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SUPPLEMENTAL NOTE ON SENATE BILL NO. 424

As Amended by Senate Committee on Judiciary

Brief*

SB 424 would create new law and amend existing law related to identity theft and identity fraud within the Kansas Consumer Protection Act, as follows.

The bill would grant the Attorney General authority, within the limits of available resources, to assist victims of identity theft, identity fraud, and related crimes in pursuing various remedies.

The bill would clarify the duties of holders of personal information. Specifically, the bill would define a “holder of personal information” (holder) as a person (defined by the bill) who collects, maintains, or possesses personal information (defined by the bill) of any other person. A holder of personal information would have the following duties:

- To implement and maintain reasonable procedures and practices appropriate to the nature of the information, and exercise reasonable care to protect the information from unauthorized access. Compliance with any applicable federal or state law or regulation governing the procedures and practices of the holder regarding the protection of the information would be deemed in compliance with this provision, and failure to comply with such law or regulation would be *prima facie* evidence of a violation of this provision; and

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- To destroy (by methods specified in the bill) records containing personal information in the holder's custody or control when the holder no longer intends to maintain or possess such records.

A holder of personal information could present an affirmative defense to a violation of these provisions if the holder proves by clear and convincing evidence that:

- The violation resulted from a failure of the method of destruction of such records, and such failure could not reasonably have been foreseen despite the holder's reasonable care; or
- The holder had, at the time of the violation, a written or electronic records management policy designed to prevent a violation of these provisions, and the destruction was not carried out pursuant such policy.

This affirmative defense would not be available to a holder unless the holder proves that persons involved in the violation received training in the records management policy, the violation was the result of a good-faith error, and no reasonable likelihood exists that the violation may cause, enable, or contribute to identity theft or identity fraud, or to a violation of an information security obligation imposed by federal or state statute or regulation.

Each violation of these provisions would be an unconscionable act or practice under the Kansas Consumer Protection Act, and each record not destroyed in compliance with the bill's provisions would constitute a separate unconscionable act.

The bill would grant exclusive authority to the Attorney General to bring an action pursuant to the bill's provisions, and nothing in the bill would be construed to create or permit a private cause of action for any violation. The bill would state its provisions do not relieve a holder of any duty to comply

with other requirements of state and federal law regarding the protection of such information.

The bill would amend an existing statute known as the “Wayne Owen Law” to name that statute, in combination with the new law established by the bill, the “Wayne Owen Act.”

The bill also would repeal an existing statute governing the destruction of consumer information.

Background

The bill was introduced in the Senate Committee on Judiciary at the request of the Attorney General. At the hearing before the Senate Committee, the Attorney General testified in support of the bill. AARP Kansas provided written testimony in support of the bill. Opponents testifying against the bill included a representative of the Kansas Chamber of Commerce and a representative of the Kansas Credit Attorneys Association. Neutral testimony was presented by a representative of the Consumer Data Industry Association.

The Senate Committee amended the bill at the request of the Attorney General to resolve issues expressed by opponents of the bill. The amendments would: adjust definitions created by the bill; add safe harbors for compliance with state and federal law, for failure of the method of destruction of records, and for the destruction of records not pursuant to a holder’s records management policy; clarify the Attorney General’s exclusive authority to bring an action under the bill and what constitutes a separate unconscionable act under the bill; and strike language that would have granted the Attorney General rules and regulation authority for the administration of the bill’s provisions.

According to the fiscal note as prepared by the Division of the Budget, the Office of the Attorney General estimates that the provisions of the bill can be accomplished using existing resources. Any fiscal effect associated with the bill is not reflected in *The FY 2017 Governor’s Budget Report*.