

Consumer Financial Privacy

Supplement to Consumer Financial Services Law Report

Guest Commentary

FACTA: Will Dodd-Frank further expand consumers' control of their credit data?

By Jonathan D. Jerison and Mark E. Rooney*

The increase in identity theft over recent years has coincided with tightened credit availability, to the dismay of consumers nationwide. Changes to the Fair and Accurate Credit Transactions Act of 2003 (Pub. L. No. 108-159) and enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203), may put consumers in greater control of their credit data.

FACTA is a series of amendments to the Fair Credit Reporting Act (15 USC § 1681 *et seq.*). FACTA addresses, among other things, credit reporting standards, prevention of identity theft, and consumer access to credit information. FACTA was the result of the imminent expiration of broad preemption of state law affecting credit reporting as enacted in the 1996 amendments to FCRA.

Under these amendments, provisions scheduled to sunset on January 1, 2004, preempted state laws relating to the ability to solicit new customers using "prescreened" credit reporting agency, sharing of financial information among affiliates, and adverse action notices. With major states such as California enacting privacy restrictions that went far beyond federal law, the financial services industry, supported by federal regulators, advocated making the FCRA national standards permanent.

The sunset of many of FCRA's preemption provisions coincided with an increase in the incidence of identity theft, which was characterized by the House Committee on Financial Service as having reached "almost epidemic proportions."

FACTA's creation of mechanisms allowing consumers to place fraud alerts on their credit files was a direct response to the threats posed by identity theft. Other consumer protections, such as the required truncation of credit and debit card numbers on printed receipts and expansion of consumer rights to free copies of their credit reports, were also prompted by the Congressional concern about identity theft.

This article reviews FACTA's main substantive provisions, including the FTC's controversial attempt to apply FACTA's "red flags" rule to lawyers and other professionals, and ongoing efforts to increase consumer access to credit information.

ID theft prevention provisions

Title II of FACTA sets forth a series of provisions designed to prevent identity theft, and to mitigate its deleterious effects.

■ **Fraud alerts.** FACTA requires that CRAs place fraud alerts on consumer credit files in certain circumstances. Fraud alerts notify credit issuers that they may not extend

credit without verifying that the consumer has actually requested it.

A consumer's request for a fraud alert can be initial or extended. A request for an initial alert would be based on the consumer's good-faith suspicion that he has been or soon will be the victim of fraud, identity theft, or some other related crime. The initial fraud alert stays on the consumer's credit file for 90 days (or for a shorter duration at the consumer's request).

A consumer who presents evidence of identity theft to a CRA can request an extended alert. This allows a fraud alert to remain on file for up to seven years.

A consumer who is in military service and stationed away from a regular duty station has the right to place an active duty military alert on his credit file.

■ **Truncation of credit card numbers.** FACTA requires companies accepting credit cards or debit cards to truncate card numbers and block out the expiration date on printed receipts. Companies may generally not print card expiration dates or more than the last five digits of a card number.

Non-compliance creates a risk of substantial liability. In cases of willful non-compliance, businesses can be liable for between \$100 and \$1,000 per consumer. Numerous lawsuits have alleged willful violations of the prohibition against showing the expiration date. Although legislation provided a reprieve for some merchants who violated the expiration date requirement, others missed the deadline for relief and faced class actions alleging willful violations.

The 9th Circuit U.S. Court of Appeals recently held that such actions can proceed despite the disparity between the harm, if any, suffered by the consumers through failure to block out the date on the receipt and the catastrophic potential impact of the litigation on merchants. (*See Bate-man v. American Multi-Cinema, Inc.*, ___ F.3d ___, 2010 WL 3733555 (9th Cir. 09/27/10).)

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*Jonathan D. Jerison, counsel with BuckleySandler LLP, advises financial institutions on federal and state consumer protection laws and regulations including the FCRA, HMDA and TILA, among others. Mark E. Rooney, an associate with the firm, represents financial institutions facing civil government enforcement actions, primarily related to mortgage lending. Reach them at (202) 349-8000.

Recent Litigation

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■ **'Red Flag' rules.** FACTA requires federal bank regulators and the FTC jointly to prescribe "red flag" rules — guidelines designed to identify and track patterns in credit usage that suggest identity theft. Although the rules were enforced against banks, thrifts, and credit unions beginning on Nov. 1, 2008, the FTC repeatedly deferred enforcement while Congress considered revisions to prevent the rule from applying to some non-financial businesses, including attorneys and accounting firms.

Congress enacted the Red Flag Program Clarification Act of 2010, (P.L. 111-319), which was signed by the president and became effective on Dec. 18, 2010. The act modifies the definition of a "creditor" that is subject to the FACTA Red Flag rules, so that they now generally cover only traditional lenders and servicers and specifically do not apply to service-providers such as professional services firms. As a result of the congressional action, the FTC began enforcing the rules on Jan. 1, 2011.

■ **Investigating change of address requests.** One method of perpetrating identity theft is through fraudulent requests for additional or replacement credit or debit cards, accompanied by a change of address notification on the account. To address this concern, FACTA requires card issuers to follow one of three procedures for issuing new cards shortly after a change in the account holder's address.

Card issuers must: 1) notify the cardholder of the request for a new card at the cardholder's former address and provide the cardholder a means for promptly reporting incorrect address changes; 2) notify the cardholder of the request for a new card by a means of communication previously agreed to by the cardholder and card issuer; or 3) use other reasonable means for ascertaining the validity of the change of address. While this provision was included as part of a bundle of consumer protections highlighted by the red flags rule, it is an active requirement for issuers and is not affected by the delay in implementing the separate rules relating to red flags.

Other provisions

FACTA severely restricts the ability of CRAs to provide medical information to their clients. Medical information contained in a consumer report must be coded so that only financial information, not the specific health care provider or the nature of medical services, is shown. Lenders may not obtain or use medical information in credit decisions and may not share it with affiliates.

FACTA also requires lenders to provide a "risk-based pricing notice" to consumers who are offered credit at higher rates than others because of information in their credit reports. Alternatively, the lender may provide an upfront disclosure of the credit score to all applicants. Either alternative allows applicants to detect and correct credit report errors early in the process.

Consumer access to credit information

Under FACTA, consumers can request one free copy of their credit report annually from each of the national CRAs. Consumers can request these reports directly from each agency, or through the government-sponsored website at www.annualcreditreport.com. The free reports contain account histories, records of credit inquiries, and consumer biographical information such as address, phone number, and employer, but they do not include a consumer's credit score. FACTA allows the national CRAs to charge a reasonable fee for credit scores.

The ability of CRAs to charge a fee for proprietary credit scores has generated confusion about where consumers can obtain their free, scoreless reports. For example, one credit score provider's TV commercials lure consumers with the word "free" but require a monthly subscription for a credit monitoring service. While the subscription can be canceled during a free trial period, some in Congress have identified such tactics as evidence of the need for further consumer protections and access to free credit scores.

In the Credit CARD Act of 2009, Congress required the FTC to issue a rule to prevent the use of such tactics. The FTC's final rule, issued February 23, 2010, requires websites selling credit reports and related services to prominently display a disclosure informing consumers of their right to obtain a free report through the government-sponsored website.

In addition, Dodd-Frank provides consumers with a free credit score when they are declined for credit, and proposed legislation would further expand that right.

Impact of Dodd-Frank on FACTA

Under Dodd-Frank, primary responsibility for issuance of regulations under FACTA and other FCRA provisions will shift from the FTC and traditional federal bank regulators to the new Consumer Financial Protection Bureau, while FCRA/FACTA enforcement for non-bank entities, including CRAs, will remain with the FTC. Thus, FCRA is an exception to the general premise that the CFPB will supervise all aspects of consumer financial protection.

Although Dodd-Frank does not address the issue of coverage of non-bank creditors by the red flags rule, the FTC, as the enforcement agency, may well extend its delay of enforcement if the problem is not addressed legislatively. Dodd-Frank otherwise makes the following changes to FCRA:

■ Consumers will now have free access to their credit scores as part of an adverse action notice, meaning that consumers who are denied credit can obtain their credit scores without charge. Some pending bills would give all consumers free access to credit scores annually, just as the current law allows for annual free credit reports.

■ The CFPB and state insurance regulators will have more flexibility to provide additional "necessary and appropriate" exceptions to the restrictions on sharing and use of medical information.

The fallout from the financial crisis is likely to leave millions of Americans needing to repair, monitor, and protect their credit profiles and scores. Those who have taken hits to their credit scores as a result of job loss, foreclosures, and uncollected credit accounts will be vocal advocates for more transparency in the credit reporting system.

It is a safe bet that the CFPB will support these calls for greater transparency through as-yet-unidentified efforts to promote greater access for consumers to their credit information. □