

## E-ALERT | Global Privacy & Data Security

January 28, 2011

### NEW YORK BILL WOULD REQUIRE CONSENT BEFORE SHARING CONSUMER INFO AND MANDATE DATA INSPECTION AND CORRECTION OPPORTUNITIES

A bill is pending in the New York State Assembly that would require a wide variety of online businesses to obtain consent before sharing consumer personal information with third parties. The bill ([A.1324](#)) also would require online businesses to permit consumers to inspect and correct errors in their personal information. The scope of the bill's provisions is broad and potentially could cover ISPs, mobile data services, cloud computing services, websites and many other types of online providers.

The bill currently is before the Consumer Affairs and Protection Committee of the Assembly, the state's lower house. The bill has seven co-sponsors, all Democrats and all but two of whom represent New York City. Six of its co-sponsors introduced an identical bill in the previous Assembly session.

The bill's stated purpose is to prevent identity theft. However, its often ambiguous and broad provisions are likely to raise concern among businesses and, potentially, privacy advocates.

#### SERVICES COVERED

Although ambiguous, the bill appears to govern, at a minimum, ISPs, other data provision services, cloud computing services, websites, and other online services and applications for which consumers must register or pay. Depending on how the bill's terms are construed, it also could govern other online services for which neither registration nor payment is required.

Specifically, the bill protects "subscribers" who employ a service that offers "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information using computer-based telecommunications." It also addresses any "service that permits a subscriber to retrieve stored information from or file information for storage in information storage facilities, electronic publishing or an electronic messaging service." The term "subscriber" is not defined, so it is not clear whether the bill merely covers services for which customers must register or pay, or whether "subscriber" simply refers to any user of a service.

#### DATA COVERED

The bill's provisions apply to "personal information," which is defined as any data that "identifies either a specific file or service utilized" in combination with information that identifies "the subscriber and/or such subscriber's online computer address." Although the bill does not define or elaborate on the type of information that would identify a file, service or subscriber and does not define the term "online computer address," it is likely that these terms are intended to refer to cookie files or other tracking mechanisms, traditional personally identifiable information such as a subscriber's name, home address, or Social Security number, and information such as an IP or MAC

addresses. If so, then the bill in effect seeks to require consumer consent before any such information could be shared with most third parties.

## CONSENT REQUIREMENT

The bill would prohibit “disclosure” (meaning sale, rental, or other dissemination) of personal information unless the subscriber has received “clear and conspicuous” notice of the disclosure and has granted consent. The required notice must be given as a “separate statement” (thereby suggesting that it cannot be provided in the context of a broader privacy policy) and must state the nature of information to be collected, how it is to be used, the types of persons to whom it will be disclosed, the period of retention, and how the subscriber may access the information for purposes of the inspection and correction requirement described below. The disclosure must be made (1) at the time of entering into an agreement to provide an on-line computer service to a subscriber, and (2) “at such time when a service is obtained.”

The bill contains only limited exceptions to this notice and consent requirement, permitting disclosure without such notice and consent only (a) where necessary to render or conduct business or provide service to the subscriber, (b) when made pursuant to a court order, (c) for purposes of extending credit or for a credit/check transaction, or (d) to fulfill the inspection and correction requirement.

## INSPECTION AND CORRECTION REQUIREMENT

The bill requires that “upon request a subscriber shall be provided access to all personal information regarding such subscriber that is collected and maintained by an on-line computer service.” The information must be made available at “reasonable times” and may be made available electronically. The subscriber must be given “reasonable opportunity” to correct errors in information collected. If the subscriber and on-line computer service disagree about whether the information is erroneous, the subscriber must be permitted to file a statement concerning the dispute (it is not specified with whom the statement should be filed).

## ENFORCEMENT

Importantly, the bill contains a private right of action and allows consumers to sue for any alleged violation of the proposed law and obtain damages and court orders compelling remedial action. The state attorney general also may bring suit to enforce the bill’s requirements. A company cannot be held liable if it can show that the violation was unintentional and resulted from a “bona fide error” made notwithstanding the maintenance of procedures reasonably designed to avoid the error.

\* \* \*

The prospect of the bill’s passage remains uncertain, but the bill follows a growing advocacy trend toward a more explicit and robust consent requirement for the disclosure of tracking data to third parties. We are following this and related developments closely.

---

If you have any questions concerning the material discussed in this client alert, please contact the following members of our global privacy & data security practice group:

<b>Yaron Dori</b>	202.662.5444	<a href="mailto:ydori@cov.com">ydori@cov.com</a>
<b>Erin Egan</b>	202.662.5145	<a href="mailto:eeegan@cov.com">eeegan@cov.com</a>
<b>Dan Kahn</b>	202.662.5539	<a href="mailto:dkahn@cov.com">dkahn@cov.com</a>

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to [unsubscribe@cov.com](mailto:unsubscribe@cov.com) if you do not wish to receive future emails or electronic alerts.

© 2011 Covington & Burling LLP, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401. All rights reserved.