CARLTON FIELDS

NAIC Cybersecurity Task Force Weighs Credit Freezes

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On May 24-25, the NAIC Cybersecurity (EX) Task Force held an interim meeting to hear comments from various industry trade organizations and other interested parties on the proposed Insurance Data Security Model Law exposed for comment on March 2. While the comments' themes largely echoed the written comments previously submitted by the interested parties, there was also a lengthy discussion on appropriate consumer protection measures to potentially implement following a data security breach. The March 2 draft of the Model Law provides for up to one year of free identity theft coverage, but the possibility that a credit freeze could be a superior measure was discussed at length. **What is a Credit Freeze?** A credit freeze allows a consumer to restrict access to his or her credit report. As most creditors must access a consumer's credit report before approving a new account, a credit freeze prevents identity thieves from opening any new accounts in a consumer's name. However, this measure specifically protects consumers from the opening of new fraudulent accounts, and not against fraudulent activity in their existing accounts or other types of identity theft. In a data breach situation where personally identifiable information is stolen, a credit freeze is useful to protect against potential credit fraud. While credit freezes are often advised for identity theft victims, they can also be implemented to prevent fraudulent activity tied to a consumer's credit. **How it Works** To place a freeze on their credit report, consumers must contact each of the three major credit bureaus – Equifax, Experian, and TransUnion – and provide personal information

along with their freeze request. Fees vary from state to state, and can range from $3 to $10 to initiate a freeze. Each credit reporting company will provide the consumer with a unique personal identification number to use should they need to lift the freeze. It can take from 15 minutes to three days to initiate a freeze, depending on whether the request is made via postal mail, electronically, or by phone. Electronic and phone requests are the quickest ways to initiate a credit freeze. Once a freeze is placed on a consumer's credit, access is completely restricted and no new accounts can be opened unless the freeze is temporarily lifted by the consumer. All existing creditors will still have access to the consumer's credit report throughout the freeze. To lift a freeze, a consumer must contact each credit bureau again and request to either temporarily or permanently lift the freeze. A temporary lift costs from $2 to $12 depending on the state, and consumers must pay each time they need to make their credit available to a potential creditor or new employer. If the consumer can determine which credit bureau the potential creditor will use to check the consumer's credit, they can simply unfreeze their credit with that particular bureau to avoid extra costs. Some states waive temporary lift fees for identity theft victims or persons over age 65. To be eligible for the fee waiver, identity theft victims typically must provide a copy of a police report and in some cases an affidavit stating they believe that they are a victim of identity theft. The freeze can be lifted for a particular party or for a specified time period, and will be reinstated after that period. A permanent lift is typically free, though it depends on the state. The consumer can dictate when they want to permanently lift the freeze. **State Laws** All 50 states and the District of Columbia have enacted legislation to allow consumers to freeze their credit reports. Any consumer can request a freeze regardless of whether they are a data breach or identity theft victim. Although all states allow any consumer to initiate a freeze, some also mention the ability to freeze on behalf of minors or incapacitated persons. The National Conference of State Legislatures website notes that 22 states allow "parents, legal guardians or other representatives of minors to place a security freeze on the minor's credit report: Arizona, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Michigan, New York, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wisconsin." Some states also waive the fees to freeze and unfreeze for consumers who can prove they are identity theft victims or are over age 65. Equifax created a fairly comprehensive list of each state's fees for the freeze placement, date range lift, specific party lift, permanent removal, and replacement pin. The list also includes whether each state assesses different fees for identity theft victims or persons 65 years of age or older. In New Jersey, for example, identity theft victims are still required to pay a $5 fee for each temporary or permanent lift on a freeze. Whereas in New York, identity theft victims are not charged any fees. In South Carolina, both identity theft victims and non-victims can implement and suspend a credit freeze entirely for free. In Illinois, all fees are waived for active-duty military. After a data breach, organizations must comply with data breach notification laws, which also vary by state. Forty-seven states and the District of Columbia have enacted legislation requiring private and government entities to notify individuals of a security breach involving their personal information. Security breach laws differ on who must comply with the law, the definition of "personal information", what constitutes a breach, requirements for notice, and exemptions. A 2015 amendment to Connecticut's

breach notification law requires that an entity provide information on how to implement a credit freeze in its breach notification to consumers (Conn. Gen. Stat. § 36a-701b(2)(B) (2015)). **Benefits of Credit Freezing as a Data Breach Remedy** In the event of a data breach, a credit freeze is considered a more effective remedy than credit monitoring in terms of prevention. Credit monitoring will only alert a consumer to fraud after the activity has occurred, while a credit freeze could prevent the fraud from happening altogether. The freeze can completely shield a consumer's credit from inquiries (See *Should you Freeze your Credit After a Data Breach?*). While the credit freeze is in place, consumers can continue to use their existing accounts and will still be able to access free annual credit reports. Existing creditors, or collection agencies working on their behalf, will also have continued access throughout the freeze. The credit restriction has the added bonus of forcing consumers to become more strategic and thoughtful when they want to open new credit. Generally, a credit freeze should not negatively impact a consumer's credit score. In fact, some believe it is more likely to help a consumer's credit score due to the reduced number of hard inquiries that can be made during the freeze (Hard inquiries are credit reviews made in the course of a lending decision that may have a small negative impact on a consumer's credit score.). Although credit freezes create more obstacles for consumers who want to open new accounts, they protect consumers' credit in a way that credit monitoring cannot. The benefit of this added security measure will likely outweigh the cost of implementation and maintaining a frozen account for data breach victims concerned about identity theft. **Drawbacks to Credit Freezing** Despite its benefits, freezing credit has some drawbacks. While a credit freeze can specifically prevent credit fraud, consumers are still vulnerable to other types of identity theft and abuse of their personal information. Some consumers may also be deterred by the cost and high-maintenance strategy of having to unfreeze and reinitiate the freeze every time they need access to their credit. For consumers who do not typically need access, such as senior citizens, a freeze may not cause any inconvenience. However, for those who must access their credit history often, the freeze is much more burdensome. Some have also expressed concern that a credit freeze could result in an increase in a consumer's insurance rates. Since some insurance companies use credit scores as a factor in determining insurance scores for underwriting and rating consumers, the inability to access the consumer's credit report may be erroneously interpreted as a negative factor by the insurer. (See *NAIC Credit-Based Insurance Scores*). Steps to mitigate this potential risk would need to be devised if credit freezes are mandated by the Model Law. Ultimately, a credit freeze doesn't completely eliminate the risk of becoming a fraud victim. Identity thieves still possess other tools to use against consumers. A freeze also will not stop misuse of a consumer's existing accounts and will prevent credit monitoring companies from tracking a consumer's credit to look for that misuse. So, while this tool effectively blocks fraudulent credit activity, it is important for consumers to continue to monitor their existing accounts and request credit reports as often as possible to keep track of those accounts. **Conclusion** To use the credit freeze as a Model Law requirement, regulators and the credit reporting agencies would need to work together to determine how this remedy could be administered in a breach situation. Since the individual affected must initiate a freeze of his or her credit, procedures would need to be devised to provide for individual decisions on whether a credit freeze is the correct or desired approach for a

particular individual. The costs and administrative resources needed for such a measure may render this suggestion a good idea that falls short of a workable mandate. *The author would like to acknowledge the significant contributions of Laura Wall, summer associate from the University of Florida, in the preparation of the article.*

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