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133

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IN SENATE

(Prefiled)

January 9, 2019

Introduced by Sen. CARLUCCI -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law and the state technology law, in relation to notification of a security breach

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. This act shall be known and may be cited as the "Stop Hacks
2 and Improve Electronic Data Security Act (SHIELD Act)".

3 § 2. The article heading of article 39-F of the general business law,
4 as added by chapter 442 of the laws of 2005, is amended to read as
5 follows:

6 NOTIFICATION OF UNAUTHORIZED ACQUISITION OF PRIVATE
7 INFORMATION; DATA SECURITY PROTECTIONS

8 § 3. Subdivisions 1, 2, 3, 5, 6, 7 and 8 of section 899-aa of the
9 general business law, subdivisions 1, 2, 3, 5, 6 and 7 as added by chap-
10 ter 442 of the laws of 2005, paragraph (c) of subdivision 1, paragraph
11 (a) of subdivision 6 and subdivision 8 as amended by chapter 491 of the
12 laws of 2005 and paragraph (a) of subdivision 8 as amended by section 6
13 of part N of chapter 55 of the laws of 2013, are amended to read as
14 follows:

15 1. As used in this section, the following terms shall have the follow-
16 ing meanings:

17 (a) "Personal information" shall mean any information concerning a
18 natural person which, because of name, number, personal mark, or other
19 identifier, can be used to identify such natural person;

20 (b) "Private information" shall mean either: (i) personal information
21 consisting of any information in combination with any one or more of the
22 following data elements, when either the data element or the combination
23 of personal information [~~or~~] plus the data element is not encrypted, or

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 is encrypted with an encryption key that has also been accessed or
2 acquired:

3 (1) social security number;

4 (2) driver's license number or non-driver identification card number;
5 [~~or~~]

6 (3) account number, credit or debit card number, in combination with
7 any required security code, access code, [~~or~~] password or other informa-
8 tion that would permit access to an individual's financial account;

9 (4) account number, credit or debit card number, if circumstances
10 exist wherein such number could be used to access an individual's finan-
11 cial account without additional identifying information, security code,
12 access code, or password; or

13 (5) biometric information, meaning data generated by electronic meas-
14 urements of an individual's unique physical characteristics, such as a
15 fingerprint, voice print, retina or iris image, or other unique physical
16 representation or digital representation of biometric data which are
17 used to authenticate or ascertain the individual's identity;

18 (ii) a user name or e-mail address in combination with a password or
19 security question and answer that would permit access to an online
20 account; or

21 (iii) any unsecured protected health information held by a "covered
22 entity" as defined in the health insurance portability and accountabil-
23 ity act of 1996 (45 C.F.R. pts. 160, 162, 164), as amended from time to
24 time.

25 "Private information" does not include publicly available information
26 which is lawfully made available to the general public from federal,
27 state, or local government records.

28 (c) "Breach of the security of the system" shall mean unauthorized
29 access to or acquisition of, or access to or acquisition without valid
30 authorization, of computerized data that compromises the security,
31 confidentiality, or integrity of [~~personal~~] private information main-
32 tained by a business. Good faith access to, or acquisition of
33 [~~personal~~], private information by an employee or agent of the business
34 for the purposes of the business is not a breach of the security of the
35 system, provided that the private information is not used or subject to
36 unauthorized disclosure.

37 In determining whether information has been accessed, or is reasonably
38 believed to have been accessed, by an unauthorized person or a person
39 without valid authorization, such business may consider, among other
40 factors, indications that the information was viewed, communicated with,
41 used, or altered by a person without valid authorization or by an unau-
42 thorized person.

43 In determining whether information has been acquired, or is reasonably
44 believed to have been acquired, by an unauthorized person or a person
45 without valid authorization, such business may consider the following
46 factors, among others:

47 (1) indications that the information is in the physical possession and
48 control of an unauthorized person, such as a lost or stolen computer or
49 other device containing information; or

50 (2) indications that the information has been downloaded or copied; or

51 (3) indications that the information was used by an unauthorized
52 person, such as fraudulent accounts opened or instances of identity
53 theft reported.

54 (d) "Consumer reporting agency" shall mean any person which, for mone-
55 tary fees, dues, or on a cooperative nonprofit basis, regularly engages
56 in whole or in part in the practice of assembling or evaluating consumer

1 credit information or other information on consumers for the purpose of
2 furnishing consumer reports to third parties, and which uses any means
3 or facility of interstate commerce for the purpose of preparing or
4 furnishing consumer reports. A list of consumer reporting agencies shall
5 be compiled by the state attorney general and furnished upon request to
6 any person or business required to make a notification under subdivision
7 two of this section.

8 2. Any person or business which [~~conducts business in New York state,~~
9 ~~and which~~] owns or licenses computerized data which includes private
10 information shall disclose any breach of the security of the system
11 following discovery or notification of the breach in the security of the
12 system to any resident of New York state whose private information was,
13 or is reasonably believed to have been, accessed or acquired by a person
14 without valid authorization. The disclosure shall be made in the most
15 expedient time possible and without unreasonable delay, consistent with
16 the legitimate needs of law enforcement, as provided in subdivision four
17 of this section, or any measures necessary to determine the scope of the
18 breach and restore the [~~reasonable~~] integrity of the system.

19 (a) Notice to affected persons under this section is not required if
20 the exposure of private information was an inadvertent disclosure by
21 persons authorized to access private information, and the person or
22 business reasonably determines such exposure will not likely result in
23 misuse of such information, or financial or emotional harm to the
24 affected persons. Such a determination must be documented in writing and
25 maintained for at least five years. The person or business shall provide
26 the written determination to the state attorney general within ten days
27 after the determination.

28 (b) If notice of the breach of the security of the system is made to
29 affected persons pursuant to the breach notification requirements under
30 any of the following laws, nothing in this section shall require any
31 additional notice to those affected persons, but notice still shall be
32 provided to the state attorney general, the department of state and the
33 office of information technology services pursuant to paragraph (a) of
34 subdivision eight of this section and to consumer reporting agencies
35 pursuant to paragraph (b) of subdivision eight of this section:

36 (i) regulations promulgated pursuant to Title V of the federal Gramm-
37 Leach-Bliley Act (15 U.S.C. 6801 to 6809), as amended from time to time;

38 (ii) regulations implementing the Health Insurance Portability and
39 Accountability Act of 1996 (45 C.F.R. parts 160 and 164), as amended
40 from time to time, and the Health Information Technology for Economic
41 and Clinical Health Act, as amended from time to time;

42 (iii) part five hundred of title twenty-three of the official compila-
43 tion of codes, rules and regulations of the state of New York, as
44 amended from time to time; or

45 (iv) any other data security rules and regulations of, and the stat-
46 utes administered by, any official department, division, commission or
47 agency of the federal or New York state government as such rules, regu-
48 lations or statutes are interpreted by such department, division,
49 commission or agency or by the federal or New York state courts.

50 3. Any person or business which maintains computerized data which
51 includes private information which such person or business does not own
52 shall notify the owner or licensee of the information of any breach of
53 the security of the system immediately following discovery, if the
54 private information was, or is reasonably believed to have been,
55 acquired by a person without valid authorization.

1 5. The notice required by this section shall be directly provided to
2 the affected persons by one of the following methods:

3 (a) written notice;

4 (b) electronic notice, provided that the person to whom notice is
5 required has expressly consented to receiving said notice in electronic
6 form and a log of each such notification is kept by the person or busi-
7 ness who notifies affected persons in such form; provided further,
8 however, that in no case shall any person or business require a person
9 to consent to accepting said notice in said form as a condition of
10 establishing any business relationship or engaging in any transaction.

11 (c) telephone notification provided that a log of each such notifica-
12 tion is kept by the person or business who notifies affected persons; or

13 (d) substitute notice, if a business demonstrates to the state attor-
14 ney general that the cost of providing notice would exceed two hundred
15 fifty thousand dollars, or that the affected class of subject persons to
16 be notified exceeds five hundred thousand, or such business does not
17 have sufficient contact information. Substitute notice shall consist of
18 all of the following:

19 (1) e-mail notice when such business has an e-mail address for the
20 subject persons, except if the breached information includes an e-mail
21 address in combination with a password or security question and answer
22 that would permit access to the online account, in which case the person
23 or business shall instead provide clear and conspicuous notice delivered
24 to the consumer online when the consumer is connected to the online
25 account from an internet protocol address or from an online location
26 which the person or business knows the consumer customarily uses to
27 access the online account;

28 (2) conspicuous posting of the notice on such business's web site
29 page, if such business maintains one; and

30 (3) notification to major statewide media.

31 6. (a) whenever the attorney general shall believe from evidence
32 satisfactory to him or her that there is a violation of this article he
33 or she may bring an action in the name and on behalf of the people of
34 the state of New York, in a court of justice having jurisdiction to
35 issue an injunction, to enjoin and restrain the continuation of such
36 violation. In such action, preliminary relief may be granted under
37 article sixty-three of the civil practice law and rules. In such action
38 the court may award damages for actual costs or losses incurred by a
39 person entitled to notice pursuant to this article, if notification was
40 not provided to such person pursuant to this article, including conse-
41 quential financial losses. Whenever the court shall determine in such
42 action that a person or business violated this article knowingly or
43 recklessly, the court may impose a civil penalty of the greater of five
44 thousand dollars or up to [~~ten~~] twenty dollars per instance of failed
45 notification, provided that the latter amount shall not exceed [~~one~~] two
46 hundred fifty thousand dollars.

47 (b) the remedies provided by this section shall be in addition to any
48 other lawful remedy available.

49 (c) no action may be brought under the provisions of this section
50 unless such action is commenced within [~~two~~] three years [~~immediately~~]
51 after either the date [~~of the act complained of or the date of discovery~~
52 ~~of such act~~] on which the attorney general became aware of the
53 violation, or the date of notice sent pursuant to paragraph (a) of
54 subdivision eight of this section, whichever occurs first.

55 7. Regardless of the method by which notice is provided, such notice
56 shall include contact information for the person or business making the

1 notification, the telephone numbers and websites of the relevant state
2 and federal agencies that provide information regarding security breach
3 response and identity theft prevention and protection information, and a
4 description of the categories of information that were, or are reason-
5 ably believed to have been, accessed or acquired by a person without
6 valid authorization, including specification of which of the elements of
7 personal information and private information were, or are reasonably
8 believed to have been, so accessed or acquired.

9 8. (a) In the event that any New York residents are to be notified,
10 the person or business shall notify the state attorney general, the
11 department of state and the [~~division of state police~~] office of infor-
12 mation technology services as to the timing, content and distribution of
13 the notices and approximate number of affected persons and shall provide
14 a copy of the template of the notice sent to affected persons. Such
15 notice shall be made without delaying notice to affected New York resi-
16 dents.

17 (b) In the event that more than five thousand New York residents are
18 to be notified at one time, the person or business shall also notify
19 consumer reporting agencies as to the timing, content and distribution
20 of the notices and approximate number of affected persons. Such notice
21 shall be made without delaying notice to affected New York residents.

22 § 4. The general business law is amended by adding a new section 899-
23 bb to read as follows:

24 § 899-bb. Data security protections. 1. Definitions. (a) "Compliant
25 regulated entity" shall mean any person or business that is subject to,
26 and in compliance with, any of the following data security requirements:

27 (i) regulations promulgated pursuant to Title V of the federal Gramm-
28 Leach-Bliley Act (15 U.S.C. 6801 to 6809), as amended from time to time;

29 (ii) regulations implementing the Health Insurance Portability and
30 Accountability Act of 1996 (45 C.F.R. parts 160 and 164), as amended
31 from time to time, and the Health Information Technology for Economic
32 and Clinical Health Act, as amended from time to time;

33 (iii) part five hundred of title twenty-three of the official compila-
34 tion of codes, rules and regulations of the state of New York, as
35 amended from time to time; or

36 (iv) any other data security rules and regulations of, and the stat-
37 utes administered by, any official department, division, commission or
38 agency of the federal or New York state government as such rules, regu-
39 lations or statutes are interpreted by such department, division,
40 commission or agency or by the federal or New York state courts.

41 (b) "Private information" shall have the same meaning as defined in
42 section eight hundred ninety-nine-aa of this article.

43 (c) "Small business" shall mean any person or business with (i) fewer
44 than fifty employees; (ii) less than three million dollars in gross
45 annual revenue in each of the last three fiscal years; or (iii) less
46 than five million dollars in year-end total assets, calculated in
47 accordance with generally accepted accounting principles.

48 2. Reasonable security requirement. (a) Any person or business that
49 owns or licenses computerized data which includes private information of
50 a resident of New York shall develop, implement and maintain reasonable
51 safeguards to protect the security, confidentiality and integrity of the
52 private information including, but not limited to, disposal of data.

53 (b) A person or business shall be deemed to be in compliance with
54 paragraph (a) of this subdivision if it either:

55 (i) is a compliant regulated entity as defined in subdivision one of
56 this section; or

1 (ii) implements a data security program that includes the following:
2 (A) reasonable administrative safeguards such as the following, in
3 which the person or business:

4 (1) designates one or more employees to coordinate the security
5 program;

6 (2) identifies reasonably foreseeable internal and external risks;

7 (3) assesses the sufficiency of safeguards in place to control the
8 identified risks;

9 (4) trains and manages employees in the security program practices and
10 procedures;

11 (5) selects service providers capable of maintaining appropriate safe-
12 guards, and requires those safeguards by contract; and

13 (6) adjusts the security program in light of business changes or new
14 circumstances; and

15 (B) reasonable technical safeguards such as the following, in which
16 the person or business:

17 (1) assesses risks in network and software design;

18 (2) assesses risks in information processing, transmission and stor-
19 age;

20 (3) detects, prevents and responds to attacks or system failures; and

21 (4) regularly tests and monitors the effectiveness of key controls,
22 systems and procedures; and

23 (C) reasonable physical safeguards such as the following, in which the
24 person or business:

25 (1) assesses risks of information storage and disposal;

26 (2) detects, prevents and responds to intrusions;

27 (3) protects against unauthorized access to or use of private informa-
28 tion during or after the collection, transportation and destruction or
29 disposal of the information; and

30 (4) disposes of private information within a reasonable amount of time
31 after it is no longer needed for business purposes by erasing electronic
32 media so that the information cannot be read or reconstructed.

33 (c) A small business as defined in paragraph (c) of subdivision one of
34 this section complies with subparagraph (ii) of paragraph (b) of subdivi-
35 vision two of this section if the small business's security program
36 contains reasonable administrative, technical and physical safeguards
37 that are appropriate for the size and complexity of the small business,
38 the nature and scope of the small business's activities, and the sensi-
39 tivity of the personal information the small business collects from or
40 about consumers.

41 (d) Any person or business that fails to comply with this subdivision
42 shall be deemed to have violated section three hundred forty-nine of
43 this chapter, and the attorney general may bring an action in the name
44 and on behalf of the people of the state of New York to enjoin such
45 violations and to obtain civil penalties under section three hundred
46 fifty-d of this chapter.

47 (e) Nothing in this section shall create a private right of action.

48 § 5. Paragraph (a) of subdivision 1 and subdivisions 2, 3, 6, 7 and 8
49 of section 208 of the state technology law, paragraph (a) of subdivision
50 1 and subdivisions 3 and 8 as added by chapter 442 of the laws of 2005,
51 subdivision 2 and paragraph (a) of subdivision 7 as amended by section 5
52 of part N of chapter 55 of the laws of 2013 and subdivisions 6 and 7 as
53 amended by chapter 491 of the laws of 2005, are amended to read as
54 follows:

55 (a) "Private information" shall mean either: (i) personal information
56 consisting of any information in combination with any one or more of the

1 following data elements, when either the data element or the combination
2 of personal information [~~or~~] plus the data element is not encrypted or
3 encrypted with an encryption key that has also been accessed or
4 acquired:

5 (1) social security number;

6 (2) driver's license number or non-driver identification card number;
7 [~~or~~]

8 (3) account number, or credit or debit card number, in combination
9 with any required identifying information, security code, access code,
10 or password which would permit access to an individual's financial
11 account;

12 (4) account number, or credit or debit card number, if circumstances
13 exist wherein such number could be used to access to an individual's
14 financial account without additional identifying information, security
15 code, access code, or password; or

16 (5) biometric information, meaning data generated by electronic meas-
17 urements of an individual's unique physical characteristics, such as
18 fingerprint, voice print, or retina or iris image, or other unique phys-
19 ical representation or digital representation which are used to authen-
20 ticate or ascertain the individual's identity;

21 (ii) a user name or e-mail address in combination with a password or
22 security question and answer that would permit access to an online
23 account; or

24 (iii) any unsecured protected health information held by a "covered
25 entity" as defined in the health insurance portability and accountabil-
26 ity act of 1996 (45 C.F.R. pts. 160, 162, 164), as amended from time to
27 time.

28 "Private information" does not include publicly available information
29 that is lawfully made available to the general public from federal,
30 state, or local government records.

31 2. Any state entity that owns or licenses computerized data that
32 includes private information shall disclose any breach of the security
33 of the system following discovery or notification of the breach in the
34 security of the system to any resident of New York state whose private
35 information was, or is reasonably believed to have been, accessed or
36 acquired by a person without valid authorization. The disclosure shall
37 be made in the most expedient time possible and without unreasonable
38 delay, consistent with the legitimate needs of law enforcement, as
39 provided in subdivision four of this section, or any measures necessary
40 to determine the scope of the breach and restore the [~~reasonable~~] integ-
41 rity of the data system. The state entity shall consult with the state
42 office of information technology services to determine the scope of the
43 breach and restoration measures. Within ninety days of the notice of the
44 breach, the office of information technology services shall deliver a
45 report on the scope of the breach and recommendations to restore and
46 improve the security of the system to the state entity.

47 (a) Notice to affected persons under this section is not required if
48 the exposure of private information was an inadvertent disclosure by
49 persons authorized to access private information, and the state entity
50 reasonably determines such exposure will not likely result in misuse of
51 such information, or financial or emotional harm to the affected
52 persons. Such a determination must be documented in writing and main-
53 tained for at least five years. The state entity shall provide the writ-
54 ten determination to the state attorney general within ten days after
55 the determination.

1 (b) If notice of the breach of the security of the system is made to
2 affected persons pursuant to the breach notification requirements under
3 any of the following laws, nothing in this section shall require any
4 additional notice to those affected persons, but notice still shall be
5 provided to the state attorney general, the department of state and the
6 office of information technology services pursuant to paragraph (a) of
7 subdivision seven of this section and to consumer reporting agencies
8 pursuant to paragraph (b) of subdivision seven of this section:

9 (i) regulations promulgated pursuant to Title V of the federal Gramm-
10 Leach-Bliley Act (15 U.S.C. 6801 to 6809), as amended from time to time;

11 (ii) regulations implementing the Health Insurance Portability and
12 Accountability Act of 1996 (45 C.F.R. parts 160 and 164), as amended
13 from time to time, and the Health Information Technology for Economic
14 and Clinical Health Act, as amended from time to time;

15 (iii) part five hundred of title twenty-three of the official compila-
16 tion of codes, rules and regulations of the state of New York, as
17 amended from time to time; or

18 (iv) any other data security rules and regulations of, and the stat-
19 utes administered by, any official department, division, commission or
20 agency of the federal or New York state government as such rules, regu-
21 lations or statutes are interpreted by such department, division,
22 commission or agency or by the federal or New York state courts.

23 3. Any state entity that maintains computerized data that includes
24 private information which such agency does not own shall notify the
25 owner or licensee of the information of any breach of the security of
26 the system immediately following discovery, if the private information
27 was, or is reasonably believed to have been, acquired by a person with-
28 out valid authorization.

29 6. Regardless of the method by which notice is provided, such notice
30 shall include contact information for the state entity making the
31 notification, the telephone numbers and websites of the relevant state
32 and federal agencies that provide information regarding security breach
33 response and identity theft prevention and protection information and a
34 description of the categories of information that were, or are reason-
35 ably believed to have been, accessed or acquired by a person without
36 valid authorization, including specification of which of the elements of
37 personal information and private information were, or are reasonably
38 believed to have been, so accessed or acquired.

39 7. (a) In the event that any New York residents are to be notified,
40 the state entity shall notify the state attorney general, the department
41 of state and the state office of information technology services as to
42 the timing, content and distribution of the notices and approximate
43 number of affected persons and provide a copy of the template of the
44 notice sent to affected persons. Such notice shall be made without
45 delaying notice to affected New York residents.

46 (b) In the event that more than five thousand New York residents are
47 to be notified at one time, the state entity shall also notify consumer
48 reporting agencies as to the timing, content and distribution of the
49 notices and approximate number of affected persons. Such notice shall be
50 made without delaying notice to affected New York residents.

51 8. The state office of information technology services shall develop,
52 update and provide regular training to all state entities relating to
53 best practices for the prevention of a breach of the security of the
54 system.

55 9. Any entity listed in subparagraph two of paragraph (c) of subdivi-
56 sion one of this section shall adopt a notification policy no more than

1 one hundred twenty days after the effective date of this section. Such
2 entity may develop a notification policy which is consistent with this
3 section or alternatively shall adopt a local law which is consistent
4 with this section.

5 § 6. This act shall take effect on the ninetieth day after it shall
6 have become a law; provided, however, that section four of this act
7 shall take effect on the two hundred fortieth day after it shall have
8 become a law.