Cybersecurity: Minimizing the X-Factor

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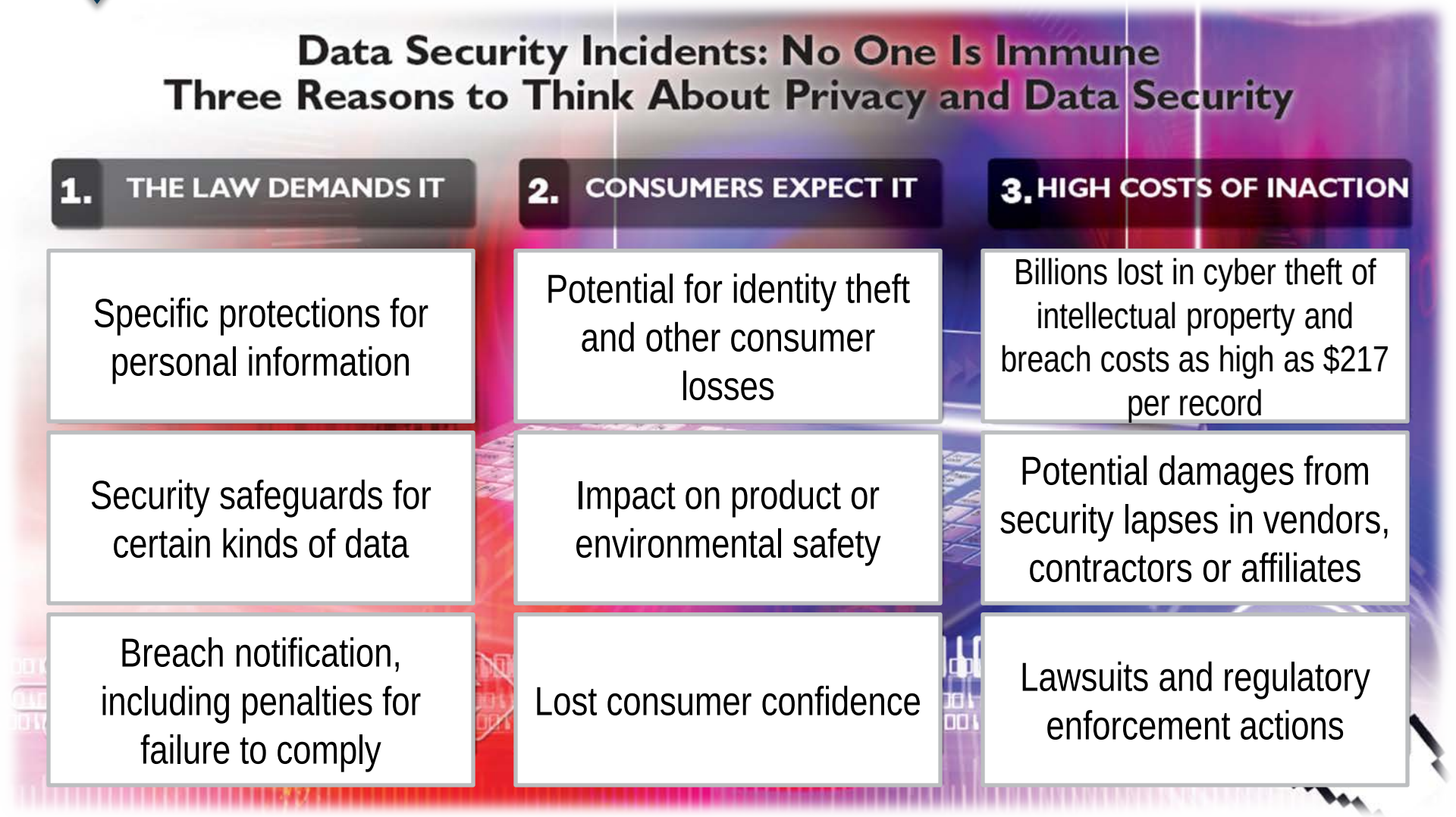
Data Security and Privacy Incidents Are on the Rise



Why More Companies are Paying Attention to Cybersecurity

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In 2015, average cost for each lost or stolen record increased from $201 to $217.

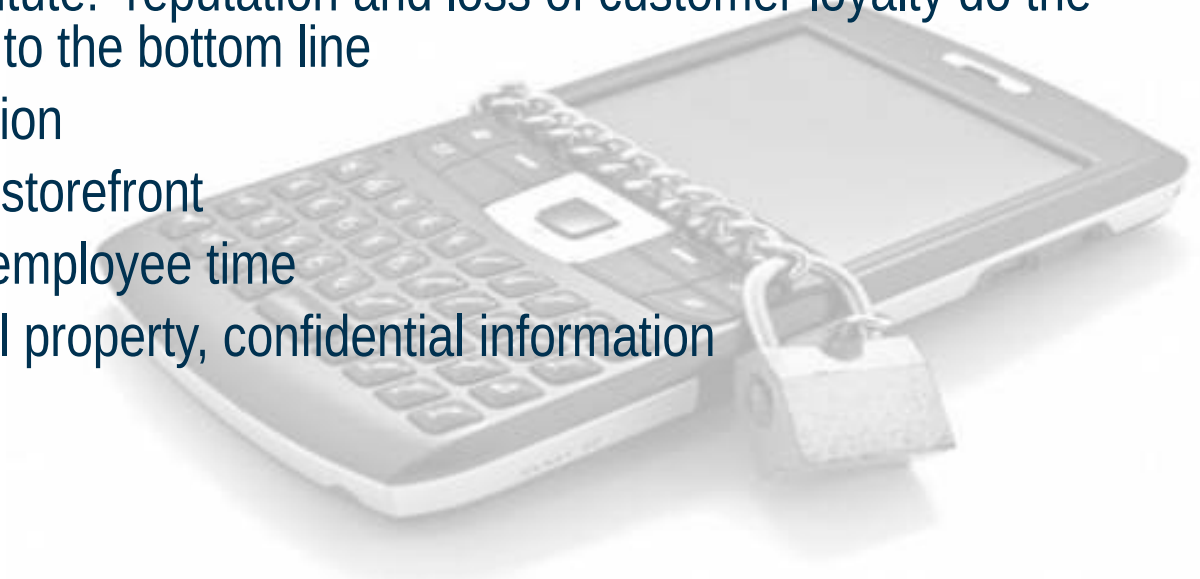
Total average cost paid by U.S. company increased from $5.9 million to $6.5 million.

Source: Ponemon Institute 2015 Cost of Data Breach Study: United States

Why More Companies are Paying Attention to Cybersecurity

- The legal costs
  - Data breach notification
  - Data breach litigation
  - Regulatory enforcement

- The non-legal costs
  - Loss of consumer/shareholder/employee confidence
    - Ponemon Institute: reputation and loss of customer loyalty do the most damage to the bottom line
  - Business interruption
    - Disabled web storefront
    - Demands on employee time
  - Loss of intellectual property, confidential information



Minimizing the X-factor: Understanding Data and Risk

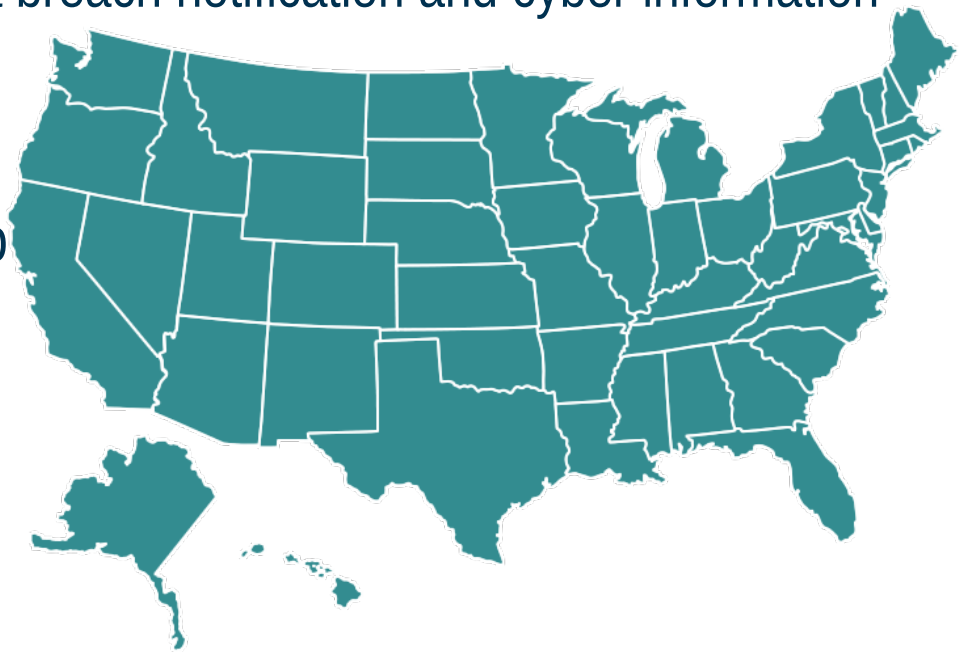
- Know your organization
  - Increased regulatory focus on “tone at the top”
  - Understand applicable laws and regulations
  - Implement data security and privacy policies, procedures, and training
- Know your data
  - e.g., personal, employee, consumer, proprietary
  - Understand and implement safeguards
- Know your risks
  - Insider threat (including inadvertent disclosure); vendors; suppliers; contractors; customers; and employees; bring your own device
  - Cyber attack
  - Physical threat and natural disasters

Minimizing the X-Factor: Navigating the Legal and Regulatory Landscape

- New laws; old proposals
- Regulatory enforcement
- Recent data breach court decisions
  - Split among courts as to whether there is actual injury/standing
  - Viability of state claims

U.S. Legislative Landscape

- Federal laws govern certain industries: e.g., HIPAA applies to healthcare sector
- Otherwise, no overarching federal cybersecurity/data breach notification law or cybersecurity standards
  - Congress considering data breach notification and cyber information sharing legislation
- Patchwork of 47 state laws, plus laws in DC, Guam, Puerto Rico, and the Virgin Islands



U.S. Legislative Landscape: State Laws

- In general, data breach = an event in which NAME + SS# or FINANCIAL INFO are accessible to unauthorized individual

- When a data breach occurs, data subjects must be notified and usually provided some explanation about incident
  - Notification to regulators: Indiana says notify AG
  - Most states require prompt notification: Indiana says without unreasonably delay (often interpreted as 30 days)

- The law that applies = law of the state where data subject resides
  - May or may not be state where company is headquartered
  - Often means company has to comply with 47+ different laws

U.S. Regulatory Landscape

- NIST Cybersecurity Framework
  - Not a regulation, but provides roadmap for regulators and industry to identify risk and defend against threats
- National Association of Insurance Commissioners
  - 12 cybersecurity principles for insurers to protect consumer information
- Securities and Exchange Commission
  - Issued guidance in 2011 on the disclosure of cybersecurity risks and incidents
- Federal Trade Commission
  - Has authority under Section 5 of FTC Act to investigate "unfair/deceptive acts or practices"
  - Pursues companies that don't keep promises made in privacy statements (this is deceptive)
  - Pursues companies that don't provide adequate security (this is unfair)

U.S. Regulatory Landscape: *FTC v. Wyndham*

- *FTC v. Wyndham Worldwide Corp.*, No. 14-3514 (3d Cir. 2015)
  - Arose out of security breach involving 619,000 customers, $10 million in fraudulent transactions
  - FTC sued Wyndham for failing to protect its customers
  - Wyndham moved to dismiss on ground that FTC failed to provide businesses with adequate notice of what constitutes "unfair" data security practices

  - Court: FTC has authority to take action against companies that employ poor IT security practices
  - FTC :
    - Every General Counsel should know what FTC is doing
    - Basic security deficiencies outlined in complaint—FTC guidance

U.S. Litigation Landscape

- Consumer class actions
- Suits by credit card companies, banks, and other issuing entities
- Shareholder derivative cases and securities litigation
  - Claims for breach of fiduciary duty, or even securities fraud; challenge conduct of officers/directors before & after breach
  - Lessons from case law
    - Regularly discuss data security/privacy at BoD meetings
    - Give BoD committee oversight of data security/privacy
    - Periodically have third-party consultants assess IT security; consider any deficiencies
    - Establish incident response team
    - Fully investigate any breach allegation

Minimizing the X-Factor: Incident Response

- Prepare
  - Engage management
  - Review/update policies and procedures
  - Develop incident response plan
  - Detection/prevention/insurance
  - Practice, Practice
- Respond
  - Execute response plan
  - Stop the bleeding
  - Take remedial action
  - Engage external experts—

  forensics, outside counsel, insurers

Minimizing the X-Factor: Incident Response

- Investigate
  - Find out who, what, how, when, and why
  - Identify compromised data
  - Determine obligation to notify
- Communicate
  - Internally—employees, management, advisors, affiliates, and BoD
  - Externally—insurance, law enforcement, regulators, elected officials, shareholders, affiliates, customers, and media
  - Assess potential liability, claims, or public safety issues
- Comply
  - Identify and comply with federal and state laws and regulations
  - Develop litigation response strategy

Minimizing the X-Factor: Review and Update Policies

- General Privacy
- Social Media
- Bring your own device
- Employee Monitoring
- Information Technology Usage
- Information and Physical Security
- Data Collection, Sharing, and Retention
  - Vendor agreements (e.g., data safeguards, responsibility to protect data, responsibility in event of a breach, compliance, liability considerations)
- Incident Response
- Training

Thank you!

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