

**August 20, 2012**

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## **Texas's Amended Data Breach Notification Law Increases Complexity for Businesses**

By [Anna Trimble](#) and [Bill Cobb](#)

On September 1, 2012, Texas's amended data breach notification law passed in June 2011 will go into effect, and residents of all 50 states will potentially feel the effects. Under the amended law, Texas extends the reach of its data breach notification laws beyond Texas borders to all affected "individuals."<sup>1</sup>

Under the current law, any entity that "conducts business" in Texas and maintains sensitive personal information on its computer network is required to notify any "Texas resident" whose personal information is, or is reasonably believed to have been acquired by an unauthorized user. The types of Texas businesses affected includes most businesses that maintain customer information, as well as virtually any health care-related business. Yet under the new amendment, any such entity conducting business in Texas must notify all affected "individuals" regardless of whether they call Texas home or not. Thus, any entity conducting business in Texas may be required to notify residents of all 50 states in the event of a data breach involving sensitive personal information. However, for affected out-of-state residents who live in states with their own notification requirements (all but four states have their own data breach notification laws), compliance with their own state law satisfies Texas requirements.<sup>2</sup>

"Sensitive personal information" is defined as an individual's first name or first initial and last name in combination with the individual's social security number; driver's license number or government-issued identification number; or account number or credit or debit card information in combination with a required security code.<sup>3</sup> The definition under the Texas statute also includes information regarding an individual's physical or mental health information; the provision of health care to the individual; or the payment for the provision of health care to the individual;<sup>4</sup> this information is referred to as "protected health information" or "PHI" in the health care industry, and is also subject to the privacy and security restrictions of the federal privacy statute known as HIPAA. Texas entities subject to HIPAA will have to determine whether they have breach reporting obligations under HIPAA, the Texas statute, or both, since the standards and requirements of HIPAA and the Texas statute are different.

The amendment also increases the penalties for a failure to notify individuals of a data breach from a maximum of \$50,000 (under the old law) to \$100 per individual per day of failed or delayed

notification, not to exceed \$250,000 for a single breach.<sup>5</sup> A business subject to this regulation is required to provide notice "as quickly as possible," with exceptions made for criminal investigations.<sup>6</sup> However, business owners should keep in mind that written proof of cooperation with law enforcement will be required to justify such a delay.

Cyber security is a timely topic. Studies have shown that in 2011, over 174 million records were reported breached.<sup>7</sup> The average cost to an organization resulting from a data breach incident is now reported to be upwards of \$6.65 million.<sup>8</sup> Despite such figures, Congress has yet to enact a law requiring businesses to notify consumers when their personal information has been compromised. Consumers are protected on a state level in 46 of the 50 states as all but Alabama, Kentucky, New Mexico and South Dakota have enacted breach notification statutes to address this growing trend.

Leaving aside the question of whether Congress's interstate commerce power potentially preempts the extraterritorial nature of the Texas law, more practically, the statute does not elaborate on what it means to "conduct business" in Texas. Under a broad reading of the statute, a business headquartered in New Mexico shipping products to consumers in Texas might be required to notify a customer in South Dakota of a data breach, where the personal information was stored in a data-farm in Indiana.

There is also some question of how the broadly worded law might apply to non-U.S. citizens living abroad whose information is stored on the servers of companies conducting business in Texas. Unless the legislature elaborates on what it means to "conduct business" in Texas, the matter will likely be examined and refined by the courts through consequent litigation.

This issue is likely to remain a potential liability for any entity that has any business dealings in Texas. If you have any questions regarding this e-Alert or how it may affect your business, please contact **Bill Cobb** at 512.236.2326 or [bcobb@jw.com](mailto:bcobb@jw.com) or **Stephanie Chandler** at 210.978.7704 or [schandler@jw.com](mailto:schandler@jw.com) or **Anna Trimble** at 512.236.2381 or [atrimble@jw.com](mailto:atrimble@jw.com) or **Jeff Drummond** at 214.953.5781 or [jdrummond@jw.com](mailto:jdrummond@jw.com).

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<sup>1</sup>Tex. Bus. & Comm. Code § 521.053(b) (effective September 1, 2012).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.* § 521.002(a)(2)(A).

<sup>4</sup>*Id.* § 521.002(a)(2)(B).

<sup>5</sup>*Id.* § 521.151(a) (current law) and § 521.151(a-1) (effective September 1, 2012).

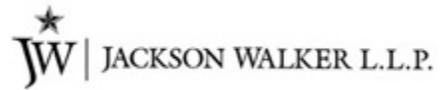
<sup>6</sup>*Id.* § 521.053(b).

<sup>7</sup>Verizon Risk Team, [2012 Data Breach Investigation Report \(2012\)](#)

<sup>8</sup>Ponemon Institute, [Fourth Annual U.S. Cost of Data Breach](#)

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