemption from general privacy provisions of attorneys and others in a confidential relationship, the Commission requested further staff research on which specific confidential relationships could be affected.

Preemption

The staff suggested that any statute drawn by the Commission should include a deferred operative date and a mechanism whereby the state may apply for a preemption determination by the Federal Trade Commission, at least with respect to the Gramm-Leach-Bliley Act. The staff will research how much time, realistically, should be allowed for the preemption determination.

The Commission observed that various federal regulatory schemes have different preemption approaches. The Commission will investigate the possibility that Gramm-Leach-Bliley would be construed to override the various specialty regulatory statutes insofar as privacy issues are concerned.
The Commission agreed with the staff recommendation that, at least for purposes of any tentative regulation circulated for comment, state legislation should preempt local regulation in the field. In order to ensure that this approach is upheld in the courts, it may be useful to include in the state legislation a finding that this is a matter of statewide importance, rather than a municipal affair, and that local preemption is therefore necessary.

**Interstate Commerce**

The Commission discussed potential problems for financial institutions in complying with differing privacy regulations among the various states. The Commission noted that this sort of problem is not new. For example, pursuant to the federal Truth in Lending Act (Regulations Z and M) states have adopted disclosure requirements, which, though complex, have not precluded businesses from operating satisfactorily. There may be some experience in that area we can look to for guidance.

The Commission felt that as a matter of general policy, state law should seek to track federal definitions, categories, and concepts, so as to facilitate compliance by financial institutions.

**Types of Information Controlled**

The Commission discussed the distinction between publicly available information and nonpublic information that may be personally identifiable, within the meaning of federal law. One approach is to distinguish between sources of the information — if provided to a financial institution by the consumer it would be protected, and if obtained by the financial institution from public sources it would not be. The Commission will further research this matter, in particular with respect to the intent of the Gramm-Leach-Bliley Act and implementing regulations.

The Commission also discussed interaction of general financial privacy statutes with specific privacy statutes applicable in various contexts, such as medical information privacy regulations. The staff will attempt to catalog the various provisions. The basic presumption should be that the general statutes do not override the special statutes, although the Commission may want to revisit that concept when we have a complete list. In particular, if the general financial privacy statute is more protective of consumer rights than the special statute, that will require careful attention.
Opt In v. Opt Out

Affiliates

The Commission agreed with the staff recommendation that the Commission should hold off making policy decisions on issues relating to information sharing between affiliates until it has collected more information on the matter.

The Commission requested further information concerning how the Connecticut and North Dakota financial privacy statutes treat consumer control of affiliate sharing.

The Personal Insurance Federation of California pointed out that, at least with respect to the insurance industry, an affiliate structure is standard for legal and other reasons, and suggested that any treatment of information sharing by affiliates must recognize that fact. The Commission requested further information relating to the nature of affiliate relationships in the insurance industry and the legal requirements that lead to such an affiliate structure.

It was also suggested that the federal position on affiliate sharing may be inconsistent with the basic approach of the state to licensure and regulation of affiliates. Whereas the federal regulatory approach is to control the parent or holding company, the state regulatory approach is to control the affiliate. See, e.g., Ops. Atty. Gen. 84-903 (1985).

Joint Marketing Agreements

The Commission raised the issue whether under the Gramm-Leach-Bliley Act there is any restriction on the size of an entity that may enter into a joint marketing agreement and thereby qualify to share information without an opportunity for consumer control. The Commission requested further information about the law and practice in the area, and treatment of this issue in other jurisdictions.

Unaffiliated Third Parties

The Commission inquired about the extent to which financial institutions may transfer customer financial information to unaffiliated third parties, and how significant a source of revenue this is. Persons in attendance at the meeting did not have this information available. It was suggested, however, that the dispersion of nonpublic personal information to third parties is not necessarily directly related to identity theft — it is the type of information transferred that is critical. For example, a person’s account balance may not be helpful to an identity
thief, whereas the person’s social security number and account number would be.
The staff will conduct further research on these issues.

Facilitate Transactions

The Commission agreed with the principle that the law should allow sharing of personal information for the purpose of facilitating the specific transaction requested by the consumer.

Privacy Notices

The Commission discussed issues related to the understandability of the privacy notice and adequacy of communication to consumers of their opportunity to control sharing of their personal information. Among the suggestions made were that the law allow privacy notices to be consolidated, that the law prescribe general standards of readability rather than specific forms (subject to review of a regulatory authority), and that the law not regulate opt in notices, only opt out notices. The Commission deferred decision on these matters.

International Competition

The Commission agreed that as a general policy, it would seek to propose statutory regulation that would be not inconsistent with foreign regulation (see, e.g., the EU Safe Harbor), so as to facilitate the ability of entities doing business in California to be competitive in international commerce.

State Regulators

The Commission discussed, but did not decide, issues relating to rulemaking by state regulators. Among the questions the Commission will consider during the course of the project are what issues, if any, should be referred to state regulators, what standards are appropriate to govern state regulations, and whether a single regulator should be designated for all privacy-related issues.

Remedies

The Commission discussed the adequacy and inadequacy of various civil and administrative remedies for privacy violations. The Commission was not inclined to limit the scope of its investigation, at least at this point in the study.
Jurisdictional Issues
The Commission noted possible long arm jurisdictional problems in enforcing state privacy rights, particularly where electronic transactions are involved. The Commission will not seek to address these problems as part of this study because they are broader than privacy issues. However, the Commission will bear them in mind as it proceeds through the study.

Retroactivity
The Commission noted the need for further research on the extent to which state privacy regulations can limit information sharing pursuant to contracts in effect at the time state law is enacted. The Commission will also further research the possible need to provide a deferred operative date or another mechanism to allow time for a Federal Trade Commission preemption determination, and for any forms that require revision or implementing regulations that must be adopted.