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Cybersecurity Safe Harbor Draft Model Legislation Executive Summary

Various states and associations, including the state of Ohio and the Conference of Western Attorneys General (CWAG), have been studying and setting forth state legislation with the goal of supporting the proposition that, if a business voluntarily makes reasonable and timely investments in its cybersecurity, and that same business is victimized by a third party breach, it should have the opportunity to use its investment affirmatively to mitigate liability. The Ohio law, S.B. 220, was passed in 2018 and serves as a viable prototype for future model legislation. The work that has been done by the CWAG Cybersecurity Working Group has provided additional features of such model legislation for consideration.

The attached draft legislation uses the Ohio law as its underlying structure but otherwise adapts it to the form of a proposed bill for Utah, as a reasonable candidate for proposed legislation and to see how such a sample bill would conform to a given state's current law. It also makes key revisions to the Ohio law that improve on its intentions by making it clearer and more protective of businesses that make investments in their cybersecurity. Those revisions include:

- Protecting compliant entities from actions in contract and statute as well as in tort;
- Protecting compliant entities from public/governmental as well as private actions;
- More clearly requiring entities to “reasonably align” their cybersecurity programs with prescribed standards, rather than requiring them to “reasonably conform” to those standards; and
- Expanding the scope of the safe harbor from applying merely to actions brought in Ohio under Ohio law by clarifying that the safe harbor will apply in any states that have adopted the model law.

The resulting model legislation proposes a cybersecurity safe harbor that reasonably addresses both the concerns of business and of regulators who wish to encourage businesses to proactively invest in their cybersecurity programs.