H-4176.2   _____

SECOND SUBSTITUTE HOUSE BILL 1149
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State of Washington   **61st Legislature**   **2010 Regular Session**

By House Financial Institutions & Insurance (originally sponsored by Representatives Williams, Roach, Simpson, Kirby, Dunshee, Nelson, and Ormsby)

READ FIRST TIME 01/21/10.

1   AN ACT Relating to protecting consumers from breaches of security;
2 adding a new section to chapter 19.255 RCW; creating new sections; and
3 providing an effective date.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5   NEW SECTION. **Sec. 1.**   The legislature recognizes that data
6 breaches contribute to identity theft and fraud and can be costly to
7 consumers.   The legislature also recognizes that when a breach occurs,
8 remedial measures such as reissuance of credit or debit cards affected
9 by the breach can help to reduce the incidence of identity theft and
10 associated costs to consumers.   Accordingly, the legislature intends to
11 encourage financial institutions to reissue credit and debit cards to
12 consumers when appropriate, and to permit financial institutions to
13 recoup data breach costs associated with the reissuance from large
14 merchants or processors who are negligent in maintaining or
15 transmitting card data.

16   NEW SECTION. **Sec. 2.** A new section is added to chapter 19.255 RCW
17 to read as follows:
18   (1) For purposes of this section:

1   (a) "Access device" has the same meaning as in RCW 9A.56.010.

2   (b) "Account information" means: (i) The full, unencrypted
3 magnetic stripe of a credit or debit card; (ii) the full, unencrypted
4 account information contained on an identification device as defined
5 under RCW 19.300.010; or (iii) the unencrypted primary account number
6 on a credit or debit card or identification device, plus any of the
7 following: Cardholder name, expiration date, or service code.

8   (c) "Breach" has the same meaning as "breach of the security of the
9 system" in RCW 19.255.010.

10   (d) "Merchant" means an individual, partnership, corporation,
11 association, organization, government entity, or any other legal or
12 commercial entity that processes more than six million access device
13 transactions annually, and who offers or sells goods or services to
14 persons who are residents of Washington.

15   (e) "Processor" means an individual, partnership, corporation,
16 association, organization, government entity, or any other legal or
17 commercial entity, other than a merchant, that directly processes or
18 transmits account information for or on behalf of another person as
19 part of a payment processing service.

20   (f) "Service code" means the three or four digit number in the
21 magnetic stripe or on a credit or debit card that is used to specify
22 acceptance requirements or to validate the card.

23   (g) "Vendor" means an individual, partnership, corporation,
24 association, organization, government entity, or any other legal or
25 commercial entity that manufactures and sells software or equipment
26 that is designed to process, transmit, or store account information
27 using encryption.

28   (2) Processors, merchants, or vendors are not liable under this
29 section if (a) the breached account information was encrypted, and (b)
30 the processor, merchant, or vendor was certified compliant with
31 applicable information security standards promulgated or adopted by any
32 payment system network through which transactions are conducted.

33   (3)(a) If a processor or merchant fails to take reasonable care
34 through the use of an industry standard level of encryption to guard
35 against unauthorized access to account information that is in the
36 possession or under the control of the merchant or processor, and the
37 failure is found to be the proximate cause of a breach, the processor
38 or merchant is liable to a financial institution, as defined in RCW

1   30.22.040, for reimbursement of reasonable actual costs incurred by the
2   financial institution to mitigate potential current or future damages
3   to its access device account holders as a consequence of the breach,
4   even if the financial institution has not suffered a physical injury in
5   connection with the breach. In any legal action brought pursuant to
6   this subsection, the prevailing party is entitled to recover its
7   reasonable attorneys' fees and costs incurred in connection with the
8   legal action.
9   (b) A vendor is liable to a financial institution instead of a
10   processor or merchant for the damages described in (a) of this
11   subsection to the extent that the damages are attributable to a defect
12   in the vendor's software or equipment related to the encryption of
13   account information.
14   (4) Nothing may prevent any entity responsible for handling account
15   information on behalf of a merchant or processor from being made a
16   party to an action under this section.
17   (5) Nothing in this section may be construed as preventing or
18   foreclosing a processor, merchant, or vendor from asserting any defense
19   otherwise available to a negligence action including, but not limited
20   to, defenses of contributory or comparative negligence.
21   (6) In cases to which this section applies, the trier of fact shall
22   determine the percentage of the total fault which is attributable to
23   every entity which caused the claimant's damages.
24   (7) The remedies under this section are cumulative and do not
25   restrict any other right or remedy otherwise available to the financial
26   institution.

27   NEW SECTION. **Sec. 3.** This act takes effect July 1, 2010.

28   NEW SECTION. **Sec. 4.** This act applies prospectively only. This
29   act applies to any breach occurring on or after the effective date of
30   this section.

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