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M E M O R A N D U M

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To Our Clients and Friends

Re: Identity Theft Protection Act of 2005

On July 28th, the Senate Committee on Commerce, Science and Transportation approved the Identity Theft Protection Act (S. 1408). The act establishes standards for protecting sensitive personal information, requires notification of security breaches, provides for security freezes and restricts the use of Social Security numbers. The Federal Trade Commission (“FTC”) is required to promulgate rules implementing the act. The legislation would be enforced by the functional regulators. No private right of action or class action may be brought under the act. In certain circumstances state attorneys general may enforce the act.

STANDARDS FOR PROTECTING PERSONAL INFORMATION

The act requires entities subject to its provisions to take reasonable steps to protect against security breaches and to prevent unauthorized access to “sensitive personal information.” A “covered entity” is any entity that acquires, maintains or utilizes “sensitive personal information.” “Sensitive personal information” is an individual’s name, address or telephone number in combination with at least one of the following:

- Social Security number or taxpayer identification number,
- Financial account number or credit or debit card number in combination with any required security code, access code or password that would permit access to an individual’s financial account, or
- Driver’s license or state identification card number.

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An entity that is complying with the FTC's Standards for Safeguarding Customer Information and Disposal of Customer Report Information and Records or Title V of the Gramm-Leach-Bliley Act ("GLB Act") is regarded as in compliance with the requirement to take reasonable steps to protect against security breaches and to prevent unauthorized access to sensitive information.

SECURITY BREACH NOTIFICATION

The act requires covered entities to disclose a breach of security to affected individuals if there is a reasonable risk of identity theft. A "breach of security" is unauthorized access to sensitive personal information. If the breach affects more than 1,000 individuals, the FTC (or other appropriate regulator) and national consumer reporting agencies ("CRAs") must also be notified.

Written or electronic notice must be given in the most expedient manner practicable, but no later than 45 days after the date on which the breach was discovered, consistent with the needs of law enforcement or measures necessary to determine the scope of the breach and to restore the security and integrity of the data system. As an alternative, if the cost of providing notice would exceed \$250,000, there are more than 500,000 affected individuals or the covered entity does not have enough information to provide written or electronic notice, substitute notice may be provided via e-mail (if e-mail addresses are known), conspicuous posting on the covered entity's website and notification to major statewide media.

An entity that complies with requirements regarding notification of security breaches under Title V of the GLB Act is regarded as in compliance with the notification requirements of the act.

SECURITY FREEZE

The act provides that a consumer may place a security freeze on his credit report by making a request to a CRA. The freeze prevents the CRA from disclosing a credit report without the consumer's prior express authorization.

SOCIAL SECURITY NUMBERS

The bill makes it unlawful for a covered entity to:

- Request an individual's Social Security number unless there is a specific use of the number for which no other identifier reasonably can be used, or
- Sell, purchase or display to the general public Social Security numbers without the individual's consent.

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Exceptions are provided for the use of Social Security numbers to obtain a consumer report as permitted under the FCRA and under certain exceptions provided in Title V of the GLB Act.

It is expected that in the upcoming months, additional Senate and House committees will consider other bills addressing similar matters.

If you have any questions concerning this legislation, please call Gilbert Schwartz, Robert Ballen or Tom Fox at (202) 776-0700.