

SESSION OF 2016

**SECOND CONFERENCE COMMITTEE REPORT BRIEF
HOUSE BILL NO. 2460**

As Agreed to April 30, 2016

Brief*

HB 2460 would create and amend law in the Kansas Consumer Protection Act regarding identity theft, identity fraud, and door-to-door sales.

Identity Theft and Identity Fraud

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

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the information would be deemed proof of 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

- 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 regarding identity theft and identity fraud, the "Wayne Owen Act."

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

Door-to-Door Sales

The bill would create the crime of violation of a consumer protection order, which would be defined as engaging in a door-to-door sale while prohibited from door-to-door sales. The bill would define "prohibited from door-to-door sales" to mean subject to a temporary or permanent order or judgment of a court entered under the Kansas Consumer Protection Act (KCPA) or any act part of or supplemental to the KCPA that restrains, enjoins, or otherwise prohibits the person from engaging in door-to-door sales in this state or any portion therein. The bill would specify an order or judgment restrains, enjoins, or otherwise prohibits the person from engaging in door-to-door sales if it:

- Expressly prohibits the person from engaging in door-to-door sales;
- Prohibits conduct that includes engaging in door-to-door sales, such as prohibiting the person from engaging in consumer transactions, as defined in the KCPA; or

- Prohibits engaging in only a particular type of door-to-door sales, such as the sale of roofing-related services, or only in a particular place, in which case criminal liability would arise only if the person engaged in the particular type of door-to-door sale that is restrained.

Violation of a consumer protection order would be a severity level 9, person felony. The person would be subject to criminal liability if the State proves beyond a reasonable doubt that such person had actual or constructive notice of the temporary or permanent order or judgment, as described in the definition of “prohibited from door-to-door sales.” The bill would outline circumstances wherein a person would have actual or constructive notice.

The bill provides criminal liability imposed under the terms of the bill would not relieve any person of civil liability for violating a consumer protection order. Any criminal penalties authorized by law could be imposed in addition to any civil sanctions or liability authorized by law. The bill would allow the Attorney General, a county or district attorney, or both to institute criminal action to prosecute this offense and would include a severability clause for the section creating this new crime.

Finally, the bill would allow the Attorney General’s Office to post conspicuously on its website any judgment or order that restrains, enjoins, or otherwise prohibits a person from engaging in door-to-door sales and would add violation of a consumer protection order to the list of crimes giving rise to civil forfeiture.

Conference Committee Action

The second Conference Committee on HB 2460 agreed to replace the contents of HB 2460 with the language of two bills:

- SB 424, as amended by Senate Committee, regarding identity theft and identity fraud; and
- SB 426, regarding door-to-door sales.

Background

As introduced and amended by the House Committee on Corrections and Juvenile Justice and amended by the Senate Committee on Corrections and Juvenile Justice, HB 2460 contained provisions related to the Kansas Offender Registration Act. These provisions were added to the Conference Committee report on HB 2463.

SB 424 Background

SB 424 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 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 in violation of a holder's records management policy due to a good faith error; 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 prepared by the Division of the Budget, the Office of the Attorney General estimates 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*.

SB 426 Background

SB 426 was introduced at the request of the Office of the Attorney General in the Senate Committee on Corrections and Juvenile Justice. At the Senate Committee hearing on the bill, the Attorney General and a representative of AARP Kansas appeared in support of the bill. There was no opponent or neutral testimony.

At the hearing before the House Committee on Corrections and Juvenile Justice, the same conferees testified. The House Committee recommended the bill be passed, but the bill was stricken from the House Calendar in March 2016.

The fiscal note prepared by the Division of the Budget indicates passage could result in additional expenditures from new cases for the Office of the Attorney General, which would require investigation and prosecution; however, those costs likely would be absorbed within existing resources. The bill also could result in additional revenues because the bill allows offenders to be liable for civil penalties for violations of the KCPA. The precise dollar amount of expenditures and revenues cannot be estimated.

The Kansas Association of Counties indicates enactment could result in increased expenses for counties in investigating and prosecuting cases; however, the precise fiscal impact cannot be estimated.

The Kansas Sentencing Commission indicates the bill would have no immediate effect on prison admissions and bed space as most new offenders would receive probation.

The bill may increase agency journal entry workload; however the specific number of entries cannot be determined.

Any fiscal effect associated with SB 426 is not reflected in *The FY 2017 Governor's Budget Report*.

Kansas Consumer Protection Act; Attorney General; identity theft; identity fraud; holders of personal information; Wayne Owen Act; violation of a consumer protection order; door-to-door sale; criminal liability; civil forfeiture

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