

# SENATE BILL REPORT

## E2SHB 1149

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As Reported by Senate Committee On:  
Labor, Commerce & Consumer Protection, February 25, 2010

**Title:** An act relating to protecting consumers from breaches of security.

**Brief Description:** Protecting consumers from breaches of security.

**Sponsors:** House Committee on Financial Institutions & Insurance (originally sponsored by Representatives Williams, Roach, Simpson, Kirby, Dunshee, Nelson and Ormsby).

**Brief History:** Passed House: 2/13/10, 63-31.

**Committee Activity:** Labor, Commerce & Consumer Protection: 2/23/10, 2/25/10 [DPA].

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### SENATE COMMITTEE ON LABOR, COMMERCE & CONSUMER PROTECTION

**Majority Report:** Do pass as amended.

Signed by Senators Kohl-Welles, Chair; Keiser, Vice Chair; Franklin, Honeyford, King and Kline.

**Staff:** Ingrid Mungia (786-7423)

**Background:** State Security Breach Law (Chapter 19.255 RCW). In 2005 the Legislature enacted a security breach law. The law requires any person or business to notify possibly affected persons when security is breached and unencrypted personal information is (or is reasonably believed to have been) acquired by an unauthorized person. A person or business is not required to disclose a technical breach that does not seem reasonably likely to subject customers to a risk of criminal activity.

Personal information is defined as an individual's first name or first initial and last name in combination with one or more of the following data elements, when either the name or the data elements are not encrypted:

- Social Security number;
- driver's license number or Washington identification card number; or
- account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account.

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Personal information does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

The notice required must be either written, electronic, or substitute notice. If it is electronic, the notice provided is consistent with federal law provisions regarding electronic records, including consent, record retention, and types of disclosures. Substitute notice is only allowed if the cost of providing direct notice exceeds \$250,000; the number of persons to be notified exceeds 500,000; or there is insufficient contact information to reach the customer. Substitute notice consists of all of the following:

- electronic mail (e-mail) notice when the person or business has an e-mail address for the subject persons;
- conspicuous posting of the notice on the website page of the person or business, if the person or business maintains one; and
- notification to major statewide media.

A customer injured by a violation of the security breach law has the right to a civil action for damages.

State Disposal of Personal Information Law. State law places restrictions on how certain types of personal information may be disposed. If a person or business is disposing of records containing personal financial and health information and personal identification numbers issued by a government entity, the person or business must take all reasonable steps to destroy, or arrange the destruction of, the information.

An individual injured by the failure of an entity to comply with the disposal or personal information law may sue for:

- \$200 or actual damages, whichever is greater, and costs and reasonable attorneys' fees if the failure to comply is due to negligence; or
- \$600 or three times actual damages (up to \$10,000), whichever is greater, and costs and reasonable attorneys' fees if the failure to comply is willful.

The Attorney General may bring a civil action in the name of the state for damages, injunctive relief, or both, against an entity that fails to comply with the law. The court may award damages that are the same as those awarded to individual plaintiffs.

Additional Federal and State Privacy Protections. Federal and state health privacy laws generally include security provisions and safeguards for health information, including information relating to an individual's identity and payment information. These duties are imposed on health insurers, providers, and others in the health system.

Federal banking and insurance laws generally include security provisions and safeguards for individually identifiable health and financial information. These duties are placed on individuals and businesses in the banking community.

Payment Card Industry Security Standards Council. The Payment Card Industry Security Standards Council (Council) is a limited liability corporation with the mission of enhancing payment account data security by fostering broad adoption of their standards for payment account security. The Council was established by American Express, Discover Financial

Services, JCB, MasterCard Worldwide, and Visa International in 2004. The Council developed the Payment Card Industry Data Security Standards (PCI DSS). According to the Council, there were six principles and requirements in developing the requirements for security management, policies, procedures, network architecture, software design and other measures:

- build and maintain a secure network;
- protect cardholder data;
- maintain a vulnerability management program;
- implement strong access control measures;
- regularly monitor and test networks; and
- maintain an information security policy.

The Council does not enforce the PCI DSS. Individual payment systems establish contractual terms and penalties for noncompliance.

**Summary of Bill:** The bill as referred to committee not considered.

**Summary of Bill (Recommended Amendments):** A number of definitions are created, including account information, breach, businesses, debit card, encrypted, financial institution, processor, and vendor.

Businesses that process more than six million credit and debit card transactions and processors are liable to a financial institution for a failure to exercise reasonable care through encryption of account information if they are proximate cause of a breach of security.

Vendors are liable to a financial institution to the extent that the damages are due to a defect in the vendor's software or equipment related to the encryption. A claim against a vendor may be limited or forestalled by another provision of law or by a contract with the financial institution.

A financial institution may recover reasonable actual costs for issuing new access devices to its account holders that live in the state. If an action is brought, the prevailing party is entitled to recover its reasonable attorneys' fees and costs incurred in connection with the legal action. A trier of fact may reduce any award by any amount recovered already recovered by a financial institution from a credit card company for the breach.

There is immunity for a business, processor, or vendor if:

- the breached account information was encrypted; or
- the business, processor, or vendor was certified compliant with security standards adopted by the Council. Compliance is established if the business, processor, or vendor is validated by an annual security assessment that occurred within 12 months of a breach of security.

There is nothing that prevents:

- any entity responsible for handling account information on behalf of a business or processor from being sued; or
- a business, processor, or vendor from asserting any defense including defenses of contributory or comparative negligence.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** The bill takes effect on July 1, 2010.

**Staff Summary of Public Testimony:** PRO: In 2005 Washington was one of the first states to say that a consumer should know when their information has been compromised by a credit card company. The bill would give financial institutions a very limited right of recovery against card processors and very large merchants. The right to recover is limited to the reissuance of plastic cards, only for Washington residence and only for actual, reasonable costs. To allow this limited right of recovery it creates a good incentive for financial institutions to do the right thing. Currently, credit unions and other financial institutions cannot recoup costs associated with a breach of security. The best thing we can do for consumers during a breach is to reissue their plastic cards, and we should encourage institutions to do this. This bill provides a financial incentive for financial institutions to do the right thing.

CON: We don't agree with the right of action in state law and interfering with contractual agreements with card holders and card issuers. We don't think this bill is necessary at this time.

**Persons Testifying:** PRO: Stacy Augustine, Washington Credit Union League; Marylin Ball-Brown, Generations Credit Union.

CON: Mark Johnson, Washington Retail Association.