

June 12, 2007

Mr. Stephen. B. Nolan
Acting Director
Office of the Director
New Jersey Division of Consumer Affairs
124 Halsey Street
Newark, NJ 07102

RE: Proposed New Rules: N.J.A.C. 13:45F

Dear Mr. Nolan:

Securities Industry and Financial Markets Association ¹(SIFMA) appreciates the opportunity to provide comments on the proposed new rules N.J.A.C. 13:45F drafted by the Division of Consumer Affairs pursuant to the enactment of the Identity Theft Protection Act (ITPA), P.L. 2005, c.226. Based on our analysis of these proposed rules, we are opposed to their adoption. Many of the key security breach provisions such as notification procedures and computer security systems requirements, as well as others, of the proposed rules differ significantly from the underlying statute making them unclear and are inconsistent with the laws of other states. In their current form, the proposed regulations will negatively impact the operations of the securities industry and hinder its growth in the state.

In an effort to assist the Division in developing more useful regulation for the Act, we have outlined in this letter specific provisions, which are problematic for the industry and diverted from the able recommendations made by the many businesses and public entities involved in the ITPA legislative process. We respectfully request that these provisions be modified as we have recommended.

¹ The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

Breach of Security Provisions

- The proposed security breach regulations in Subchapter 3 far exceed the authority set forth in the Act. The proposed regulation at N.J.A.C. 13:45F-3.1(c) impose a duty to mitigate any damage where there has been a breach of security. However, there is no such mandate contained anywhere in the underlying Act. The term duty is very broad and poorly defined, raising more questions than answers. Therefore, we recommend it be removed from the proposed regulations.
- The requirement that every business and public institution maintain computerized records containing personal information employ computer security measures is outside the purview of the Act. N.J.A.C. 13:45F-3.2. The Act does not mandate computer security measures and the Division develop such standards without consultations with both business and public sector entities and through regulation. We would recommend this provision to be removed from the proposed rule.
- The statute requires notices of a breach “in the most expedient time possible and without reasonable delay.” The proposed regulations have adopted a new standard in N.J.A.C. 13:45F-3.3(a) requiring notice to the State police within 6 hours, then notice to customers within 24 hours of State Police even in instances where no need for an investigation is cited. We recommend that the notification provision in the original statute replace the burdensome standard put forward in the proposed rule.
- While proposed N.J.A.C. 13:45F-3.3 requires notification to the police and telephone numbers are provided, proposed N.J.A.C. 13:45F-3.4(g) requires that businesses and public entities maintain documentation of the notification to police without clear instructions. The rules do not provide guidance to businesses or public entities on what will qualify as sufficient documentation to satisfy the regulations in order to prove that the disclosure was made if done via telephone. Therefore, we recommend that at least alternate notification such as facsimile and electronic mail be added to the regulation, so a business or the public entity can have an appropriate paper trail to document its file particularly when it may be subject to the potentially severe penalties imposed under the Consumer Fraud Act.
- We are unclear of the purpose of proposed N.J.A.C. 13:45F-3.5 relative to the destruction of records. Once a business destroys records, it will now have to maintain a record of the records destroyed. We assert that the language contained in the Act itself at N.J.S.A. 56:8-162 was sufficiently clear to allow businesses to dictate destruction methods. Further, SIFMA’s members as well as many others in the financial services industry are subject to stringent federal and state regulations regarding record retention, which dictate the destruction of records. Quite frankly, this provision runs contrary to many of those statutory requirements, and the proposed regulations should reflect the language in the Act.

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Social Security and Violations Provisions

- The proposed regulations contain several references to minimum standards at N.J.A.C. 13:45F-3.2 (e.g. definitions of breach, encryption); disclosure provided in N.J.A.C. 13:45F-3.4(b) and (c); Social Security number transmission restrictions at proposed N.J.A.C. 13:45F-4.1(a)(4); and the violation provisions at N.J.A.C. 13:45F-5.2(b)(3). The minimum standards are too prescriptive to be nimble to allow businesses to respond to changing situations and too vague ("up to date," and "risky") to provide meaningful guidance. The language used in the definition of "breach of security" in the Act was sufficiently clear and should not be substituted by the new regulatory language. It provides in part that "secured by encryption or any other method or technology that renders the personal information unreadable or unusable." N.J.S.A. 56:8-161.
- With respect to the proposed regulations on social security numbers in Subchapter 4, there was no reference in the Act regarding the reason for requesting an individual's Social Security numbers as set forth at N.J.A.C. 13:45F-4.1(f). Further N.J.A.C. 13:45F-4.1(g) requires that when a business or public entity requests a Social Security number, they must "do so in conditions under which the Social Security number will remain confidential." Again, this provision is not derived from the Act and it is unclear. Therefore, we recommend removing it from the proposed rules.
- The failure to maintain a computer security system as proposed in N.J.A.C. 13:45F-5.2(b)3 is not referenced or required by the Act. Further, it was developed with out consultations with businesses. Also, the Act does not penalize "wrongful use" of a Social Security number as proposed in N.J.A.C. 13:45F-5.2(b)6, which is also not defined. We would recommend these provisions be removed from the proposed rules.

Thank your for your consideration of our comments. Please call me if have any questions or need additional information, my telephone number is 212-618-0533.

Sincerely,



Nancy Donohoe Lancia
Vice President
State Government Affairs

Cc: Maggie M. Moran , Office of the Governor, Deputy Chief of Staff
The Honorable Steven Goldman, Commissioner of Banking and Insurance
The Honorable Bonnie Watson Coleman
The Honorable Shirley Turner