

# Client Alert

A report  
for clients  
and friends  
of the firm    **November 2003**

## California Passes Nation's First State On-line Privacy Policy Law

*A new state law is about to go into effect that requires operators of commercial Internet sites or on-line services to take more extensive steps to ensure that consumers are aware of businesses' Web site privacy policies. Businesses that gather identifying personal information about California residents must now conspicuously post their privacy policies on their Web sites or on-line services, conform policies to meet certain requirements, and abide by those policies. In addition, businesses should realize that the law imposes liability for negligent, as well as intentional, violations.*

California recently passed, and outgoing Governor Davis signed, the nation's first state on-line privacy policy law.<sup>1</sup> The new law is scheduled to go into effect on July 1, 2004. Requiring operators to post their privacy policies is a significant change in the law, as businesses formerly only did so voluntarily. Businesses risk violating the statute if they fail to post their privacy policies within 30 days of being notified of noncompliance. However, businesses should take preemptive steps prior to July 1, 2004 to avoid non-compliance concerns.

### What the Law Does

California's new law applies to "operators" of Internet services, defined as a "person or entity that collects personally identifiable information from California residents through an Internet Web site or on-line service for commercial purposes." Thus, most businesses providing products or services on-

<sup>1</sup> This is the text of the law:

SECTION 1. This act shall be known as, and may be cited as, the Online Privacy Protection Act of 2003.

SEC. 2. The Legislature finds and declares all of the following:

- (a) Each operator of a commercial Web site or online service has an obligation to post privacy policies that inform consumers who are located in California of the Web site's or online service's information practices with regard to consumers' personally identifiable information and to abide by those policies.
- (b) It is the intent of the Legislature to require each operator of a commercial Web site or online service to provide individual consumers residing in California who use or visit the commercial Web site or online service with notice of its privacy policies, thus improving the knowledge these individuals have as to whether personally identifiable information obtained by the commercial Web site through the Internet may be disclosed, sold, or shared.
- (c) It is the intent of the Legislature that Internet service providers or similar entities shall have no obligations under this act related to personally identifiable information that they transmit or store at the request of third parties.

SEC. 3. Chapter 22 (commencing with Section 22575) is added to Division 8 of the Business and Professions Code, to read:

#### CHAPTER 22. INTERNET PRIVACY REQUIREMENTS

22575. (a) An operator of a commercial Web site or online service that collects personally identifiable information through the Internet about individual consumers residing in California who use or visit its commercial Web site or online service shall conspicuously post its privacy policy on its Web site, or in the case of an operator of an online service, make that policy available in accordance with paragraph (5) of subdivision (b) of Section 22578.

An operator shall be in violation of this subdivision only if the operator fails to post its policy within 30 days after being notified of non-compliance.

(b) The privacy policy required by subdivision (a) shall do all of the following:

- (1) Identify the categories of personally identifiable information that the operator collects through the Web site or online service about individual consumers who use or visit its commercial Web site or online service and the categories of third-party persons or entities with whom the operator may share that personally identifiable information.
- (2) If the operator maintains a process for an individual consumer who uses or visits its commercial Web site or online service to review and request changes to any of his or her personally identifiable information that is collected through the Web site or online service, provide a description of that process.
- (3) Describe the process by which the operator notifies consumers who use or visit its commercial Web site or online service of material changes to the operator's privacy policy for that Web site or online service.
- (4) Identify its effective date.

line are affected by the statute if they collect personal information, such as first and last names, of their customers. The law requires an operator of a commercial Web site to conspicuously post its privacy policy on its Web site. An operator of an on-line service may post on its Web site, or has the option of using any other "reasonably accessible" means of providing its privacy policy to consumers. The law imposes substantive requirements on operators as well, requiring privacy policies to identify the categories of personal information collected. In addition, policies must identify the categories of third-party persons or entities with whom personal information may be shared. If operators offer a process for consumers to review and request changes to their personal information, the law further requires that operators provide a description of that process for consumers. Operators must describe the process by which they notify users of their Web sites or on-line services of material changes to their privacy policies. Finally,

operators must identify the effective dates of their privacy policies.

### Technical Requirements

The law requires that operators "conspicuously post" their privacy policies. Under the statute, operators may accomplish this in various ways. A Web page containing the actual privacy policy will suffice, so long as it is the home page or the first significant page a user encounters after entering the Web site. Alternatively, operators may provide a hyperlink icon to the policy. The icon must include the word "privacy" and must be distinguishable from the background color of the Web page. Finally, a text hyperlink will comply with the law if it includes the word "privacy," written in capital letters equal to or greater in size than the surrounding text, or is otherwise set off from the surrounding text by size, font, color or symbols. All hyperlinks, whether icons or text, must appear on the home page or the first significant page a user encounters.

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1 (cont'd)

22576. An operator of a commercial Web site or online service that collects personally identifiable information through the Web site or online service from individual consumers who use or visit the commercial Web site or online service and who reside in California shall be in violation of this section if the operator fails to comply with the provisions of Section 22575 or with the provisions of its posted privacy policy in either of the following ways:

- (a) Knowingly and willfully.
- (b) Negligently and materially.

22577. For the purposes of this chapter, the following definitions apply:

(a) The term "personally identifiable information" means individually identifiable information about an individual consumer collected online by the operator from that individual and maintained by the operator in an accessible form, including any of the following:

- (1) A first and last name.
- (2) A home or other physical address, including street name and name of a city or town.
- (3) An e-mail address.
- (4) A telephone number.
- (5) A social security number.
- (6) Any other identifier that permits the physical or online contacting of a specific individual.
- (7) Information concerning a user that the Web site or online service collects online from the user and maintains in personally identifiable form in combination with an identifier described in this subdivision.

(b) The term "personally identifiable information" means individually identifiable information about an individual consumer collected online by the operator from that individual and maintained by the operator in an accessible form, including any of the following:

(b) The term "conspicuously post" with respect to a privacy policy shall include posting the privacy policy through any of the following:

- (1) A Web page on which the actual privacy policy is posted if the Web page is the homepage or first significant page after entering the Web site.
- (2) An icon that hyperlinks to a Web page on which the actual privacy policy is posted, if the icon is located on the homepage or the first significant page after entering the Web site, and if the icon contains the word "privacy." The icon shall also use a color that contrasts with the background color of the Web page or is otherwise distinguishable.
- (3) A text link that hyperlinks to a Web page on which the actual privacy policy is posted, if the text link is located on the homepage or first significant page after entering the Web site, and if the text link does one of the following:
  - (A) Includes the word "privacy."
  - (B) Is written in capital letters equal to or greater in size than the surrounding text.
  - (C) Is written in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.
- (4) Any other functional hyperlink that is so displayed that a reasonable person would notice it.
- (5) In the case of an online service, any other reasonably accessible means of making the privacy policy available for consumers of the online service.

(c) The term "operator" means any person or entity that owns a Web site located on the Internet or an online service that collects and maintains personally identifiable information from a consumer residing in California who uses or visits the Web site or online service if the Web site or online service is operated for commercial purposes. It does not include any third party that operates, hosts, or manages, but does not own, a Web site or online service on the owner's behalf or by processing information on behalf of the owner.

(d) The term "consumer" means any individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family, or household purposes.

22578. It is the intent of the Legislature that this chapter is a matter of statewide concern. This chapter supersedes and preempts all rules, regulations, codes, ordinances, and other laws adopted by a city, county, city and county, municipality, or local agency regarding the posting of a privacy policy on an Internet Web site.

22579. This chapter shall become operative on July 1, 2004.

## Remedies

The law itself contains no specific remedies or enforcement provisions. However, the attorney general, district attorneys, or authorized county counsels and city attorneys may enforce the new law through the California Business and Professions Code, Unfair Trade Practices chapter.<sup>2</sup> The courts may impose a fine of up to \$2,500 per violation, taking into consideration factors such as the seriousness of the misconduct and the defendant's assets, liabilities, and net worth. Businesses should use caution, as the law provides that violations for noncompliance may occur through either knowing and willful conduct or negligent and material conduct. Therefore, courts may impose liability for actions that are deemed intentional or merely careless.

## Criticism of the New Law

Some have criticized the law as overbroad in its reach, and because of its potential conflict with other states' laws. The California law could be the first in a series of state-by-state on-line privacy policy legislation, raising compliance and enforcement problems as businesses attempt to conform to conflicting state laws. A federal law preempting all state attempts to enact legislation in this area could alleviate these concerns, although no such law appears imminent. Also, a challenge under the Commerce Clause to the U.S. Constitution is possible, given the reach of the California law nationwide.

## Complying with the California Law

Unless Congress or a court invalidates the new California law, businesses that gather on-line information about California residents should work to bring consumer access to their privacy policies in line with the requirements discussed in this Client Alert. In addition to providing increased access to their privacy policies, businesses should ensure that policies conform to the informational requirements mandated by the law.

## For further information:

For further information about the new California privacy policy law or help in complying, contact:

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<sup>2</sup> See Cal. Bus. & Prof. Code Sections §§ 17200-17210 (West 1997 & Supp. 2003).

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Proskauer's Computer Security Practice Group counsels clients on their obligations in the event of a computer security breach and the steps that may be taken to avoid or limit legal liability from potential computer intrusions. The following individuals serve as the contact persons who would welcome any questions you might have:

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