

Congress Deals with Credit Reports and Identity Theft: The Fair and Accurate Credit Transactions Act

“Those who do not learn from history are doomed to repeat it.”

—George Santayana

I used to think about that George Santayana quote a lot, particularly while taking history courses. However, it also applies to Congress when they revisit legislation in order to improve it.

The Fair and Accurate Credit Transactions Act (FACTA) was signed into law on December 4, 2003, by President George W. Bush. The name of this law reflected the concerns of many Americans about the fairness and accuracy of their credit reports, as well as concerns regarding privacy and identity theft.

The law was an amendment of the Fair Credit Reporting Act that was originally passed in 1970. At that time, the focus of the law was on providing consumers better access to the information contained in their credit reports. The Fair Credit Reporting Act was amended in 1996 primarily to deal with concerns about the accuracy of information found in credit reports and in recognition of consumer rights pertaining to credit reports, as well as in response to concerns about the accuracy of the information contained within those reports. The 1996 amendment of the law provided a number of new consumer rights. However, in return for those rights now guaranteed by federal law, the rights of the individual states to generally enact stronger consumer protection laws in this area of the law were preempted temporarily until January 1, 2004. It was the looming deadline of the federal preemption of state action regarding many credit and privacy-related issues that made almost certain that financial industry lobbyists would press for legislation to be passed to extend those preemptions before the January 1, 2004 deadline. Fortunately for consumers, the fact that the financial industry was so anxious to have a law passed in a timely fashion also made financial institution lobbyists a bit more willing to compromise on some matters to the benefit of consumers—although, make no mistake about it, this law is written to protect the financial industry in this country. But one would have to be the ultimate negativist not to recognize that there are significant new benefits to consumers contained within FACTA to improve the accuracy of credit reports and help in the fight against identity theft.

Major Provisions of FACTA

“Just the facts, ma’am,” the line attributed to Jack Webb as Sgt. Joe Friday in the classic 1951–57 television crime show *Dragnet*, was never actually spoken by Jack Webb on the show. The line is just a cultural myth. However, FACTA is not a myth. It is the law and it is filled with important provisions. It deals with several facets of credit reporting. One of its primary goals is to enhance the accuracy of the entire credit-reporting system. It also has a number of provisions that deal with credit reporting and identity theft.

Free Credit Reports

One of the major benefits of FACTA is the provision that requires credit-reporting agencies to provide consumers, upon request, a free copy of their credit report annually within 15 days of the date of the request. Credit-reporting agencies formerly charged for this service, except in Colorado, Georgia, Maine, Maryland, Massachusetts, New Jersey, and Vermont, where state law already provided for an annual free report. You can expect to receive a host of solicitations for other services of the credit-reporting agencies with your free credit report because they take advantage of this law as a marketing opportunity.

Reinvestigations Following Review of Free Credit Report

FACTA gives the credit-reporting agencies 45 days in which to conduct a reinvestigation of any discrepancies discovered by consumers after reviewing their free annual credit reports.

Summary of Rights

Having rights in regard to your credit is of use to you only if you are aware of your rights in this complicated area of consumer rights. FACTA requires the FTC to make available a summary of the rights of consumers under the law. This summary of rights is given to consumers who are denied credit or offered credit at less favorable terms as a result of information contained in their credit reports. The FTC is also required to generally promote the availability of this summary of rights and provide it on the FTC website. The summary of rights must include information describing when a consumer may obtain a free copy of his or her credit report, the right to dispute information in the consumer’s credit report, and the right to obtain his or her credit score. The summary of rights must also include toll-free telephone numbers for all federal agencies involved with FACTA and a notice to consumers that they might have additional rights under their own state’s laws.

Fraud Alerts

In the past, people who were the victims of identity theft were routinely told to contact the three major credit-reporting agencies, Equifax, Experian, and TransUnion, to have a fraud alert placed on their credit report at each agency. A single telephone call to any of the big three would permit you to put a fraud alert on your account. That was the good news. A fraud alert is a notice placed prominently on your credit report that informs creditors and those considering granting you credit that you have been, or are in imminent danger of becoming, a victim of identity theft due to the privacy of your personal financial information being compromised. A fraud alert usually listed your telephone number and, in an effort to avoid further identity theft damages, a request that you be called before further credit applied for in your name would be granted. But the key word in that last sentence was “request.” The bad news was that until FACTA was passed, the use of fraud alerts was completely voluntary on the part of creditors. Before FACTA, many businesses granting credit would look at only a summary report or credit score report prepared by the credit-reporting agency. Because the fraud alert was included only on the full credit report, many businesses extending credit never saw the fraud alerts. In addition, many creditors did not bother to even check for fraud alerts when granting credit, thereby rendering them useless. Unfortunately, the law does not provide any penalty for businesses that do not check for fraud alerts, and many companies still do not pay much attention to them.

Fortunately, the rules regarding fraud alerts were both codified and strengthened by FACTA. The law recognizes the right of consumers to contact any of the three major credit-reporting agencies and have a fraud alert placed on their files at each of those agencies whenever the consumer has a good-faith suspicion either that he or she has been a victim of fraud or identity theft, or that he or she is about to become a likely victim of such a crime.

An initial fraud alert must include information that notifies anyone who is considering the consumer’s credit report for business purposes that the consumer does not authorize the establishment of any new credit or extension of present credit without the specific permission of the consumer. The initial alert also has a place for the consumer to provide a telephone number to be used for identity verification when credit is sought in the consumer’s name.

The initial fraud alert remains on the consumer’s credit report for 90 days; however, an extended fraud alert can remain, at the consumer’s request, on his or her credit report for up to seven years if the consumer provides an identity theft report to the credit-reporting agency. The identity theft report can take the form of the Federal Trade Commission’s Identity Theft Affidavit if that affidavit has been filed with a law enforcement agency. The FTC’s Identity Theft Affidavit is available at www.ftc.gov/bcp/edu/resources/forms/affidavit.pdf, and more information about it can be found in the “Form Letters”

material on this book's website (www.ftpress.com/identitytheft). Whenever a credit score is calculated for a creditor or prospective creditor reviewing the file for credit-granting purposes, the fraud alert must be included with the credit score. Unlike the situation before the passing of FACTA, anyone or any business that uses credit reports and the credit scores calculated from the information contained therein now is required to honor the fraud alert.

A further benefit of placing an extended fraud alert on your credit report is that for the next five years you are automatically taken off of the prescreened lists regularly provided by the credit-reporting agencies to credit card issuers and insurance companies sending out the offers that clutter our mailboxes and make us more susceptible to identity theft.

Anyone placing a fraud alert on his or her credit report also has the right to a free copy of his or her credit report within three business days of requesting a copy. Those people placing an extended fraud alert on their files are also eligible to receive two free copies of their credit report during the 12-month period following the filing of the extended fraud alert. The consumer is free to choose when he or she wants to receive these free reports.

Active duty military personnel have their own special provisions for fraud alerts. A person on active duty with the military, including someone who is in the reserves but serving at somewhere other than his or her usual station, may request an active duty alert that becomes a part of the person's credit report for the next 12 months. For the next 24 months, he or she will be automatically opted out of prescreened offer lists.

Blocking of Information

Credit-reporting agencies are required by FACTA to block any negative information that appears on the consumer's credit report as a result of the consumer being the victim of identity theft. To qualify for blocking of such information, the consumer must provide the credit-reporting agency with a copy of the identity theft report filed by him or her with a law enforcement agency, which again emphasizes how important it is to report all instances of identity theft to federal or state law enforcement officials. After the consumer has filed this report with the credit-reporting agency, it must promptly notify the company that provided the false information that the information provided by them might be the result of an identity theft, that an identity theft report has been filed, and that an information block has been requested. After they have been so notified, the provider of information that has been blocked must institute procedures to prevent the erroneous blocked information from being resubmitted to the credit-reporting agencies.

Business Records Disclosure

This provision of FACTA permits a victim of identity theft to directly contact businesses where an identity thief might have opened accounts or purchased goods or services in the identity theft victim's name, and upon presentation of a police report and an identity theft affidavit get copies of that business's records to help the consumer start the often long process of clearing his or her name.

Credit Card Number Truncation

Credit card numbers imprinted on receipts are an important source of information for identity thieves, who often obtain this information by rummaging through trash. FACTA requires all receipts that are electronically printed to truncate the numbers of the credit card so that no more than the last five digits of the card number appear on any sales receipt.

Social Security Number Truncation

Under FACTA, a consumer may request that the credit-reporting agencies truncate his or her Social Security number where it appears on his or her credit report whenever a consumer's credit report is sent out. This is important in order to reduce the number of people having access to this sensitive information.

Banning of Collecting Debts Resulting from Identity Theft

When an identity theft victim has filed an identity theft report with both a law enforcement agency and the credit-reporting agency, as well as notified the business where the identity theft debt originated, that particular business may not attempt to collect that debt from the identity theft victim. In addition, it may not sell that debt to anyone or place the debt with a collection agency. If you first learn about your identity being stolen by being contacted by a collection agency attempting to collect a debt that was incurred in your name by an identity thief, you should inform the collection agency that the debt is not valid and that you are a victim of identity theft. The collection agency is then required under FACTA to notify the creditor. You are then entitled to see all the information regarding this debt, such as applications, account statements, and late notices. After a creditor is notified that the debt was incurred by an identity thief, the creditor may not either sell the debt or put it into collection against you.

Single Notice of Furnishing Negative Information

Any financial institution that provides negative information about a consumer to a credit-reporting agency must also notify the consumer that this is being done. However, the financial institution is required to do this only the first time

they provide such negative information to the credit-reporting agencies. This notice may be included with the regular monthly billing statement or a notice of default. It may not be included with the consumer disclosures required by the Truth in Lending laws. The fact that this notice is required only a single time again emphasizes the necessity of regularly reviewing your accounts in detail in order to protect your credit.

The Right of Consumers to Dispute Inaccurate Information Directly with the Furnisher

Before FACTA, if a consumer disputed the accuracy of information reported by a creditor or other provider of information to the credit-reporting bureaus, he or she had to request an investigation regarding the accuracy of the information from the credit-reporting agency, which, in turn, had to request an investigation into the accuracy of the information by the provider of the information. Now the consumer has the right to go directly to the individual furnishers of information and request that they reinvestigate the disputed information reported to the credit-reporting agencies. This right is subject to FTC regulations. It is important to note that credit repair organizations will not be authorized to make requests on behalf of individual consumers for reinvestigation of disputed items.

Disclosures of Results of Reinvestigation

To improve the accuracy of consumer credit reports, FACTA requires the credit-reporting agencies to notify the furnishers of information when changes are made to a consumer's credit report after a change on the report has been made following a reinvestigation requested by the consumer. When the furnisher of information is informed of the change in the credit report, the furnisher must have its own procedures in place to block out the incorrect information that might have resulted from identity theft in order to prevent such information from being resubmitted erroneously to the credit-reporting agency.

Notification of Address Discrepancy

As a way of reducing identity theft, FACTA requires credit-reporting agencies to notify anyone requesting a credit report on a particular consumer when the consumer's address on the request is different from the address as shown on the credit report.

In addition, a common identity theft tactic of identity thieves who have managed to obtain your credit card number or debit card number is to contact the issuer of the credit card or debit card and ask them to change the address of the account for the credit card or debit card and then to request that replacement

cards be sent to them at the identity thief's address. Now before new or replacement cards may be issued, the card issuer must confirm the legitimacy of the change of address within 30 days of being requested to change the address. When an address change is combined with a request for replacement cards, the issuer of the card must contact the cardholder directly to confirm the change of address.

Disposal of Consumer Information

Because much identity theft is done through “dumpster diving”—which involves going through the trash of government agencies and private companies that collect and then dispose of documents that contain personal information such as Social Security numbers that can be used for identity theft—rules were enacted under FACTA to require that such government agencies and businesses dispose of sensitive documents properly by burning, pulverizing, or shredding so that the information in the documents cannot be retrieved by anyone.

As for disposing of files with sensitive information that are stored electronically, the rules require that these too be destroyed or erased so that they cannot be read or reconstructed when being disposed.

Being fully aware of the ingenuity of identity thieves who could pose as document-destruction contractors, agencies and companies are required to do a due-diligence investigation of any document-destruction contractor they are thinking of using before providing them with documents for disposal. Some of the ways that a due-diligence investigation would be done include reviewing an independent audit of the contractor's operations, speaking with references, requiring that the contractor be certified by a recognized trade organization, and reviewing the contractor's security policies and procedures.

New Opt-Out Rules for Prescreened Credit Offers

The offers of “preapproved” credit cards with which many of us are flooded can be not only an annoyance but also a source of identity theft if a criminal gets hold of the offers that so many of us just routinely toss into the wastebasket. FACTA requires that such prescreened offers must prominently contain a telephone number, the use of which will permit the consumer to opt out of receiving further offers. Under prior law, the duration of a telephone opt-out was two years. This has been increased to five years. The FTC was also ordered to increase consumer awareness of the entire opting-out process.

New Opt-Out Rules for Marketing Solicitations

For the first time, the law now requires that consumers be given the opportunity to opt out of having their personal information shared for marketing purposes with the affiliates of a company with which they do business. A consumer opt-out in this situation lasts for five years. Under this new rule, for instance, a bank with which you presently have an account would have to ask you before sharing your information with a company with which it is affiliated that sells insurance. Unfortunately, this new rule is filled with exemptions that water down the effectiveness of the rule. Privacy advocate and Maryland Senator Paul Sarbanes commented on this part of FACTA, saying, “I would have liked to have gone further...in the affiliate sharing section to provide more protection for the financial privacy of consumers....”

Preemption of State Laws

When the original Fair Credit Reporting Act was enacted into law in 1970, the law provided for federal protection of consumers in the areas of credit and credit reporting, but permitted the individual states to enact their own laws that would enhance consumer rights in these areas of the law. When the Fair Credit Reporting Act was amended in 1996, Congress specified seven particular provisions of the FCRA regarding which states would be preempted from enacting stronger consumer laws until January 1, 2004. It was this deadline that provided the impetus for the financial services industry to pressure Congress to enact FACTA before the January 1, 2004, deadline. Otherwise, the financial services industry would have most likely been made subject to a host of stronger laws passed by the individual states to protect their citizens. Fortunately, the impending deadline also made the financial services industry a bit more willing to compromise in some areas because of the risk of not having legislation passed before 2004. The bad news is that FACTA made permanent the seven areas of federal preemption, thus limiting the states from enacting stronger consumer protection laws in those seven covered areas. FACTA also significantly limited the ability of the states to strengthen provisions of FACTA in areas that were new to FACTA, such as the area of risk-based pricing notices.

Fortunately, when it came to the burgeoning area of identity theft legislation, FACTA only limits the states' powers to pass laws to reduce identity theft where state laws would deal with matters that were specifically dealt with by FACTA, such as the truncation of credit card numbers on receipts. Where something affecting identity theft was not specifically covered within FACTA, the states are still free to pass their own tougher laws. In the past, the states have taken the lead in protecting consumers from identity theft, so this part of FACTA is good news. The bad news, however, is that some laws that served to protect citizens of individual states have been invalidated by FACTA.