

THE FINANCIAL SERVICES ROUNDTABLE



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June 15, 2004

Federal Trade Commission/Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: FACTA Identity Theft Rule, Matter No. R411011

Dear Sir or Madam:

The Financial Services Roundtable¹ (the “Roundtable”) appreciates the opportunity to comment to the Federal Trade Commission (“FTC”) on the notice of proposed rulemaking for related identity theft provisions, duration of active duty alerts, and appropriate proof of identity under the Fair and Accurate Transactions Act of 2003 (the “Act”).

Background

The FTC proposed rules under the Act defines the terms “identity theft” and “identity theft report,” the duration of active duty alerts, and the appropriate proof of identity needed by consumers to block fraudulent trade lines in their consumer reports, place or remove fraud or active duty alerts, or obtain a file disclosure containing a truncated Social Security number under certain circumstances.

Roundtable member companies are concerned that the broad definitions of “identity theft” and “valid law enforcement report” would have a negative impact on the industry. By including attempted fraud in the definition of identity theft, institutions would be forced to include common fraud and other more germane events in the definition and respond accordingly. In addition, the expanded definition of identity theft, would lead to inaccurate or fraudulent reporting of identity theft. This would place an extreme burden on financial institutions that would have to deal with a greater volume of identity theft reports, thereby allocating valuable resources that would otherwise be dedicated to assisting true victims of identity theft.

¹ The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine accounting directly for \$18.3 trillion in managed assets, \$678 billion in revenue, and 2.1 million jobs.

The proposed rule would also allow consumers to use the identity theft reporting process to inappropriately repair credit. We recommend that the final rule adequately balance the protection of identity theft victim's rights against the safeguards needed to ensure that the industry is protected from fraudulent reporting of identity theft.

The proposed definition of identity theft is too broad

Section 111 of the Act adds a number of new definitions to Fair Credit Reporting Act ("FCRA"), including "identity theft" and "identity theft report". Identity theft is defined as a fraud which is committed or attempted using a person's identifying information without lawful authority. The FTC clarifies in the rule that "identifying information" will have the same meaning as "means of identification" in 18 U.S.C. 1028(d)(7).

Roundtable member companies believe that the proposed definition of identity theft is too broad in scope. In particular, the inclusion of attempted fraud in the definition significantly increases what is considered identity theft. As stated in the proposed rule, the definition of identity theft is critical because it defines the scope of fraudulent conduct that entities must take steps to prevent, and the definition determines who is a victim that is entitled to take advantage of the rights outlined under the Act. By including attempted fraud in the definition, instances that are traditionally considered common fraud, such as a stolen credit card, would now be considered identity theft. Including traditional credit card fraud in the definition of "identity theft" may significantly increase claims of identity theft, fraud alerts and requests to block information as to individual transactions. For example, if a child used his or her parent's credit card without permission, the parent should not be able to claim that this act constituted "identity theft," thereby allowing the parent to, among other things, repair their credit report or block negative information on that report.

The definition of identity theft in the proposed rule would trigger certain duties for financial institutions. Companies would have to allocate additional resources and change systems to respond to new "identity theft" complaints. Institutions would be forced to create new accounts for these victims, change passwords and take other appropriate actions which would not normally be necessary for victims of common fraud. We believe that the additional costs associated with expanding the definition of identity theft would outweigh the benefits to the consumer. For example, if a fraud is attempted but not completed, the consumer will have suffered little, if any, harm. Any harm that the consumer will have suffered can be, or already will have been, adequately addressed. Therefore, we urge the FTC to limit the definition of "identity theft" to exclude attempted fraud.

We believe that the expansion of the definition of identity theft may also have a negative impact on the credit reporting process. According to the proposed rule, a consumer's credit score may be lowered if a credit report inquiry is made as a result of an

attempted fraud. The proposed rule suggests that the consumer is entitled to have this fraudulent trade line removed from his or her credit report file. We believe that FCRA already addresses this issue. If a consumer becomes aware that a credit report inquiry was made as a result of an attempted fraud, the consumer can dispute the accuracy of this inquiry with a credit reporting agency, pursuant to existing section 611 of the FCRA. The credit reporting agency would be required to conduct an investigation of the accuracy of the disputed information or simply delete it. If the investigation revealed that the disputed information was inaccurate, incomplete or could not be verified, the credit reporting agency would be required to delete it from the consumer's file. In addition, upon receipt of the dispute, the credit reporting agency would be required to inform the furnisher of that information of the dispute. We believe that modification to the term "identity theft" is not necessary for a consumer to remove a fraudulent inquiry from his or her credit report file that resulted from an attempted fraud. We are concerned that individuals will claim to be victims of identity theft in order to prevent legitimate attempts to report negative events to the credit bureaus.

The definition of "identifying information" should be narrowed

The proposed rule states that the term "identifying information" will have the same meaning as "means of identification" in 18 U.S.C. 1028(d)(7). We strongly urge the FTC to clarify that the definition of "identifying information" in section 603.2(a)(1) of the proposed rule does not include credit card numbers or other account numbers. The proposed rule would define the term "identifying information" as "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual."² This definition describes certain information that would qualify as "identifying information," including name, social security number, driver's license number and fingerprint (all of which are traditional means used for identification).

Roundtable member companies believe that the broad definition of "identifying information" could unnecessarily broaden the scope of identity theft. This definition determines the information that must be used in connection with a fraud in order for that fraud to qualify as identity theft under the FCRA. For example, the proposed definition of "identifying information" appears to transform instances of traditional credit card fraud into identity theft because a fraud would have been committed using another person's identifying card number. We believe that a credit card is not intended as a means of identification standing alone, but only as a method of payment.

The Roundtable believes that including traditional credit card fraud in the definition of "identity theft" may significantly increase claims of identity theft, fraud alerts and requests to block information as to individual transactions, rather than entire tradelines, which are already covered by the Truth in Lending Act dispute provisions. These processes are costly to credit reporting agencies, as well as to users of credit reports. We strongly urge the FTC to limit the definition of "identity theft" by clarifying

² 69 Fed. Reg. at 23,377.

that the term “identifying information” does not include credit card numbers or account numbers that would not, standing alone or with the name of the account holder, allow a person to commit fraud or identity theft.

The Roundtable supports the FTC’s approach to the use of identifying information “without lawful authority”

We support the FTC’s determination that the definition of “identity theft” should include the limitation that the identifying information be used “without lawful authority.” If an individual permits another to use his or her identifying information to commit a fraud, this individual should not be entitled the recourse established by the FCRA for legitimate victims of identity theft.

The proposed rule should protect identity theft victims while at the same time guard against the misuse of identity theft reports

The proposed rule creates new elements to the definition of “identity theft report.” The proposed rule requires consumers alleging identity theft to be as specific as possible and allows credit bureaus or creditors to request, within reasonable bounds, additional information or documentation to help them determine if the identity theft actually occurred. Consumers who produce an identity theft report would have the ability to place bureau blocks to mitigate further fraud. Specifically, under section 605A of the FCRA consumers may request an extended fraud alert for seven years which notifies users that the consumer may be the victim of identity theft. Furnishers of credit information would not be able to sell or transfer information to credit collection agencies and could not report negative information to the bureaus once an alert is placed.

Roundtable member companies support protecting identity theft victims, as evidenced by the recent creation of the Identity Theft Assistance Corporation (“ITAC”). However, we are concerned that identity theft reports may be used to inappropriately repair credit rather than to correct actual errors resulting from fraud. We believe that safeguards need to be taken to prevent an abuse of the system which would result in a misguided shifting of resources that are needed to protect the real victims of identity theft and would also create significant costs to institutions dealing with fraudulent identity theft reports. We believe the following recommendations would enhance the identity theft reporting process.

First, the proposed rule indicates that consumers would no longer have to file an official criminal report with local, state, or federal law enforcement agencies in person. In addition, law enforcement officials may establish automated means to collect complaints of identity theft (*i.e.*, an online complaint). We oppose this portion of the proposed rule. We believe that victims of identity theft are better served by having direct communications with law enforcement officials as opposed to a complaint system based on anonymity. Law enforcement officials are trained to handle these matters. We

believe that not having to meet face to face with law enforcement officials could prompt incomplete, inaccurate and fraudulent complaints.

Second, the proposed rule only appears to permit a single request for additional information within five (5) business days after the identity theft report is filed. Financial institutions have a successful track record addressing these types of complaints. We believe that institutions should be given adequate time to resolve these issues and request the appropriate documentation. We believe that five days is not enough time for financial institutions to analyze complaints and submit a formal request to the consumer for additional information. We recommend extending the time frame for submitting a request for additional information to thirty days. In addition, we request that the FTC clarify that a furnisher's investigation may involve more than a single request for information. Even though the victim is required to file an identity theft report "with as much specificity as the consumer can provide", there will usually be a need to request additional information in order to investigate such a report. We recommend that if the furnisher has grounds to request additional information or documentation after the first request, the furnisher should be allowed to make an additional request. Otherwise, the consumer may intentionally provide insufficient information on the first request if they believe no subsequent requests are forthcoming.

Roundtable member companies are also concerned about certain examples in the proposed rule that illustrate what constitutes reasonable grounds for a furnisher to request additional information from the consumer. We believe that these standards would make it difficult for furnishers to request additional information. In particular, we believe that it would be hard for a furnisher to demonstrate that there is "an indication that the report was obtained fraudulently". We urge the FTC to provide furnishers with more flexibility under this example by using language in the final rule such as "an identifiable concern, or reasonable expectation that the report was obtained fraudulently."

Third, Roundtable member companies are concerned with the requirement that consumers be as specific as possible when filing an identity theft report. We believe that this requirement is too subjective and does not act as an adequate safeguard against fraud. We believe that the FTC should provide additional guidance as to what type of information should be included in these reports.

Fourth, we believe that it is necessary for the final rule to make it clear that as a general rule identity theft reports cannot be filed by third parties. This would limit the ability of individuals and credit repair organizations from taking advantage of the identity theft reporting process. We do recognize that there may be some limited exceptions to this rule for identity theft victims who are minors, elderly, infirm, or when the third party has acquired power of attorney to act as the victim's agent.

Fifth, we recommend that identity theft reports specifically identify what activity is the result of identity theft. If trade lines are not specified in the report, then action,

such as blocking, should not be required. This will prevent persons from making vague allegations of theft which are not actionable.

Sixth, the proposed rule does not provide furnishers sufficient flexibility to respond to inaccurate or fraudulent identity theft reports. When a credit reporting agency receives an identity theft report from a consumer that alleges identity theft, the agency has four business days to block the file, pursuant to section 605B. As a practical matter, the credit reporting agency will not investigate the identity theft report. The affected financial institution however will investigate the allegation to determine its veracity. This creates a substantial burden for the institution, especially if the identity theft report is fraudulent.

It is not clear whether or not there are sufficient remedies for a financial institution which learns that the consumer's identity theft allegation is fraudulent. A financial institution should have some recourse to protect itself from these losses. We suggest that the rules allow institutions to either (i) pursue collection of the consumer's debt, without violating section 615(f), or (ii) move the credit debt to a new credit account or loan account that will then be reported to the credit reporting agencies as a separate trade line, without violating section 623(a)(6)(A).

The proposed expansion of “valid law enforcement report” is inappropriate

The Roundtable believes that the proposed rule does not strike the correct balance between the needs of legitimate victims of identity theft and the risk of the inappropriate use of law enforcement reports. The expansion of the definition of “valid law enforcement report” would permit consumers to file reports with the FTC's Identity Theft Data Clearinghouse, with a local law enforcement agency, through an automated system operated by a law enforcement agency (with no face-to-face meeting), by mail, over the Internet, or over the phone to staff who are not criminal investigators.

We believe that this broad definition creates an easy process for filing a report that would dramatically expand the number of fraudulent identity theft reports filed and place a substantial burden on financial institutions that investigate and resolve these complaints. We believe that the expanded definition of “valid law enforcement report” would also allow consumers to request a block in an attempt to repair a negative credit report. While there would be a great incentive for the consumer to file a report, there is no deterrent under the rule (such as prosecution or penalties) for this type of fraudulent conduct.

The Roundtable recommends that the FTC narrowly define “valid law enforcement report” to ensure the validity of these reports. We recommend that the final rule require that law enforcement reports be created through face-to-face or other personal contact with law enforcement agencies, or only allow law enforcement agencies with arrest authority to issue these reports.

Conclusion

We appreciate the FTC's efforts to draft regulations, in conjunction with the FACT Act, that protect the rights of identity theft victims. However, Roundtable member companies believe that definitions of "identity theft" and "valid law enforcement report" outlined in the proposed rule are too broad in scope and may lead to fraudulent reporting of identity theft. We recommend that the FTC's final rules define identity theft as actual rather than attempted fraud. We also recommend that appropriate safeguards be put into place to prevent individuals from filing fraudulent identity theft reports in an effort to repair their credit. This includes, among other things, narrowing the definition of what is considered a "valid law enforcement report" and giving institutions enough time to investigate identity theft reports and request sufficient additional information.

If you have any further questions or comments on this matter, please do not hesitate to contact me or John Beccia at (202) 289-4322.

Sincerely,

Richard M. Whiting

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Executive Director and General Counsel