

COMMENTER: Robert J. Johnson

ORGANIZATION: National Association for Information Destruction, Inc.

STATE: Arizona

INITIATIVE NAME: 16 CFR Part 682; Disposal of Consumer Report Information and Records; Comment Request

MATTER NUMBER: Project No. 165410

Re: Comment of the National Association for Information Destruction, Inc. 16 CFR Part 682; Disposal of Consumer Report Information and Records

On September 12, the U.S. Federal Trade Commission (FTC) announced it was seeking public comment on its Disposal Rule, a rule which implements part of the Fair and Accurate Credit Transactions Act of 2003 (FACTA).

The National Association for Information Destruction, Inc., (NAID) is a non-profit trade association having founded and granted 501(c)(6) status in 1994 in order that it may educate business and government on the importance of proper destruction of non-public personally identifiable information (PII), and other regulated or proprietary information. This mission is conducted on behalf of and service to its member-organizations that provide commercial secure destruction services. NAID currently represents more than 1,700 member locations around the world, 70% of which operate in the United States.

Based on our experience, NAID believes that most U.S. organizations meet their information destruction requirements at this point in time by outsourcing to a secure service, and the majority of those services are provided by a NAID member-company.

NAID commends the FTC for the good and difficult work it has done and continues to do to prevent and prosecute the mishandling of PII, prevent and prosecute Identity Fraud, and in general protect the personal information of U.S. citizens and hold those that don't accountable. NAID also commends the FTC for seeking public comment on the Disposal Rule, a regulation with which our association has a long history of involvement.

When Congress originally passed FACTA, those within the FTC responsible for creating the Disposal Rule sought NAID's input even before they began work. Insofar as the Disposal Rule represented the first (and remains the only) national information destruction requirement, it is to their credit that they sensibly turned to

the industry trade organization for advice. They had the foresight to see that a law requiring the destruction of personal information had the potential to create an opportunity for disreputable or incapable service providers to prey on those who would be now be required to comply with the new requirement. As a result, NAID helped craft the vendor selection due diligence recommendations now included in the current Disposal Rule.

The FTC's invitation for comment is specifically focused on four aspects of the Disposal Rule:

1. The economic impact and benefits of the Disposal Rule
2. Possible conflicts with state, local or other federal laws
3. The Disposal Rule's effect on any technological or other industry changes
4. Whether or not the definition of "consumer information" should be expanded to include aggregate information or information that can be reasonably linked to an individual

Due to our standing in the information destruction industry, NAID responds to the FTC with the following:

The economic impact and benefits of the Disposal Rule:

While there is obviously an economic impact on organizations who would otherwise neglect their responsibility to destroy discarded PII with which they have been entrusted, the Rule gives covered entities the authority to determine the most efficient and effective method to comply with the law. The potential economic burden to those who might suffer without a destruction requirement, not to mention the economic burden to law enforcement and society at large, is exponentially higher.

Possible conflicts with state, local or other federal laws:

Currently, there are no other federal laws that require the destruction of discarded personal information. Federal regulations that include data protection requirements, such as the Health Insurance Portability and Accountability Act (HIPAA) or the Financial Services Modernization Act (GLBA), simply require the covered entity take reasonable steps to prevent unauthorized access. Therefore, NAID draws the logical conclusion that existing federal laws which do not include a destruction requirement will not overlap with a new law that does.

Currently, 29 states have a law requiring the destruction of all personal information prior to disposal. There is admittedly overlap in some situations where consumer report information is an issue. However, the vast majority of the state laws exempt covered entities that are also required to comply with HIPAA or GLBA, which, as stated above, have no destruction requirement. Therefore, covered entities in the

healthcare sector, including doctors, hospitals, dentists, laboratories, extended care facilities, and others, as well as, those in the financial sector, including banks, credit unions, stock brokers, non-bank lenders, insurance companies, among others, - all of whom potentially receive consumer report information - are NOT covered by those state destruction requirements. As such, since these entities are exempt from their state laws and the federal laws have no conflict there is no overlap with the destruction requirements in the Rule.

Of course, in the 21 states that currently have no state law requiring the destruction of discarded personal information there is no overlap whatsoever.

The Disposal Rule's effect on any technological or other industry changes:

Fortunately, drafters of the Disposal Rule had the foresight to predicate compliance on the reasonableness principle. By stating that covered entities must take reasonable steps to destroy personal information prior to disposal, it gives complete flexibility to organizations in determining the most efficient and effective steps to elicit this result, regardless of the medium (hard copy or electronic) and regardless of their size and structure.

This does not mean that there are not emerging challenges related to the ubiquity of technology. For example, if consumer report information is copied or scanned, it is likely that the device used for that purpose (e.g. a copy machine or printer) retained a copy of that information on its internal hard drive. If consumer information is sent in an email or as an attachment, neither the sender nor recipient may know where the email or attachment resides (although the institution should). Furthermore, if consumer information is stored in "the cloud," (meaning on a third party server or servers, a destruction command does not necessarily destroy the information, but rather disconnects the user from the file. Hypothetically, were that consumer report information to continue to live on a remote server or servers when those servers are retired, does the legacy custodian – the server farm – own the compliance obligation? Many states, as well as the Disposal Rule, hold the inadvertent legacy custodian responsible for regulatory data protection requirements.

It is not that the Disposal Rule has had an effect on technological changes as much as technological changes have had an effect on the Disposal Rule. If NAID would advise any modification to the Disposal Rule in this regard, it would be to add provisions and clarity to provide direction (and enforcement) related to these emerging issues.

Whether or not the definition of “consumer information” should be expanded to include aggregate information or information that can be reasonably linked to an individual:

Most people, even those responsible for data protection compliance do not appreciate the very limited scope of the current Disposal Rule, which applies only to personal information that comes from a Credit Reporting Agency (CRA). It is as much about the source of the information as it is its personal nature. In other words, the form on which the consumer provided that same information to the covered entity is not covered by the regulation, only the report that comes back from the CRA. From a technical point of view, this is a small portion of the personal information processed by covered entities and appears to the lay person as unnecessarily limited and even arbitrary.

While it is important to appreciate that FACTA amends the Fair Credit Reporting Act, which itself has a defined jurisdiction, it would be a positive step toward improved consumer protection if the definition of consumer report information were expanded as broadly as possible. It is NAID’s belief that such steps would be met with little resistance. NAID has found in its studies of compliance-related decision makers that most FACTA Disposal Rule covered entities already believe the definition is considerably broader than it is, and their organization have policies in accordance with that belief.

In closing, NAID thanks the FTC for this opportunity. The commission’s work is critically important to all American’s and the many challenges daunting.
Respectfully submitted,

Robert J. Johnson
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National Association for Information Destruction, Inc.