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Client Alert

A report for clients and friends of the Firm

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New York Social Security Number Protection Law

New York has joined a growing number of states that have enacted laws protecting the confidentiality of Social Security Numbers ("SSNs") by placing limitations on the use and dissemination of such numbers.[1] This *Client Alert* reviews the statutory prohibitions and provides some general interpretive guidance.

General Prohibitions and Requirements

Effective January 1, 2008, the New York Social Security Number Protection Law (which is part of the state's General Business Law) prohibits any "person, firm, partnership, association or corporation" (other than the state or its political subdivisions) from:

1. Intentionally communicating or making available to the general public an individual's SSN (or any number derived from a person's SSN);[2]

2. Printing an individual's SSN on any card or tag required for the individual to access products, services or benefits;

3. Requiring an individual to transmit his SSN over the internet, unless the connection is secure or the SSN is encrypted;

4. Requiring an individual to use his SSN to access an internet web site, unless a password or personal identification number or other authentication device is also required to access the site; and

5. Printing an individual's SSN on any materials mailed to the individual (unless state or federal law requires the SSN to be on the document). There are significant exceptions to this prohibition, which are discussed below.

N.Y. Gen. Bus. Law §399-dd.

The statute also includes a general confidentiality requirement, which provides that any covered entity who is in possession of an individual's SSN shall, to the extent that the SSN is maintained for the conduct of a business or trade, (1) take reasonable steps to ensure that none of the entity's officers or employees have access to the SSN for any purpose other than for a legitimate or necessary purpose related to the conduct of the business or trade, and (2) provide safeguards necessary or appropriate to preclude unauthorized access to the SSN and to protect its confidentiality.

Exceptions. There are some important exceptions to the above prohibitions. Specifically, with regard to the provision prohibiting an SSN from appearing on materials mailed to an individual, the law provides that SSNs "may be included in applications and forms sent by mail, including documents sent as part of an application or enrollment process, or to establish, amend or terminate an account, contract or policy, or to confirm the accuracy of the [SSN]." N.Y. Gen. Bus. Law §399-dd(2)(e). However, an SSN may not be printed on a postcard or other mailer that does not require an envelope, or be visible on the envelope or without the envelope being opened.

In addition, the law does not prohibit the collection, use or release of an SSN as required by federal or state law, or the use of an SSN for internal verification, fraud investigation or administrative purposes, or for

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[1] Other states that have enacted legislation regulating the use of SSNs include Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont and Virginia.

[2] The law defines the term SSN to include *any number derived from a person's SSN*, but it does not include any number that has been encrypted.

any business function specifically authorized by the Gramm-Leach-Bliley Act.

Application to Employee Benefit Plans

The New York law is broad insofar as the prohibitions apply to any "person, firm, partnership, association or corporation." On its face, it would therefore appear to apply to employee benefit funds and plans, as well as employers. It is possible that the application of the law to benefit plans might in the future be challenged on ERISA preemption grounds, but the success of that challenge is not assured.

General Advice

Clearly, employers and benefit plans must continue to collect and use SSNs for payroll, tax and related purposes. However, the general use of an SSN as the identification number for all employment purposes is becoming increasingly problematic, and a business should only allow its employees and officers to have access to SSNs for "legitimate or necessary purpose[s] related to the conduct of [the] business or trade."

The prohibition contained in item 5 above (forbidding the inclusion of an individual's SSN in materials mailed to him) will likely generate a fair number of questions. Specifically, it is unclear how broadly one may interpret the exceptions for "applications and forms" and for documents sent "as part of an application or enrollment process, or to establish, amend or terminate an account, contract or policy, or to confirm the accuracy of the [SSN]." It is also unclear what sort of "safeguards" will be determined to be sufficient to meet the statutory requirement to prevent unauthorized access to SSNs and to protect their confidentiality. In the absence of specific authoritative guidance with regard to these issues, we generally recommend that employers and employee benefit plans take a conservative approach in analyzing each specific situation.

Applications, Forms and Enrollment Process. As noted, the law expressly states that an individual's SSN may be printed on "applications and forms" that are sent to an individual by mail, including documents sent "as part of an application or enrollment process." These quoted terms are not defined in the statute. In the absence of further guidance, this language would appear to permit the inclusion of an individual's SSN on the following materials mailed to the individual:

- employment applications;
- pension or annuity benefit applications, including death benefit applications;
- medical and other welfare benefit claim forms;
- survivor annuity waiver forms; and
- COBRA election forms.

Of course, the above items are only examples of some of the documents that might fall within the exception.

Although arguments may be made to the contrary, it would appear that the following documents would not be viewed as "part of an application or enrollment process:"

- pension and annuity estimate letters;
- periodic annuity/401(k) statements;
- general benefit plan communication materials, such as Summary Annual Reports, Summaries of Material Modifications and Code Section 204(h) notices;
- "Explanation of Benefit" notices relating to medical claims (although an argument may be made that they are part of the benefit application process); and
- QDRO-related correspondence (although an argument may be made that certain of such correspondence falls within the exception for "applications" or for documents sent "to establish … an account," as described below).

Documents Sent To Establish, Amend or Terminate an Account, Contract or Policy, or To Confirm the Accuracy of the SSN. This exception also appears straightforward. However, we caution against interpreting it too broadly (particularly the language regarding confirmation of the accuracy of an SSN). For example, we advise against taking the position that the inclusion of an SSN in general employment or benefit plan communications is intended to confirm the accuracy of an individual's SSN.

General Confidentiality Requirement. With regard to the statute's general confidentiality requirement, we recommend that clients adopt internal procedures and safeguards to ensure that individuals' SSNs are accessible to only those employees and officers who require access to SSNs for purposes of conducting the entity's business or plan administration.

As an initial matter, employers and benefit plans may wish to conduct an audit of the entity's current practices to determine when, and for what purpose, SSNs are collected, stored (including hard copy and electronic storage) and used. For each instance, a business- or benefit-related purpose should be identified and recorded, and existing forms and practices should be revised to eliminate unnecessary collection, storage and usage of SSNs.

Employers and benefit plans should also consider:

- Adopting and enforcing a policy prohibiting the accessing, copying or transmission of SSNs except for business- or benefit-related purposes.
- Keeping SSNs separate from general employee personnel files. Documents containing SSNs should be physically or electronically secured. Where possible, SSNs stored or transmitted electronically should be encrypted.
- Maintaining records showing who has accessed the SSN files and for what purpose.

Penalties for Noncompliance

The statute authorizes the New York State Attorney General to initiate an action for injunctive relief against violators of the law and, for violations of items (1) through (5) above, a court may impose civil penalties of up to $1,000 for a single violation and up to $100,000 for multiple violations resulting from a single act or incident. A second or any subsequent violation may result in a civil penalty of up to $5,000 for a single violation and $250,000 for multiple violations resulting from a single act or incident. There is a statutory defense for unintentional violations resulting from *bona fide* errors made notwithstanding the maintenance of procedures reasonably adopted to avoid such errors.

Conclusion

Inasmuch as this is a very new law that has not yet produced interpretative guidance, and given the strong public policy of protecting against identity theft, we recommend that covered entities proceed in a conservative manner in interpreting the law's reach and make a good faith effort to comply with its restrictions.

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