VIEWPOINT CONT.

Canada's Digital Privacy Act Receives Royal Assent

suppressing or preventing fraud, provided that in either case it is reasonable to expect that disclosure with consent would compromise the investigation or ability to detect, suppress or prevent the fraud, as applicable.

   – Information contained in a witness statement may be collected, used and disclosed without consent, provided the collection, use or disclosure is necessary to assess, process or settle an insurance claim.

Not Yet in Force

Once Bill S-4 provisions relating to mandatory breach notification are in force, they will require organizations to notify affected individuals and the commissioner of a breach of security safeguards involving personal information under the organization's control, where the breach poses a "real risk of significant harm" to the affected individuals. Government institutions and other organizations also will need to be notified in prescribed circumstances, including if the organization believes that the institution or other organization may be able to reduce or mitigate the risk of harm to the affected individuals. This standard for reportable breaches is similar to that under Alberta's Personal Information Protection Act. However, organizations also will have to keep a record of all data breaches, including those that do not meet this harm threshold, and report all breaches to the commissioner upon request. An organization that knowingly fails to report or record a breach as required by PIPEDA will be guilty of an offense punishable by fines of up to CA$100,000. ◙

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Washington WATCH

Agency & Regulator News

Consumer Financial Protection Bureau
Lessons Learned from First Administrative Appeal in PHH Corp Case

On June 4, 2015, the CFPB issued its final decision in its enforcement action against PHH Corp. While the case involved the alleged payment of kickbacks in exchange for real estate referrals in violation of the Real Estate Settlement Procedures Act (RESPA), the decision was notable for several reasons that are informative for prepaid and other payments-related businesses:

- The case is the first ruling by Director Richard Cordray in a contested administrative proceeding before the CFPB.
- The case was initially heard by an administrative law judge (ALJ), then appealed to Director Cordray on separate grounds by both the CFPB and by PHH.
- Under the Dodd-Frank Act, the CFPB has the ability to choose whether to bring claims in federal district court or before an administrative law judge and generally can receive the same remedies regardless of the forum it chooses.
- In the PHH case, instead of filing suit in federal court, as has been the common practice for most of its contested enforcement actions, the CFPB filed an administrative claim before the ALJ.
- In doing so, the CFPB used is prosecutorial discretion to avoid the three-year statute of limitations that otherwise would apply to the RESPA claim if the claim were brought in federal court. This is concerning because it demonstrates the CFPB's power to change the venue for enforcement actions to avoid otherwise applicable statutes of limitation.
- Director Cordray determined he had de novo review authority both with respect to the findings of fact and the conclusions of law. As a result, he was able to give little (or no) deference to the decision reached by the ALJ.
- In the PHH case, the ALJ initially ordered PHH to pay *$6.4 million* in disgorgement, and, on appeal, Director Cordray increased the award to more than *$109 million*.

   This case serves as instructive precedence for future contested enforcement actions brought before Director Cordray. It is concerning that he was able to avoid the statute of limitations by selecting the venue for the proceeding and utilizing a de novo review standard in the appeal. It also is concerning that the CFPB effectively can serve as both the prosecutor and the judge in a case where Director Cordray hears the appeal of an ALJ, which some may see as effectively stacking the deck against the corporate defendant.