

New Delaware “Data Destruction Law”

Effective January 1, 2015, Delaware adopted a “Data Destruction Law” relating to the destruction of documents containing consumer personal information.¹ Originally promulgated as Delaware House Bill 295, the Law can be found in [Title 6 of the Delaware Code, Sections 50C-101 through 50C-104](#). Under the Law, new obligations are imposed on certain commercial entities relating to the destruction of records containing consumers’ personally identifiable information, as well as permitting both public and private causes of action to be brought against companies who fail to comply with its requirements.² If you are incorporated in or conduct business in Delaware, the Law may affect your business.

Data destruction requirements

Under the Law, when electronic or paper “records” (which include backup tapes, as well as local and cloud data storage devices) within the custody or control of a commercial entity are “no longer to be retained” by the commercial entity, it is required to take “all reasonable steps” to destroy any unencrypted “personal identifying information” (PII) of consumers contained in such records prior to their disposal.³ This can be achieved through shredding, erasing, or otherwise destroying or modifying the records to render them indecipherable or completely unreadable.⁴ Oddly, however, the Law does not address when the records must be destroyed after is the commercial entity determines that they will no longer be kept.

Who is required to comply?

The Law applies to corporations, trusts, partnerships, LLPs, LLCs, and various other associations or organizations subject to Delaware law, and its broad definition of “commercial entity” encompasses such entities regardless of their size, revenues, number of employees, or status as a for-profit or non-profit organization.⁵ This application will have important and substantial implications nationwide since many enterprises have and continue to incorporate in Delaware due to its favorable corporate laws, and continue to do business with the State and/or its residents.

The Law, however, exempts from its application certain financial institutions regulated by the Gramm-Leach-Bliley Act (GLBA), certain health insurers or healthcare facilities regulated by the Health Insurance Portability and Accountability Act (HIPAA), consumer reporting agencies subject to the Fair Credit Reporting Act (FCRA), and any government division, agency or instrumentality.⁶

What type of data is covered?

The Law’s data destruction requirements apply to consumers’ unencrypted PII.⁷ For purposes of the Law, a “consumer” is considered an individual entering into a transaction “primarily for personal, family, or household purposes.” PII consists of the consumer’s first name or first initial and last name combined with any one or more of the following pieces of information of the

¹ § 2, H.B. 295, 147th Delaware General Assembly (2014)

² §§ 50C-101 - 50C-104

³ § 50C-102

⁴ *Id.*

⁵ § 50C-101(1)

⁶ § 50C-104

⁷ § 50C-102

applicable consumer: signature, full date of birth, social security number, passport number, driver's license or state identification card number, insurance policy number, financial services account number, bank account number, credit or debit card number, any "other" financial information (e.g., tax or payroll information), or "confidential health care information" (e.g., information relating to the consumer's health care history, diagnosis condition, treatment or evaluation obtained from a health care provider which identifies the consumer).⁸ Any unencrypted PII of a consumer would need to be disposed of according to the Law's requirements.

Consequences of violations

In favor of consumers' rights, the Law allows both public and private causes of action to be brought against its violators.⁹ Affected consumers incurring actual damages as a result of a violation may bring a civil suit against the offending commercial entity.¹⁰ Treble damages can be recovered (e.g., for reckless or intentional violations), which can compound quickly provided "each record unreasonably disposed of constitutes an individual violation."¹¹ Additionally, the Delaware Attorney General may bring administrative enforcement actions for violations if it believes that such action would be in the "public interest."¹²

What this means for businesses

While the Law reflects a benign goal of protecting the privacy of consumers' personal information, the apparent scope of its application to commercial entities and lack of specificity as to the trigger for when such records must be destroyed could subject the Law to certain challenges. If your business is incorporated in or otherwise conducts business in Delaware or with its residents, and your business collects or has access to consumers' PII you should closely examine your data destruction policies to determine whether the Law applies to you. If the Law applies to you, compliance is required as of January 1, 2015.¹³

⁸ § 50C-101(2)-(3)

⁹ § 50C-103

¹⁰ § 50C-103(b)

¹¹ § *Id.*

¹² § 50C-103(c)

¹³ § 2, H.B. 295, 147th Delaware General Assembly (2014)