February 5, 2019

Mr. Asheesh Agarwal
General Counsel
U.S. Social Security Administration
6401 Security Blvd.
Baltimore, MD 21235

Dear Mr. Agarwal:

The undersigned organizations, representing leading payments companies, consumer data providers and nearly every financial institution in the United States, write regarding the Social Security Administration's (SSA) efforts to implement Section 215 of S. 2155, the Economic Growth, Regulatory Relief, and Consumer Protection Act (P.L. 115-174).

Section 215, better known as the bipartisan "Protecting Children from Identity Theft Act," was enacted to combat the scourge of synthetic identity fraud that is being felt in communities across the country. Targeting vulnerable populations, notably children and recent immigrants to our country, synthetic identity fraudsters use schemes that turn almost exclusively on their use of Social Security numbers. As the National Association of Attorneys General stated in a recent letter to Acting Commissioner Berryhill supporting the swift implementation of Section 215, "[o]ur residents lose thousands of dollars a year and suffer from ruined credit scores, as well as a general sense of anxiety regarding their identity."[1] Time clearly is of the essence. We greatly appreciate the sense of urgency and collaborative approach that the SSA's Office of Data Exchange, Policy Publications, and International Negotiations has taken in developing the system and gathering industry requirements and hope to continue working together in this manner.

In this spirit, we write to express our concern with what we understand to be your office's plans to initiate a time-consuming rulemaking process related to the statute's direction to a "permitted entity" to accept consumer consent electronically prior to accessing SSA's Consent Based Social Security Number Verification system or its successor system (which has been given the working name of eCBSV). The goal of this law – protecting consumers from identity fraud – is one we all share, and underscores the need to move this implementation forward as expediently as possible, and without undue delay. We hope you will find this information valuable.

As detailed further below, Section 215 expressly states that "[n]o provision of law or requirement…shall prevent the use of electronic consent" obtained by an individual's electronic signature. Accordingly, it is Congress's specific intent that no statute, expressly to include The Privacy Act (5 U.S.C. § 552a), or any regulations promulgated or policy adopted by SSA, should prevent SSA from responding to an eCBSV request submitted by a permitted entity where the

[1] https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2018/pr18-32-letter.pdf.

permitted entity has obtained the individual's electronic consent evidenced by the individual's electronic signature.

Rulemaking would be unnecessary and, in fact, contrary to the plain language of the statute, Congressional intent and well-settled public policy. We present the following facts of law as evidence:

Express Language of Section 215

Section 215 seeks to reduce synthetic identity fraud by allowing certain permitted entities, with a consumer's written – including electronic – consent, to validate that consumer's information through the use of a database maintained by SSA.

The law provides the following parameters regarding consumer consent:

- Section 215(f)(1) states that:

  "Notwithstanding any other provision of law or regulation, a permitted entity may submit a request to the database or similar resource described in subsection (c) only—

  (A) pursuant to the written, including electronic, consent received by a permitted entity from the individual who is the subject of the request; and

  (B) in connection with a credit transaction or any circumstance described in section 604 of the Fair Credit Reporting Act (15 U.S.C. 1681b)."

  - **Accordingly**, a permitted entity must obtain a consumer's "written, including electronic, consent" prior to submitting a request to eCBSV.
  - This provision expressly overrides any existing or future law or regulation that would otherwise apply to this consumer consent.[2]

- Section 215(f)(2) states that:

  "For a permitted entity to use the consent of an individual received electronically pursuant to paragraph (1)(A), the permitted entity must obtain the individual's electronic signature, as defined in section 106 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7006)."

  - **Accordingly,** if a permitted entity is obtaining electronic consent it must obtain the consumer's electronic signature, as defined in the Electronic Signatures in Global and National Commerce Act (ESIGN Act) (15 U.S.C. § 7006(5)).

[2] Courts have long interpreted the term "notwithstanding" to override both prior-enacted laws (*see, e.g., Crowley Caribbean Transport, Inc. v. United States*, 865 F.2d 1281 (1989) (in which a "notwithstanding" provision of the Foreign Assistance Act of 1961 authorizing disaster relief assistance to be furnished overrode an earlier cargo preference law requiring that shipments of U.S. goods to foreign countries be made on U.S. flag vessels), and laws enacted subsequently (*see, e.g., New Jersey Air National Guard v. FLRA*, 677 F.2d 276 (3d Cir. 1982), cert. den. 459 U.S. 988 (1982) (a more specific earlier enactment containing a "notwithstanding" clause was not overridden by a later, more general statute; also in interpreting the phrase "notwithstanding" in regards to prior-enacted laws, finding that "[a] clearer statement is difficult to imagine").

- Under the ESIGN Act, "electronic signature" means:

  "[A]n electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."

- The definition of electronic signature is technology neutral, and purposefully broad. A range of processes are currently and regularly used by permitted entities to achieve an electronic signature in consumer financial services transactions.

- Section 215(f)(3) states that:

  "No provision of law or requirement, including section 552a of title 5, United States Code [The Privacy Act], shall prevent the use of electronic consent for purposes of this subsection or for use in any other consent based verification under the discretion of the Commissioner."

  - **Accordingly**, no other provision of law or other requirement can prevent a permitted entity from obtaining electronic consent to submit a request to eCBSV.
  - The plain language speaks to Congress's specific intent in passing Section 215(f)(3) to enable a permitted entity to obtain consent by electronic signature consistent with the ESIGN Act without regard to any statutory or regulatory requirement, or SSA policy, related to obtaining an individual's consent.
    - Such preempted regulatory requirements would include the general restriction on disclosing individual's records without written consent. See 20 C.F.R. § 401.100.
    - Such preempted SSA policies would include the Disclosure with Consent Policy (GN 03305).
    - The program manual and the regulation do not need to be amended because Congress spoke directly to the matter, clearly stating that the statute, and not the regulation or manual, are controlling.

Express Language of the ESIGN Act

There also is a standalone ESIGN Act basis for concluding that permitted entities can rely on electronic consent without implementing regulations from SSA. Specifically, the ESIGN Act's general rule of validity provides that electronic signatures have the same legal effect as written signatures, stating:

> *"Notwithstanding any statute, regulation, or other rule of law…with respect to any transaction in or affecting interstate or foreign commerce— (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."*[3]

[3] 15 U.S.C. § 7001(a).

Further:

- The term "transaction" means "an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons" (15 U.S.C. § 7006(13)), and would include credit applications or other transaction between permitted entities and individuals underlying eCBSV requests.
- The term "electronic record" means "a contract or other record created, generated, sent, communicated, received, or stored by electronic means" (15 U.S.C. § 7006(4)), and would include a record of consent by an individual for purposes of submitting an eCBSV request.
- The term "electronic signature" means "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record" (15 U.S.C. § 7006(5)), and would include a checkbox or other process adopted by an individual for purposes of consenting to an eCBSV request.
- The ESIGN Act does not limit, alter, or otherwise affect any requirement imposed by a statute or regulation relating to the rights and obligations of persons "other than a requirement that contracts or other records be written, signed, or in nonelectronic form." The ESIGN Act specifically overrides a regulation that requires a record or signature to be written, such as 20 C.F.R. § 401.100.
- It is not necessary for a specific law or regulation to address compliance with the ESIGN Act because the ESIGN Act states that electronic documents and electronic signatures have the same validity as paper documents and handwritten signatures, notwithstanding any statute, regulation, or other rule of law generally.

Accordingly, based solely on the ESIGN general rule of validity and notwithstanding any other provision of law, including The Privacy Act, electronic signatures are valid for purposes of satisfying requirement for written consent, and no rulemaking is required to implement the electronic consent provisions of Section 215.

Exception under the APA

If, despite the language of Section 215 and the ESIGN Act, the SSA pursues a rulemaking, that rulemaking should not hinder or delay the development of the new eCBSV system.

- Since the rulemaking would be a technical change to harmonize the regulation to adhere to the controlling statute, the rulemaking would be exempt from the notice-and-comment procedure under the Administrative Procedure Act ("APA"). The APA provides that an agency is not required to conduct notice-and-comment rulemaking when the agency, for good cause, finds that the requirement is impracticable, unnecessary, or contrary to the public interest (collectively, the "good cause" exception). (5 U.S.C. § 553(b)(B)). The agency must make such a finding and include a brief statement of reasons therefore in the rule issued. Additionally, such a rulemaking is exempt from the APA requirement that it be published at least 30 days before its effective date (5 U.S.C. § 553(d)(3)).

- As explained in the Senate Report accompanying the APA, "unnecessary" means "unnecessary as far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved."[4] A rulemaking is unnecessary when an agency makes minor or technical determinations involving little to no agency discretion.[5]
- When a regulation has been superseded by recent statutory changes, as is the circumstance with the SSA's consent regulation and the enactment of Section 215, a notice-and-comment rulemaking is not required under the APA.[6]

    - In this instance, a rulemaking is unnecessary as the statute has clear language that electronic consent is valid for purposes of the eCBSV, and that language overrides the existing regulation. There is no public interest in such a rulemaking, as Section 215 and the ESIGN Act are controlling in regard to the ability of SSA to accept electronic consent. The rulemaking would have no impact on the public and would be purely technical in nature.

- SSA has invoked the "good cause" exception in the past. For example, in May 2018, SSA issued a final rule removing its "Special Payments at Age 72" rules from the Code of Federal Regulations.[7] SSA removed these rules because they are obsolete and no longer necessary, as there are no individuals who currently receive special age 72 payments, and no individuals will become entitled to these payments in the future. In justifying issuing a final rule without a notice-and-comment process, SSA invoked the "good cause" exception, finding that "prior public comment is unnecessary because this

[4] Senate Report, No. 752, 79th Cong. 1st Sess. at 200 (1945) https://www.justice.gov/sites/default/files/jmd/legacy/2014/03/20/senaterept-752-1945.pdf.

[5] *See, e.g.*, Mack Trucks, Inc. v. E.P.A., 682 F.3d 87, 94 (D.C. Cir. 2012) ("[The 'unnecessary'] prong of the good cause inquiry is 'confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.'") (quoting Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2001)); N. Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755, 767 (4th Cir. 2012); Nat'l Nutritional Foods Ass'n v. Kennedy, 572 F.2d 377, 385 (2d Cir. 1978); United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 30–31 (1947) ("'Unnecessary' refers to the issuance of a minor rule in which the public is not particularly interested.").

[6] *See, e.g.*, Outdated or Superseded Regulations: Title I, Parts A through C; Christa McAuliffe Fellowship Program; and Empowerment Zone or Enterprise Community—Priority, 83 Fed. Reg. 42438 (Aug. 22, 2018) (Department of Education removed outdated or superseded regulations without APA notice-and-comment under 5 U.S.C. § 553(b)(B), and waived the 30-day delay in the effective date under 5 U.S.C. § 553(d)(3), "The regulations being removed have been superseded by new legislation or were issued to implement a program that is no longer funded."); Outdated and Superseded Regulations—Career and Technical Education National Programs, 83 Fed. Reg. 47837 (Sept. 21, 2018) ("There is good cause to waive rulemaking in this case because this final regulatory action merely removes regulations that are superseded by statute and, therefore, outdated and unnecessary. This regulatory action adopts no new regulations and does not establish or affect substantive policy.").

[7] Removal of Special Payments at Age 72, 83 Fed. Reg. 21707 (May 10, 2018).

final rule only removes from the Code of Federal Regulations obsolete and unnecessary rules…"[8] For the same reasons, the SSA also waived the 30-day delay in effective date.

- Similar to the SSA's removal of the Special Payments at Age 72, the SSA rules governing disclosure with consent (20 C.F.R. § 401.100) have become obsolete due to the enactment of Section 215. The same reasoning used by the SSA in the removal of rules would apply to a change in the consent rules.

Accordingly, legal precedent and prior SSA actions strongly suggest that if SSA were to conduct a rulemaking, such rulemaking would be exempt from the notice-and-comment process and would be effective immediately, as the rulemaking is unnecessary and purely technical in nature.

Thank you for your consideration of our views. Based on our shared interest in a successful outcome to this implementation effort, and the positive and productive engagement we have had with SSA thus far, we hope you will find the foregoing information compelling and agree with this straightforward analysis. We urge the SSA to avoid an unnecessary rulemaking that would cause any delay in the implementation of this important consumer protection statute. By honoring the clear public policy imperative conveyed by Congress and moving forward expeditiously together, we can prevent more victims of synthetic identity fraud.

Sincerely,

American Bankers Association
Bank Policy Institute
Better Identity Coalition
Consumer Bankers Association
Consumer Data Industry Association
Consumer First Coalition
Credit Union National Association
Independent Community Bankers of America
National Association of Federally-Insured Credit Unions

[8] Id. at 21707.