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**Testimony in Support of Senate Bill 424
Presented to the Senate Judiciary Committee
By Attorney General Derek Schmidt**

March 8, 2016

Chairman King, members of the committee:

Thank you for this opportunity to present testimony in support of Senate Bill 424.

This is an important consumer protection bill. Although I regret we were unable to have this hearing sooner – because I think doing so with less deadline pressure would have enabled us to avoid some of the concerns that today’s opponents have expressed – it is appropriate that the committee is hearing this measure during National Consumer Protection Week.

Merely mentioning the words “data breach” is enough to strike fear into the heart of the business community. And that is, to me, understandable. The problem is so large – the risk to consumers so great – that there is a flurry of legislative activity on the subject. And the result of that flurry is a very real concern about patchwork laws that are difficult for businesses that operate across state lines to comply with.

This bill moves toward *solving* problems. It does *not* make those problems worse.

As you know, identity theft is a serious crime and a widespread problem in the United States and worldwide. This bill asks you to place some additional tools in our toolbox for preventing and combating identity theft. It builds on the statute you enacted in recent years, the Wayne Owen Law, that already puts the power of the Kansas Consumer Protection Act to work in combating identity theft and identity fraud.

The overall theme of this legislation is to harmonize, clarify and strengthen provisions of current law. Although this bill applies to more than paper records, the main motivation for this bill is old-fashioned “document dump” cases. During my service in the attorney general’s office, we have worked on three such cases that were large in scope. In one case, a business in Wichita disposed of hundreds of employee records containing sensitive personal information by setting boxes in an alley for ordinary trash collection. This improper disposal potentially exposed hundreds of employees’ personal information to identity theft. We ultimately settled with this company.

A second case remains pending. The fact pattern is similar to the first case, but because the case is pending I cannot discuss it in detail. I anticipate it soon will settle. In both of these first two cases, a significant point of contention in the settlement negotiations was whether the existing Kansas law regarding disposal of records containing personal identifying information is, or is not, part of the consumer protection act.

A third case, with a similar fact pattern, was not susceptible to enforcement under current law. That is because the nature of the information contained in the improperly disposed-of records, although highly sensitive and personal, did not fit within the narrow definition covered by the current records-disposal law. See definition of “personal information” at K.S.A. 50-7a01(g).

This bill is intended to update current law to make it more useful in these sorts of bread-and-butter data security and records-disposal cases. I am hopeful we have designed this legislation in a manner that avoids some of the more-difficult issues that arise in the current national discussions and debates about data security and data management.

Key provisions of Senate Bill 424

First, the bill expressly authorizes the attorney general’s office to assist victims of identity theft and identity fraud in navigating the process of obtaining assistance once their identity has been breached. This provision, which is New Section 1 of the bill, is modeled on similar authority in the Indiana Attorney General’s office that has proven helpful and successful. In Indiana, low-cost assistance from law clerks have proven invaluable in assisting identity theft victims.

Second, the bill moves toward a more uniform definition of what constitutes “personal identifying information” that is protected by law. Currently, different statutes use different definitions, creating uncertainty and confusion as to what information gives rise to legal liability if it is improperly handled. This bill promotes uniformity by using the definition in the identity theft/identity fraud statute as the baseline. This provision is contained on page 1, lines 26-27 of the bill. This seems a sensible approach: The information that would be subject to protection under this bill would be the same information that, if misused, can under current law subject the person who misuses it to criminal prosecution.

Third, the bill makes clear that the current-law provision that imposes a duty to safely and properly dispose of records containing personal identifying information is part of the consumer protection act. Currently, that provision is codified at K.S.A. 50-7a03. Current law makes clear that unsafe disposal of records containing personal information is illegal, but it does not make clear what enforcement authority is available when a violation occurs. This provision, contained on page 1, lines 35-36, and page 2, lines 1-11, makes clear that this provision of current law is part of the consumer protection act. Under current law, we typically allege a consumer protection act violation; this provision would effectively codify that practice.

Fourth, this bill makes clear that any holder of personal identifying information has a duty to take reasonable steps to protect the information it collects. To avoid the potential of opening the floodgates to litigation, the bill makes clear this duty is enforceable only by the attorney general and not in private civil litigation. These provisions are on page 1, lines 31-34, and page 2, lines 12-14.

Fifth, this bill allows the attorney general’s office to adopt rules and regulations in administering the Wayne Owen Law. This makes sense, particularly given the rapidly evolving nature of data security and changing responses necessary to assist victims of identity theft. This provision is on page 2, lines 35-37.

Amendment

Mr. Chairman, in the event the committee works this bill, I request the attached amendment be adopted. This amendment makes clear that a “safe harbor” exists for holders of personal identifying information who handle such information in compliance with federal law. This makes good sense. We’re not trying to create yet-another burden for regulated businesses to meet; rather, we are trying to make clear that

businesses that collect and hold people's personal identifying information have an obligation to act reasonably to protect that information while it is in their control, and that obligation can be satisfied by complying with applicable federal law if federal law applies.. Our amendment also deletes the word "destruction" from page 1, line 34, and also page 2, line 8.

Addressing Opponents' Concerns

This bill is late to the legislative process, and I realize we have had limited time to work through concerns. I have been grateful for the opportunity to work with some of the organizations testifying today as opponents, and I am confident that their legitimate concerns can be easily addressed.

For example, it is my understanding that if this amendment I am proposing is adopted, the Consumer Data Industry Association, which appears today as an opponent of this bill, will instead become neutral on the bill. I request you adopt the proposed amendment.

Regarding the remaining concerns expressed by the Kansas Chamber, with whom I have met, and the Kansas Credit Attorneys Association, with whom I have not, I suspect concerns can be overcome. Indeed, it appears to me that most of the concerns those groups are expressing here on behalf of their members are *concerns with current law*, not with the changes to current law proposed by this bill. To the extent that the concern is that this bill does not go far enough in fixing concerns with current law, I would respectfully ask the committee not to make the perfect the enemy of the good.

If this bill becomes law this year, it would be my pleasure – if so requested – to work with all interested parties over the next interim period to develop further changes to the various statutes of concern. But while those sorts of issues are being discussed and hashed out over the next year, Kansas consumers – whose personal identifying information is held by groups and organizations that exercise little or no care to protect it – should not remain at risk.

Thank you for your consideration. I would be happy to stand for questions.

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AG Proposed Amendment (request adoption as a package)

On p. 1, line 34, after “disclosure” and before the semicolon insert:

“. If federal law or regulation governs the procedures and practices of the holder of personal identifying information for handling such personal identifying information, then (i) compliance with such federal law or regulation shall be deemed compliance with this subsection and (ii) failure to comply with such federal law or regulation shall be prima facie evidence of a violation of this subsection” ; and

Insert new (e) in Sec. 2 and renumber the remaining paragraphs accordingly:

“(e) This section does not relieve a holder of personal identifying information from a duty to comply with other requirements of state and federal law regarding the protection of such personal identifying information.

On p. 1, line 34, and also p. 2, line 8, strike “destruction”