

## Could The Equifax Executives Face Criminal Charges?

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*“It’s one of the most egregious examples of corporate malfeasances since Enron”*

In September, over 145 million Americans learned their most private information had been compromised through a breach of the credit reporting agency Equifax.<sup>1</sup> Equifax joins Experian and TransUnion as one of the three largest credit reporting agencies in America who is tasked with protecting Social Security numbers, addresses, credit card information, date of births and other information.

While we have seen several major cybersecurity breaches, the Equifax breach is significant simply because you cannot change your date of birth. You cannot change your Social Security number. Therefore, 145 million Americans, or approximately half of the country, will need to protect themselves from identity theft and credit card fraud for the rest of their lives. The bottom line is there really is no second chance here for Equifax.<sup>2</sup> Their business is about keeping personal information safe and when that information is leaked, there is no going back, or as we trial lawyers like to say “You can’t un-ring a bell.”

The executives at Equifax announced this breach in early September, yet the breakdown in their security apparently reaches back as far as May, June, and July of this past year.<sup>3</sup> The investigation revealed Equifax was hacked in part through a website software program called Apache Struts which is widely used by many Fortune 100 companies.<sup>4</sup>

Significantly, the vulnerability of Apache Struts appears to have been known to Equifax before it was hacked because there was a “patch” available to fix some of these vulnerabilities as early as March.<sup>5</sup> However, the real issue with this “patch” for Equifax is all about timing. All Equifax had to do was implement this fix to the software when it came out and the breach could have been prevented.<sup>6</sup> Yet, the company which keeps our personal information waited and did nothing to implement the patch.<sup>7</sup> Understandably, many Americans are upset about the corporate incompetence displayed by Equifax. The next question becomes could members of Equifax face criminal charges?

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<sup>1</sup> Newcomb, Alyssa. *NBC News* (Sep. 10, 2017), <https://www.nbcnews.com/tech/security/massive-equifax-data-breach-could-impact-half-u-s-population-n799686>.

<sup>2</sup> Lawyer 2 Lawyer, *Legal Talk Network*, “The Legal Implications of the Equifax Data Breach”. Podcast. ( Sep. 29, 2017)

<sup>3</sup> *Id.*

<sup>4</sup> Whittacker, Zack. *ZD Net*, (Sep. 5, 2017), <http://www.zdnet.com/article/critical-security-bug-threatens-fortune-100-companies/>.

<sup>5</sup> Newman, Lily Hay. *Wired*, “Equifax officially has no excuse”, (Sep. 14, 2017), <https://www.wired.com/story/equifax-breach-no-excuse/>.

<sup>6</sup> Lawyer 2 Lawyer, *supra* note 2.

<sup>7</sup> *Id.*

Bi-partisan members of Congress are certainly concerned. North Dakota Democratic Senator Hedi Heitkamp has stated that “somebody needs to go to jail”.<sup>8</sup> Senate Minority Leader Chuck Schumer called Equifax’s treatment of consumers “disgusting” and its inability to protect data “deeply troubling”.<sup>9</sup> House Republican Lamar Smith of Texas, who chairs the Committee on Science, Space, and Technology, and South Carolina Republican Trey Gowdy, who chairs the Committee on Oversight and Government Reform, said both committees would investigate the Equifax hack.<sup>10</sup>

On the civil side, Equifax will surely face the threat of class action lawsuits and a Federal Trade Commission investigation. The standard for negligence in a civil case is sometimes described as how a “reasonable man of ordinary prudence”<sup>11</sup> would act, which is lawyer talk for asking what would a careful person do in the same situation? Think would a careful person stop at an intersection with a stop sign? Would a careful executive of a major credit agency make sure a patch for software was implemented?

Criminally, the executives who sold stock in Equifax before the breach was disclosed could face punishment from the Securities and Exchange Commission.<sup>12</sup> Additionally, there's ample precedent for corporate executives going to jail for negligence.<sup>13</sup> This is provided by a rule called the "responsible corporate officer" doctrine, which prosecutors can use to charge executives whose lack of oversight endangers the public welfare.<sup>14</sup> The catch, though, is the "responsible officer" rule has only been deployed in cases involving food, drugs or the environment. Right now, there's no such federal law when it comes to personal data.<sup>15</sup> But there probably should be given the clear public harm that occurs after major data breaches—including the Equifax hack, which has been widely described as the worst in history.<sup>16</sup>

The time is rapidly coming when executives should be held to the same standard for protecting personal data as they do for the environment or the food supply. If you know or suspect your personal data has been compromised, Consumer Reports has recommended a security freeze in order to prevent fraudsters from using your information.<sup>17</sup>

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<sup>8</sup> Henning, Peter J. *The New York Times* (Sep. 20, 2017), <https://www.nytimes.com/2017/09/20/business/equifax-hack-penalties.html>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Prosser and Keeton On Torts, *West Group* ( 5<sup>th</sup> Ed. 1984). Pg 174.

<sup>12</sup> Roberts, Jeff John. *Fortune* (Sep. 16, 2017), <http://fortune.com/2017/09/16/equifax-legal/>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Blyskal, Jeff. *Consumer Reports*, (Oct. 13, 2017), <https://www.consumerreports.org/equifax/a-freeze-wont-help-with-all-equifax-breach-threats/>.