DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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CFPB TAKES FIRST DATA SECURITY ACTION

The Consumer Financial Protection Bureau (CFPB) recently ordered Dwolla, Inc., an online payment processor, to pay a $100,000 fine for allegedly deceiving customers regarding its security practices.

Data security and data breaches are areas typically governed by the Federal Trade Commission (FTC). Here, the CFPB utilized its authority under the Dodd-Frank Wall Street Reform and Consumer Protection Act to take action against institutions allegedly engaged in unfair, deceptive or abusive acts or practices. The CFPB seemed particularly concerned with language on Dwolla's website stating that its data-security practices "exceeded" or "surpassed" industry standards, that its practices were "Payment Card Industry compliant," and that its data was "encrypted and stored securely." Specifically, the CFPB stated that because (1) Dwolla's representations regarding its data-security practices were likely to mislead a reasonable consumer into believing Dwolla had incorporated reasonable and appropriate data-security practices when it had not and (2) Dwolla's representations were material because they were likely to affect a consumer's choice of conduct regarding whether to become a member of Dwolla's network, Dwolla's practices constituted deceptive acts or practices.

The CFPB alleged that Dwolla failed to:

- Adopt and implement data-security policies and procedures reasonable and appropriate for the organization;
- Use appropriate measures to identify reasonably foreseeable security risks;
- Ensure that employees who have access to or handle consumer information received adequate training and guidance about security risks;
- Use encryption technologies to properly safeguard sensitive consumer information; and
- Practice secure software development, particularly with regard to consumer-facing applications developed at an affiliated website.

Notably, Dwolla does not appear to have been subject to an actual data breach. Dwolla posted a blog entry on March 2 regarding its security practices. The entry does not directly reference the CFPB, but states that Dwolla has not detected any evidence or indicators of a data breach, nor has it received a notification or complaint of such an event.

Companies should look to the conduct provisions of the Consent Order as a guide for their own data security practices. Specifically, the CFPB will require Dwolla to, among other things:

- Refrain from misrepresenting, expressly or by implication, its data-security practices;
- To the extent not already in place, adopt and implement reasonable and appropriate data-security measures to protect consumers' personal information on its computer networks and applications;
- Establish, implement and maintain a written, comprehensive data-security plan;
- Adopt and implement data-security policies and procedures;
- Designate a qualified person to coordinate and be accountable for the data-security program;
- Conduct data-security risk assessments twice annually;
- Conduct regular mandatory employee training on a variety of data-security issues;
- Obtain an annual data-security audit from an independent, qualified third party.

The FTC also has challenged companies' published policies in the past, treating posted policies as quasi-contracts with customers and challenging the accuracy of policy statements when allegedly misleading or deceptive.

Data security continues generally to be a hot issue with regulators. In December 2015, Wyndham Hotels and Resorts settled FTC charges that its security practices unfairly exposed consumer payment card information. In early March, the FTC issued orders to nine different companies to obtain information as to how those companies assess other firms' compliance with the Payment Card Industry Data Security Standards. Companies should closely monitor their data security practices and how they represent their data security practices to consumers.❑

✧ *Mike Tomkies and Emily Barlage*

Darrell L. Dreher
ddreher@dltlaw.com

Elizabeth L. Anstaett
eanstaett@dltlaw.com

Margaret M. Stolar
mstolar@dltlaw.com

Robin R. De Leo
robin@dreher-la.com

Susan M. Seaman
sseaman@dltlaw.com

2750 HUNTINGTON CENTER
41 S. HIGH STREET
COLUMBUS, OHIO 43215
TELEPHONE: (614) 628-8000 FACSIMILE: (614) 628-1600
WWW.DLTLAW.COM

Michael C. Tomkies
mtomkies@dltlaw.com

Charles V. Gall
cgall@dltlaw.com

Judith M. Scheiderer
jscheiderer@dltlaw.com

Susan L. Ostrander
sostrander@dltlaw.com

Emily C. Barlage
ebarlage@dltlaw.com