TO: Hon. Ellen Corbett
Majority Leader
FR: TechNet
DT: May 4, 2011
RE: SB 242 – ***Oppose***

TechNet, which represents California's leading technology companies and investors in sectors such as Internet commerce, social networking, information technology and clean energy, regrets to inform you of our opposition to your SB 242, as amended May 2.

California-based companies lead the way in developing new social networking technologies, technologies that allow people to communicate with others for a broad variety of social and business reasons. California leads the nation in creating exciting new companies and thousand of new jobs. SB 242 would undermine that leadership. Though we share your interest in protecting consumer privacy, TechNet is very concerned that SB 242 – in adopting a one-size-fits-all privacy rule – would undermine the continuing innovation that has made this young, still-evolving sector so dynamic. As California struggles to restore growth and create good jobs, enactment of this legislation would pose a potentially devastating blow to California's world leadership in Internet commerce.

Our specific concerns are as follows:

SB 242 could reduce consumer privacy and use of social networking sites
SB 242 would dramatically reduce, not enhance, the privacy of Californians of all ages. Sections 60(a) and (b) of SB 242 would require social networking sites to force users to make decisions about privacy and visibility of *all* of their information well before they have ever used the service. A new user of a social networking service cannot know what to expect or what they may wish to protect before they have ever experienced social networking. Sections 60(a) and (b) would enact a mandate that would lead to what is derisively known as "privacy shrink wrap." In other words, mandating that consumers choose privacy before they experience a product will certainly lead users to quickly click through the available options without contextual understanding of or serious thought to the case-by-case implications of the choices being made. TechNet is concerned that the description of all available privacy and visibility options to a consumer who has never used the service in question, as required in the bill, would become at best a burdensome, complicated regime that would confuse consumers, not protect them. Further, the result of requirements in sections (a) and (b) could be to deter potential users from signing up for new services entirely. Social networking companies are continuously developing new ways to educate and empower consumers about their privacy settings, innovation that could be stifled by the requirements of SB 242.

Many social networking sites currently offer what are known as "contextual" or "just-in-time" privacy or visibility controls. This practice, recognized by the Federal Trade Commission as a best practice, lets the user make decisions about use of their data within the context of the use

of that data. These options give users real-time information and decision-making power about specific uses of information. A common just-in-time, contextual privacy notice on a popular social networking site has fewer than forty words, describes exactly the information to be shared and with whom, and is easily understood by a layperson. By imposing a regulatory straightjacket, SB 242 could inhibit the development of more user-friendly privacy strategies such as these. The result is a privacy regime that is ultimately less effective and less protective of Californians

SB 242 is unnecessary
The May 2 version of SB 242 singles out social networking sites without demonstration of any harm. There is no indication that California users of social networking sites are less sophisticated or more vulnerable than those Californians who do not use social networking sites, or that social networking sites are failing to appropriately communicate existing choices to their users. Quite to the contrary, research by the Pew Internet and American Life Project has found that two-thirds of users of social networking sites have made adjustments to privacy settings (including adjustments toward more visibility and adjustments toward less visibility) while more than 75% of users who are concerned about the availability of personal information online have done so. That study also found that the most visible and engaged Internet users are also most active in adjusting their settings.

Additionally, there is no indication that Californians want to have personal information removed from social networking sites but are unable to. Few social networking site users ever ask that information about posted about them be removed. Major social networks, including Facebook, already remove personal information when the requestor specifies the information to be removed and the information is not already widely available.

SB 242 would be unworkable
Section 60(c) mandates that social networking sites remove "any personal information" within 48 hours of request without specific description of the information to be removed or its location, a requirement that may be technologically impossible to meet. The California Legislature should be careful not to mandate the creation of new technologies that do not yet exist. A second problem is that without a minimum of personal information to work from social networking sites would not know what information to look for to delete or whose account to work from. For example, there are 30,000 Joe Sullivans in the U.S. This problem is compounded by the fact that many users share the same basic biographical information, that hundreds of millions of users use social networking sites and generate tens of billions of pieces of content every month. It is simply not possible for social networking sites to scrub one person's information from an entire site using existing technologies.

Sections 60(b) and 62(c) would force social networking sites to explain privacy settings in terms so simple as to achieve a score of at least 70 on the Flesch Reading Ease index (which calculates reading ease using only the number of syllables, words and sentences, regardless of content or context). While we all agree that information about privacy and visibility online should be conveyed in simple, easy-to-understand language, such a standard is arbitrary and impossible to achieve in this context. For example, consider the following simple paragraph: "Don't let friends or strangers pressure you to be someone you aren't. You may be Net-savvy, but people and relationships change, and unexpected stuff can happen on the Internet." These two sentences, authored by the child safety experts at ConnectSafely and included in the publication "Social Web Tips for Teens," would fail the standard imposed by SB 242.

SB 242 would do significant damage to California's technology sector

California leads the world in Internet commerce, a sector employing an estimated 162,000 people. Social networking and online apps represent among the fastest growing source of good jobs in the state. SB 242 would dramatically limit social networking sites' growth potential in California by imposing additional operating costs and raising barriers to consumer participation in social networking services, all while exposing those services to massive and unwarranted civil liability and in turn, creating significant confusion and uncertainty for investors, businesses and consumers. As previously indicated, SB 242 will stifle innovation and prevent companies from bringing new and useful privacy tools to market, including the new employees required to create and service those products.

The damage would not be limited to social networking sites alone. SB 242 would also affect California-based application developers that depend on social networking platforms for their revenue and growth. For instance, well over a million developers build applications on the Facebook platform that depend on social networking traffic for revenue and growth. These developers employ tens of thousands of Californians, generating substantial tax revenues.

SB 242 violates the United States and California Constitutions
SB 242 would interfere with the right to freedom of speech enshrined in both the First Amendment to the United States Constitution and Article 1 of the California Constitution. Specifically, Section 60(a) would establish a barrier between an existing California user of a social networking site and her ability to continue speaking as desired. It does this by forcing social network sites to establish a requirement that by default a user may post information but not share it with any other user. We note, parenthetically, that this defeats the central purpose of participation in a "social" networking service. By hiding from view all existing users' information until they make a contrary choice, the State of California would be imposing limits on a user's ability to "freely speak, write and publish his or her sentiments on all subjects." Section 60(c) would disrupt the legitimate speech of non-requestors who desire to share "personal information" with a requestor.

SB 242 violates the Dormant Commerce Clause of the U.S. Constitution. Internet commerce is an inherently interstate activity and SB 242 would regulate businesses far beyond California's borders. Social networking sites cannot reliably know if a visitor is a California resident. Therefore every covered site in the world would need to change its practices in order to comply with California law. By forcing out-of-state users to limit their sharing as required by 60(a) and to clear the thresholds to speech established by Sections 60(b) and (c), SB 242 would limit the ability of non-Californians to both share as they wish with other and freely enter into in a commercial relationship with social networking sites. As a result, any out-of-state company affected by the law would be entitled to bring a Commerce Clause challenge under 42 U.S.C. §1983.

Because SB 242 is unconstitutional on its face, it exposes California taxpayers to fiscal liability for compensating the companies that would be injured by its passage. As these are federal constitutional issues, once SB 242 was declared unconstitutional, the plaintiffs would qualify for an award of attorneys' fees against California under 42 U.S.C. §1988. Enactment of this legislation would result in California taxpayers paying both the plaintiffs' attorneys' fees as well as the state's defense costs, resulting in the unnecessary expenditure of taxpayer dollars at a time when California can least afford it.

For these reasons, we must oppose SB 242. We appreciate your attention to these concerns.