

Client Alert

Regulator Brings First-Ever Enforcement Action under New York's Financial Services Cybersecurity Regulation

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On July 21, 2020, New York's Department of Financial Services ("DFS")—the regulatory body that oversees New York's financial institutions, insurance companies, and a variety of other businesses—brought its first-ever enforcement action under New York's Cybersecurity Requirements for Financial Services Companies (the "Cybersecurity Regulations").

DFS Charges First American Financial

The DFS charged title insurance giant First American Financial with six Cybersecurity Regulations violations. The charges stem from an alleged vulnerability in First American's title-delivery website that exposed over 850 million documents containing sensitive consumer information, including social security numbers, drivers' licenses, and banking information. Specifically, according to the DFS, First American underestimated the cybersecurity risk, failed to follow its own cybersecurity policies, and disregarded warnings and advice from its in-house cybersecurity team. The DFS also alleges that First American failed to remedy the vulnerability for over six months after having discovered it in late 2018.

Cybersecurity Regulations: Compliance and Penalties

The Cybersecurity Regulations, which became effective in March 2017, require all covered entities to implement and maintain a comprehensive cybersecurity program, including technological safeguards proportionate to the entity's cybersecurity risk and a policy governing information security, data privacy, and incident response. Covered entities must also hire and train personnel knowledgeable in information security.

The DFS has scheduled an administrative hearing regarding its allegations beginning on October 26, 2020. Should First American be found liable, it faces potentially substantial penalties—up to \$1,000 per "violation." The DFS considers each exposure of confidential information to be a separate violation. In the event the DFS finds First American liable, under New York State law, the company may appeal that finding through an Article 78 proceeding in New York State court, which would pose the first opportunity for New York courts to consider the application of the Cybersecurity Regulations.

DFS' Expansive Enforcement

The charges against First American are notable in at least two respects. First, the DFS brought this enforcement action despite First American's position that the data vulnerability impacted no New York residents. While the Cybersecurity Regulations permit the DFS to exercise its authority even where no

New York consumers were impacted, it reflects a relatively expansive use of the DFS' powers in only its first enforcement action in this area. Second, the DFS's decision to seek to hold First American liable appears to be in tension with the view taken by at least one other regulator—according to First American, it's home-state insurance regulator (the Nebraska Department of Insurance) concluded in June 2019 that the company had adequately addressed the incident.

The First American enforcement action is the latest reminder that regulators are becoming increasingly aggressive in addressing publicly identified data breaches and other vulnerabilities. With DFS now actively enforcing its Cybersecurity Regulations, and the looming prospect of enforcement of the California Consumer Privacy Act, companies now face a much more crowded and precarious regulatory landscape than they did even a few months ago.

Litigation & Arbitration Group

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