# THE FACT ACT AND ITS IMPACT ON RETAILERS, MERCHANTS AND OTHER NON-FINANCIAL COMPANIES

The Fair and Accurate Credit Transactions Act of 2003 (the "Fact Act" or "Act") has significance to businesses that are not furnishing consumer report information, but may still be covered by the new law and its extensive forthcoming regulations. Signed into law by President Bush on December 4, 2003,[1] the Act, in general, makes significant and substantial changes to the Fair Credit Reporting Act (the "FCRA"). Among other changes, the Act: (a) permanently reauthorizes the federal preemption provisions of the FCRA, and adds other areas in which state laws are preempted; and (b) establishes significant consumer protection standards addressing identity theft. The Act also applies to limiting the use and sharing of medical information in the financial system. In general, the Act provides limitations on the use and disclosure of medical information in consumer reports.[2] Additionally, the Act requires the Federal Trade Commission (the "FTC") and federal banking agencies to establish regulations implementing the Act.

The provisions of the Act are effective at different times. As for those provisions of the Act without specific effective dates, the FTC, along with the Board of Governors of the Federal Reserve System, issued joint final rules in February 2004 that establish the effective dates of such provisions.[3] The Act permanently reauthorizes several existing FCRA provisions that were set to expire on January 1, 2004.[4] In addition, the Act extended preemption to several new

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1 *See* Pub. L. 108-159.

2 *See* Act §§ 411 and 412. A detailed discussion of the Act's medical provisions is beyond the scope of this memorandum.

3 *See Effective Dates for the Fair and Accurate Credit Transactions Act of 2003: Joint Final Rules Establishing Schedule of Effective Dates*, Commission Action for February 4, 2004, *available at* http://www.ftc.gov/os/2004/02/4. The FTC has stated, however, that "because the substantive federal provisions actually will become effective at different times…establishing December 31, 2003 as the effective date for the preemption provisions would allow the state law to continue in effect until the respective federal preemptions come into effect." *See* Letter from the FTC and the Federal Reserve System to Plunkett, Hillebrand, and Mierzwinski (Dec. 23, 2003), *available at* http://www.ftc.gov/os/2004/01/040102frbletter.pdf.

4 Specifically, the Act permanently reauthorizes: (1) prescreening of consumer reports; (2) a consumer reporting agency's ("CRA") procedures related to the disputed accuracy of information in a consumer's file; (3) duties of a person who takes any adverse action with respect to a consumer; (4) responsibilities of persons who furnish information to CRAs; (5) information contained in a consumer report; (6) information sharing among affiliates; and (7) the summary of rights notices provided to consumers.

identity theft provisions.[5] The FTC has stated that some provisions of the Act should not require significant changes to existing business activities -- those provisions are currently in effect, as of March 31, 2004. Other provisions of the Act requiring significant changes to business practices will take effect December 1, 2004.[6]

The Act applies generally to financial businesses that furnish[7] or use information relating to consumer reports.[8] Importantly, however, businesses that do *not* furnish or use consumer report information could still be subject to certain requirements of the Act, since the Act can be applicable to both financial and nonfinancial institutions. This memorandum provides a general discussion of the Act as it applies to nonfinancial institutions, such as retailers or merchants who do not furnish consumer report information or use consumer reports for credit transactions, although they may use consumer reports in connection with employment purposes.[9]

## I. Truncation of credit card and debit card account numbers[10]

*The Act prohibits businesses from printing the expiration date of a credit or debit card or more than the last five digits of an account number on an electronically printed receipt.* For example, this requirement applies to the point of sale receipts issued by retail stores. Thus, at a minimum, companies should review all forms of their electronic receipts to ensure that they comply with

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5 These new provisions are: (1) the truncation of credit and debit card numbers; (2) fraud and active duty alerts; (3) blocking information resulting from identity theft; (4) the truncation of social security numbers; (5) free annual reports; (6) "red flag" guidelines and regulations, prohibition on sale or transfer of debt caused by identity theft, and debt collector communications concerning identity theft; (7) coordination of consumer complaint investigations; (8) duties of furnishers upon notice of identity theft-related information; and (9) disposal of records. *See* Act § 711.

6 *See supra* note 3.

7 The Act has several requirements addressing the furnishing of consumer report information. *See, e.g.*, Act §§ 152, 154, 312, 314, and 317. A discussion of such requirements is beyond the scope of this memorandum.

8 In general, the definition of "consumer report" under the FCRA means a communication "of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for…credit or insurance to be used primarily for personal, family, or household purposes;…employment purposes; or…any other purpose authorized under section 604" of the FCRA. FCRA § 603(d)(1).

9 Financial institution under the FCRA means banks, savings and loan associations, mutual savings banks, credit unions or other entities which hold consumer transaction accounts. FCRA § 603(t).

10 *See* Act § 113. This requirement is effective three years after the enactment date for cash registers that are in use before January 1, 2005 (*i.e.,* December 4, 2006), and one year after the enactment date for registers that are first put into use on or after January 1, 2005.

this requirement. This requirement does not apply to transactions in which the only means of recording credit or debit card numbers is by handwriting or by an imprint or copy of the card.

## II. Summary of rights of identity theft victims[11]

Under the Act, a company that enters into a commercial transaction for consideration with a person who has allegedly made unauthorized use of a victim's identification must provide a copy of the application and business transaction records directly to the victim, or to any federal, state, or local law enforcement authority if specified by the victim, within thirty days of the victim's request. Before a company provides such information to a victim, unless the company knows the identity of the victim with "a high degree of confidence," the company can require the victim to provide it with proof of his or her identity and proof of identity theft, including a police report evidencing the claim and (1) a copy of the identity theft affidavit developed by the FTC; or (2) an affidavit of fact that is acceptable to the company. The company may decline to provide such information to the victim under various reasons provided by the Act: for example, if in good faith the company determines that it does not have a high degree of confidence in knowing the true identity of the individual requesting the information. In addition, this section of the Act does not (a) create an obligation on the part of a company to retain records that are not otherwise required to be retained in the ordinary course of its business; or (b) require a company to disclose records that are not reasonably available or do not exist.

Thus, in the event a company enters into a commercial transaction for consideration with an individual who has allegedly made unauthorized use of another's identification, it must be prepared, and have the proper mechanisms in place, to provide records of the transaction directly to the victim of the identity theft or to certain law enforcement authorities, if requested by the victim, assuming the victim provides proper proof as discussed herein.

## III. Affiliate Sharing[12]

The Act limits the sharing of information between affiliated companies (businesses related by common ownership or affiliated by corporate control) for marketing purposes. Specifically, under the Act, consumers must be afforded a clear, conspicuous and concise notice and a right to opt out of having their data shared among affiliates for *marketing solicitation purposes*, absent an applicable exception. *Significantly*, the new opt-out covers a substantially broader amount of information, including a company's own transactions and experiences with its customers. Note that this new notice and opt-out required by the Act is *in addition to* the pre-Act FCRA opt-out for affiliate sharing. The opt-out is valid for five years from the date the business receives the opt-out request from the consumer, after which the consumer must be provided with a new

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[11] *See* Act § 151(a)(1). The first part of Section 151(a)(1), Section 609(d), is effective on December 1, 2004. The second part of Section 151(a)(1), Section 609(e), became effective as of June 2, 2004, and applies to the requirements discussed in section II of this memorandum.

[12] *See id*. § 214 (effective no later than March 2005).

opportunity to opt out. There are several exceptions to providing this new opt-out, including using information to make marketing solicitations to a consumer with whom the person has a *preexisting business relationship*, or to perform services on behalf of an affiliate.

Companies should evaluate how and under what circumstances they disclose information to their affiliates, including transaction or experience information, and whether they need to modify their business practices accordingly. For example, if a company discloses certain customer transaction information to affiliates who intend to send marketing information to such customers, then the company must provide such customers with the appropriate notice and opt-out as provided by the Act, unless the use of such information is covered by an exception under the Act.

## IV. Disposal of consumer report information and records[13]

Generally, the Act requires those who maintain or possess consumer information derived from consumer reports for business purposes to properly dispose of such information. Thus, companies should have the processes in place that will allow them to dispose information in accordance with these requirements.

## V. Reconciling addresses[14]

If a company requests a consumer report from a CRA and the request includes an address for the consumer that substantially differs from the addresses in the file of the consumer, and the CRA issues a consumer report to the requester and notifies such person of such discrepancy, then the user of the consumer report -- even potentially if such use is solely in connection with employment purposes -- must assist in reconciling such information under certain circumstances, pursuant to guidelines to be established by the FTC or other federal agencies, as applicable.

## VI. Protecting employee misconduct investigations[15]

The Act clarifies an employer's responsibilities under the FCRA when using third parties to investigate workplace misconduct. The Act amended the definition of "consumer report" to exclude from that definition certain communications made in the context of employee investigations. For example, if a company uses communications in the context of an investigation of suspected misconduct relating to employment, or compliance with applicable law, rules, or a preexisting written policy of the employer, and the communication is disclosed only to certain entities as provided by the Act (*i.e.*, to the employer or agent of the employer, to a

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13 *See id*. § 216 (effective on the date that the implementing rule becomes effective, which is within one year after the date of enactment of this section).

14 *See id*. § 315 (effective Dec. 1, 2004).

15 *See id*. § 611 (effective March 31, 2004).

government agency, to any self-regulatory organization, or as otherwise required by law), and the communication is not made to investigate a consumer's creditworthiness, credit standing, or credit capacity, then the communication would fall under an exception and would not be deemed to be a consumer report under the FCRA. If a company takes adverse action under this section, then it must disclose to the employee a summary containing the nature and substance of the communication upon which the adverse action is based. Thus, in sum, this means that companies may hire third parties to investigate workplace misconduct without having to satisfy certain notice and disclosure requirements previously required by the FTC under the pre-Act FCRA.

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If you have any questions concerning this memorandum, please contact Timothy McTaggart at 202-303-1121 or Demetrios Eleftheriou at 202-303-1134, both in our Washington, DC office.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is 212-728-8000, and our facsimile number is 212-728-8111. Our Web site is located at www.willkie.com.

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