DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

March 10, 2021

UTAH LEGISLATURE PASSES CYBERSECURITY AFFIRMATIVE DEFENSE ACT

On March 2, 2021, the Utah House and Senate passed the Cybersecurity Affirmative Defense Act. The Act applies to "persons," a term defined to include a financial institution organized, chartered or holding a license authorizing operation under the law of Utah, another state or another country.

The Act creates certain affirmative defenses if a person has a written cybersecurity program that provides administrative, technical and physical safeguards to protect personal information including:

(1) Being designed to: (i) protect the security, confidentiality and integrity of personal information, (ii) protection against any anticipated threat or hazard to the security, confidentiality or integrity of personal information and (iii) protect against a breach of system security;

(2) Reasonably conforming to a recognized cybersecurity framework as described in the Act; and

(3) Being of an appropriate scale and scope in light of the following factors: (i) the size and complexity of the person, (ii) the nature and scope of the activities of the person, (iii) the sensitivity of the information to be protected, (iv) the cost and availability of tools to improve information security and reduce vulnerability; and (v) the resources available to a person.

The Act sets forth three affirmative defenses. First, if the person has a written cybersecurity program in place that meets the above standards, the person has an affirmative defense to a claim that is brought under the laws of or in the courts of Utah and alleges that the person failed to implement reasonable information security controls that resulted in the breach of system security.

Second, the Act provides an affirmative defense to a person that failed to appropriately response to a breach of system security if the person maintains a written cybersecurity program that meets the requirements of the Act and the written cybersecurity program had protocols at the time of the breach of system security for responding to a breach of system security that reasonable complied with the written cybersecurity program.

Third, the Act provides an affirmative defense to a person that failed to appropriately notify an individuals whose personal information was compromised in a breach of system security if (i) the person maintains and complies with a written cybersecurity system that meets the requirements of the Act and the written cybersecurity program had protocols at the time of the breach for notifying an individual and the person followed the protocol.

The Act provides that a person may not claim an affirmative defense if: (i) the person had actual notice of a threat or hazard to the security, confidentiality or integrity of personal information, (ii) the person did not act in a reasonable amount of time to take known remedial efforts to protect the personal information against the threat or hazard and (iii) the threat or hazard resulted in the breach of system security.

The Act provides that a person's written cybersecurity program reasonably conforms to a recognized cybersecurity framed work if the written cybersecurity program for personal information obtained in the breach of the system security that is regulated by the federal government or state government reasonably complies with the requirements of a regulation, including Title V of the Gramm-Leach-Bliley Act.

The Act clarifies that there is no private right of action if a person fails to comply with a provision of the Act. We will monitor and keep you updated on the status of the Act. If enacted, the full version of the Act will be added to the Firm's Marketing and Privacy Digest. ❑

✧ *Elizabeth Anstaett and Lindsay Valentine*

CONSUMER PRIVACY LEGISLATION UPDATE

Washington Privacy Act

On March 3, 2021, the Washington Senate passed the Washington Privacy Act ("WPA") and transmitted the bill to the House for consideration. *See* our prior ALERT dated Jan. 25, 2021. The Washington legislature has been attempting to pass a comprehensive consumer data privacy act since 2019. Last year, the legislation failed to pass the WPA after the House amended the Senate bill to add a private right of action. The Senate's version of the WPA transmitted to the House explicitly provides that a violation of the WPA may not serve as the basis for a private right of action and that it may be solely enforced by the attorney general.

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Oklahoma Computer Data Privacy Act

On March 4, 2021, the Oklahoma House passed H.B. 1602, which creates the Oklahoma Computer Data Privacy Act ("OCDPA"). The OCDPA requires that businesses subject to the law must disclose the categories and specific items of personal information collected and delete the consumer's personal information collected by the business if requested by the consumer. The OCDPA also gives the consumer the right to opt out of the sale of their personal information by the business to third parties.

Similar to the California Consumer Privacy Act, the OCDPA does not apply to (i) the sale of personal information to or by a consumer reporting agency if the information is to be reported in or used to generate a consumer report, as defined by the Fair Credit Reporting Act ("FCRA") or used solely for a purpose authorized under the FCRA and (ii) personal information collected, processed, sold or disclosed in accordance with the federal Gramm-Leach-Bliley Act ("GLBA"). The OCDPA also exempts a financial institution or an affiliate of a financial institution that is subject to the GLBA.

We will provide a detailed analysis of each bill if it progresses through the state legislature. Please let us know if you have any questions. ❑

✧ *Elizabeth Anstaett and Lindsay Valentine*