

## Data Privacy and Cybersecurity

# COVID-19 Consumer Data Protection Act 2020 Update



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On May 4, 2020, we published a [client alert](#) regarding a discussion draft of the COVID-19 Consumer Data Protection Act of 2020 (the Act). On May 7, 2020, a [revised version](#) of the Act was formally introduced by Senator Roger Wicker (R- Miss.), along with co-sponsors, Senators John Thune (R-S.C.), Jerry Moran (R-Kan.), Marsha Blackburn (R-Tenn.) and Deb Fischer (R-Nebr.). Below, we highlight some of the key differences between the discussion draft and the Act as introduced.

### **Exclusion of Business Contact Information and Employee Screening Data from Covered Data**

One of the strongest reactions to the discussion draft of the Act was that it covered a large swath of information associated with employees and visitors to businesses. The Act as introduced addressed both of those concerns by excluding “business contact information” and “employee screening” data from data that was covered by the restrictions of the Act.

- **Business Contact Information** is information related to an individual’s business position name or title, business telephone number, business address, business email address and other similar business information, provided such information is collected, processed or transferred solely for purposes related to such individual’s professional activities.
- **Employee Screening Data** is the covered data of an individual who is an employee, owner, director, officer, staff member, trainee, vendor, visitor, intern, volunteer or contractor of a covered entity, provided that such data is only collected, processed or transferred by the covered entity for the purpose of determining, for purposes related to the COVID-19 public health emergency, whether the individual is permitted to enter a physical site of operation.

### **Carve Out for Service Providers in Definition of Covered Entities**

As in the discussion draft, the introduced version of the Act applies to any entity regulated by the FTC as well as common carriers and non-profit entities that collect, process or transfer covered data. However, as introduced, the Act expressly *excludes* service providers from the definition of covered entity. A service provider is defined in the Act as an entity that processes or transfers such covered data for the purpose of performing one or more services or functions on behalf of, and at the direction of, a covered entity to which it is not related, with respect to a set of covered data.

### **Addition of Persistent Identifier to Covered Data**

The scope of covered data has been expanded by adding the term persistent identifier. Now, covered data includes personal health information, precise geolocation data, proximity data and persistent identifiers. A persistent identifier is defined as a technologically derived identifier that identifies an individual, or is linked or reasonably linkable to an individual over time and across services and platforms, which may include a customer number held in a cookie, a static Internet Protocol (IP) address, a processor or device serial number or another unique device identifier.

### **Addition of Opt-In Consent Carve Out**

While the discussion draft *required* opt-in consents prior to the collection of covered data, the Act as introduced provides that a covered entity is *not* required to first obtain consents from employees, owners, officers, staff members, trainees, vendors, visitors, interns, volunteers or contractors permitted to enter a covered entity's physical site of operations. In short, employers are not required to obtain consents from a wide array of individuals whom are given access to the employer's offices.

### **Addition of Data Accuracy**

The Act as introduced includes a new provision related to data accuracy. This new provision requires a covered entity to take reasonable measures to ensure the accuracy of covered data collected, processed or transferred for a covered purpose and provide an effective mechanism for an individual to report inaccuracies in the covered data.

### **Changes to Frequency of Public Reporting**

Whereas the discussion draft of the Act required reporting every 30 days, the Act as introduced would require covered entities to publish a report 30 days after the enactment of the Act, and not less frequently than every 60 days thereafter. As in the discussion draft, the required reporting would include the aggregate number of individuals from whom the covered entity collected, processed or transferred covered data; the categories of data collected, processed or transferred by the company; the specific purpose for each of the categories of covered data collected, processed or transferred; and to whom the data was transferred.

### **Clarification on Enforcement by States Attorney General and FTC**

The Act as introduced clarifies that only the FTC and States Attorney General have enforcement authority by adding the language that they have the "exclusive means of enforcing compliance with this Act."

The Act as introduced also includes new investigatory provisions which provide that States Attorney General would not be prevented from exercising the powers conferred on them or the State official by State laws to conduct investigations, administer oaths, affirmations or to compel the attendance of witnesses or the production of documentary or other evidence.

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