

Analysis of the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159 (2003). [1](#)

Summary of FACTA Changes to the FCRA

The FCRA's most significant features include:

- Existing FCRA preemption provisions are made permanent and other areas in which state and local laws are preempted have been added, especially in specific areas relating to identity theft. This should not be construed to mean that all areas of identity theft are now preempted.
- Consumers can place fraud alerts on their credit files and block information caused by identity theft or fraud. The FTC and other federal agencies must establish guidelines to protect against fraud and identity theft. The law provides for "active duty alerts" for active duty military personnel.
- When a consumer is granted credit, but, because of a credit rating, the credit granted is at a less advantageous rate, the consumer must receive notice of that fact.
- Consumers have the right to one free credit report annually from the national repositories and national specialty credit reporting agencies, a newly designated group of credit reporting agencies. The FTC must prescribe regulations to provide procedures and processes for consumers to obtain free reports.
- The standard for furnisher accuracy is changed from "knows or consciously avoids knowing" to the higher standard of "knows or has reasonable cause to believe" information is inaccurate. Regulators must establish guidelines for furnishers regarding the "accuracy and integrity" of information furnished to credit reporting agencies. A study on the accuracy of consumer reports must also be conducted.
- Consumers may dispute information and initiate an investigation directly with furnisher. Furnishers cannot forward information to credit reporting agencies when a consumer submits an identity theft report to the furnisher relating to that information.
- A requirement that credit and debit card numbers be truncated on consumer receipts will be implemented over an extended period. Consumers can request that their social security number be truncated from their credit report.
- Credit scores and how they are determined must be disclosed to consumers for a reasonable fee, as determined by the FTC. Consumers must be notified of this right. A study on the potential disparate impact of credit scores is required.
- Consumers can prohibit the sharing of information by affiliates that will be used for marketing purposes.
- Communications to employers from third party investigators are no longer considered consumer reports under the FCRA. However employees must be

- notified if adverse action is taken based such communications and employees have the right to a summary of the nature and substance of the communication.
- Additional limits are placed on the sharing of medical information.
 - A financial literacy and education commission is created.

General Comments

The name, Fair and Accurate Credit Transactions Act of 2003, shows a change in emphasis from credit reporting to accuracy of information in credit transactions. In addition to identity theft, accuracy was a significant concern for legislators.² The Financial Literacy and Education Improvement Act, also a part of FACTA,³ shows an emphasis on consumers accurately using financial information to make informed credit decisions. The goal as stated is “not simply to improve knowledge, but rather to improve consumers’ financial choices and outcomes.”⁴ These are important goals for advocates to refer to when arguing the intent of the FCRA, including FACTA and its contents.

Several provisions in FACTA will be beneficial to consumers, but they come at the expense of preempting state law in several areas. Moreover, private enforcement of many of the new provisions in FACTA has been substantially limited. Each provision should be read carefully to determine the extent that private claims can be made and enforced by private attorneys or whether enforcement is limited to state and federal enforcement agencies.

On December 4, 2003, the President signed the Fair And Accurate Credit Transactions Act of 2003 (FACTA).⁵ This legislation contains significant amendments to the Fair Credit Reporting Act on a broad scope of topics and issues. This is an initial analysis of FACTA and the many changes it makes to the Fair Credit Reporting Act (FCRA).⁶

Preemption and Limitation of Liability

Preemption

States lost preemption sunset provision. The impetus for FACTA was the expiration of existing subject-matter-specific preemption provisions in the FCRA. The prior version of the FCRA provided that its preemptions of state laws would not apply to state laws that were enacted after January 1, 2004 and that offered consumers greater protections than those of the FCRA.⁷ Congress not only eliminated that provision, it added a long list of new preemptions that significantly limit states’ abilities to regulate much of the FCRA’s subject matter and conduct requirements.⁸

Preexisting subject matter preemption provisions. All of the preemptions of the prior version of the FCRA, listed below, remain:

- § 604(c) [furnishing prescreening reports].
- § 604(e) [consumer’s right to opt-out of prescreening reports].

- § 611 [time period for an agency’s reinvestigation of a consumer’s dispute (but state laws in effect on September 30, 1996 remain effective)].
- § 615(a) [duties of users taking adverse actions on the basis of information contained in consumer reports].
- § 615(c) [safe harbor for users taking adverse actions on the basis of information contained in consumer reports].
- § 615(d) [duties of users making written credit or insurance solicitations on the basis of information contained in consumer files [prescreening offers]].
- § 605 [requirements related to information contained in consumer reports (but state laws in effect on September 30, 1996 remain effective)].
- § 623 [responsibilities of furnishers of information to consumer reporting agencies (but identified state laws of Massachusetts and California remain effective)].
- Affiliate exchange of information (but an identified Vermont law remains effective).[9](#)

New incorporations into preexisting preemption provisions. The subject matter of the following new provisions of FACTA are preempted by virtue of their being amendments or additions to sections already on the preemption list:

- § 611(a)(5)(A), requiring agencies that find upon reinvestigation that an item of information is inaccurate or incomplete or unverifiable to notify the furnisher that the agency has modified or deleted the item.
- § 605(a)(6), prohibiting agencies from including the identity of medical information furnishers in consumer reports.
- The new provisions of § 623 that impose the following new responsibilities on furnishers:

- (1) requiring furnishers, including debt collectors, to comply with new “date of delinquency” designations;
- (2) requiring furnishers to have reasonable procedures to prevent refurnishing information that an agency has notified the furnisher has been blocked as resulting from identity theft;
- (3) requiring financial institutions to notify customers that they are furnishing negative information to agencies about that customer;
- (4) allowing customers to dispute information directly with a furnisher; and (5) requiring medical information furnishers to notify agencies of their status.

New subject matter preemptions. FACTA added the following to the list of preempted subjects:

- The new provision of § 609(e) requiring business entities that have done business with an identity thief to provide transaction information to the victim.[10](#)
- § 624, regarding the new right to opt-out of certain affiliate marketing solicitations.[11](#)

- The new provisions of § 615(h) requiring creditors to issue new risk-based pricing notices.[12](#)

Credit score preemption. The revised Act further preempts states from imposing any requirement or prohibition regarding the following disclosures about credit scores:

- The summary of a consumer’s rights to dispute information and to obtain credit scores that agencies are to provide consumers under the revised § 609(c).
- The summary of identity theft victim’s rights that agencies are to provide under new § 609(d) to consumers who believe they are or might be the victim of fraud or identity theft.
- The right to credit scores from agencies and mortgage lenders granted by new §§ 609(f) and (g).[13](#)

Exceptions from credit score preemption. Identified California and Colorado laws remain effective[14](#) and state insurance laws regulating the use by insurers of credit-based insurance scores are not preempted.[15](#)

Free credit report frequency preemption. States are preempted from regulating the frequency of any disclosure under the revised § 612(a), which allows consumers a free annual disclosure of their credit reports.[16](#)

Exceptions from free credit report frequency preemption. Identified laws of Colorado, Georgia, Maine, Maryland, Massachusetts, New Jersey, and Vermont remain effective.[17](#)

Required conduct preemptions. The scope and extent of the preemption provisions will likely be a debated issue. In the context of identity theft, however Congress added language to the general preemption section of the statute which appears to preserve the right of states to legislate laws to protect consumers from identity theft. The relevant section states:

Except as provided in subsections (b) and (c), this title does not annul, alter, affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency.[18](#)

At first glance this is a positive change, however, several exceptions to this general proposition were added to specifically provide that no “requirement or prohibition” may be imposed “with respect to the conduct required by the specific provisions of - ”

- § 605(g), requiring businesses to truncate credit/debit card numbers on electronic receipts.
- § 605A, requiring nationwide consumer reporting agencies to include fraud alerts and active duty alerts and to refer the alerts to other agencies, requiring resellers

- to reconvey to a consumer any fraud or active duty alert included in a report it obtains from another agency, requiring non-nationwide consumer reporting agencies to provide contact information for nationwide agencies to consumers, requiring alerts to include specified information, and requiring users to verify the identity of consumers whose reports contain fraud and active duty alert.
- § 605B, requiring agencies to block identity-theft related information and to notify the furnisher of such information that it has been blocked.
 - § 609(a)(1)(A), allowing consumers to request that an agency not disclose the first 5 digits of their SSN's in a report provided to the consumer.
 - § 612(a), requiring agencies to provide consumers with a free annual report when requested through a to-be-established centralized source;
 - § 615(e), requiring agencies to issue red flag guidelines and regulations.
 - § 615(f), prohibiting the sale or transfer of identity theft debts.
 - § 615(g), requiring debt collectors to notify creditors of fraudulent debts.
 - § 621(f), requiring agencies to refer identity theft complaints and fraud alerts to each other.
 - § 623(a)(6), requiring furnishers to have procedures for responding to identity theft notifications from agencies and prohibiting furnishers from re-submitting fraudulent information.
 - § 628, requiring agencies to provide regulations that will require proper disposal of consumer information.[19](#)

Preemptions' effects on state laws targeting identity theft. State laws with "requirements and prohibitions" with respect to the conduct required by the specific preemptions enumerated above are thus preempted. However this limitation, in addition to the language added to the general section of § 625 (formerly § 624) strongly suggest that states may enact other identity theft laws, so long as they are not inconsistent with other provisions of the FCRA, including laws which may be stronger than the provisions found in FACTA and other parts of the FCRA. By adding the language stating, "or for the prevention or mitigation of identity theft," to subsection (a) of § 625 [§ 1681t] it can be argued that Congress did not intend to preempt the entire field of identity theft, but only those areas specifically addressed. Any other interpretation would render the new language superfluous, a conclusion not likely to be adopted by the courts.

Where a statute expressly preempts some areas, but not others, a reasonable inference can be made that Congress did not intend to preempt others by implication.[20](#) Thus in the area of identity theft, where FACTA expressly preempts specifically enumerated conduct, but not others, it is reasonable to infer that the other areas are not preempted. Where preemption is of concern, careful pleading may avoid it. If a UDAP or other identity theft related claim focuses on aspects of the conduct other than those regulated by FACTA, preemption may be avoided. For example, in a negligent enablement claim, if the focus of the conduct relates to a failure to properly identify the identity thief, rather than the fact that a fraud alert was not placed on a consumer file, the claim may not be preempted.

State laws in effect prior to FACTA and not previously preempted by the 1996 amendments to the FCRA should not be affected by FACTA, unless of course they relate

to the specific conduct contained in the new FACTA provisions. For example, any state laws that provided for a type of “fraud alert” are likely to be preempted.

Limitations on Liability

FACTA further limits the ability of consumers to enforce their rights under the FCRA by expanding limits on liability for violations of the FCRA in three ways: by adding new responsibilities to sections that are covered by the FCRA’s pre-existing qualified immunity provision, by adding new responsibilities to sections covered by a pre-existing limitation of liability provision, and by adding new limitation of liability provisions. Finally, FACTA not only limits the right of consumers to enforce the FCRA, but also puts new restraints on the rights of states to bring actions to enforce many of the obligations imposed on furnishers.

Expansion of the preexisting qualified immunity provision. The prior version of the FCRA explicitly provided that consumers could not enforce the provisions of § 623(a), which requires furnishers to provide accurate information to agencies, through the liability provisions of the FCRA, § 616 (willful noncompliance) and § 617 (negligent noncompliance).²¹ The FCRA additionally limited liability for violations of the FCRA with a qualified immunity provision that allowed consumers to bring one of the following state law claims only if the consumer showed that the information was furnished with “malice or willful intent to injure”:

- (1) A claim “in the nature of defamation, invasion of privacy, or negligence,”
- (2) Brought against any agency, user, or furnisher;
- (3) Based in whole or in part on a consumer report; and
- (4) Based on any of the following:
 - (a) Disclosures made pursuant to § 609 [Disclosures to consumers];
 - (b) Disclosures made pursuant to § 610 [Conditions and form of disclosure to consumers];
 - (c) Disclosures made pursuant to § 615 [Requirements on users of consumer reports]; or
 - (d) Disclosures by a user of a consumer report to or for a consumer against whom the user has taken adverse action, where the disclosure is based on the report.²²

FACTA did not amend that provision; however, by expanding the sections referred to in the provision FACTA provided qualified immunity for disclosures that violate the following new provisions:

- § 609(a)(1)(A), requiring agencies to withhold the last 5 digits of a consumer’s SSN from the disclosure of the consumer’s file if the consumer so requests.
- The amendment to § 609(c) that requires agencies to provide certain information with their disclosure of a file to a consumer, including the FTC’s summary of consumers’ rights to obtain and dispute information in consumer reports and to obtain and dispute credit scores.

- § 609(d), requiring agencies to provide consumers who believe they are or may be the victim of identity theft with an FTC-issued summary of their right to use the FCRA's new procedures for remedying the fraud.
- § 609(e), allowing identity theft victims to obtain business transaction information from businesses that have done business with the thief.
- § 609(f), requiring agencies to disclose credit scores and certain related information.
- § 609(g), requiring mortgage lenders to disclose credit scores to loan applicants and to provide them with a designated notice.
- § 615(d)2), requiring that users making credit or insurance solicitations present the required prescreening notice in a format, size, type, and manner to be established by the FTC.
- § 615(h), requiring creditors to issue risk-based pricing notices.

New incorporations into the existing limitation of liability provision for furnishers. The following new furnisher responsibilities which were added to § 623(a), are protected from enforcement by consumers pursuant to the limitation of liability provision in § 623(c):

- § 623(a)(6), requiring furnishers to have procedures for responding to identity theft notifications from agencies and prohibiting furnishers from re-submitting fraudulent information.
- § 623(a)(7), requiring financial institutions to notify customers that they are furnishing negative information to agencies about that customer.
- § 623(a)(8), allowing consumers to dispute information directly with a furnisher and requiring furnishers to reinvestigate a dispute when it meets certain conditions, to complete the investigation within the designated time, and to notify each agency to whom the furnisher furnished the information if the furnisher finds that it was inaccurate.
- § 623(a)(9), requiring persons in the business of providing medical services, products, or devices and who furnish information to agencies to notify the agencies of their status as medical information furnishers.

New limitation of liability provisions of the FCRA. FACTA also added the following limitations on liability for new responsibilities under the FCRA.

- § 609(e)(6), providing that identity theft victims may not enforce their new rights to business transaction information from businesses that have done business with the thief.[23](#)
- § 615(h)(8), providing that consumers may not enforce the new obligations of users to provide risk-based pricing notices.[24](#)
- § 623(c)(2), providing that consumers may not enforce the obligation of the federal banking agencies, the National Credit Union Administration, and the FTC to establish accuracy and integrity guidelines for furnishers and to prescribe regulations requiring furnishers to establish reasonable policies and procedures for implementing those guidelines.[25](#)

- § 623(c)(3), providing that consumers may not enforce the obligation of agencies to issue red flag guidelines and regulations.[26](#)

New restraints on states' actions. FACTA amends the FCRA's administrative enforcement section[27](#) to provide that in the case of a violation of furnishers' obligations to provide accurate information[28](#) or to comply with to-be-issued guidelines to protect the accuracy and integrity of consumer information,[29](#) or of financial institutions' obligations to comply with the to-be-issued red flag guidelines for detecting identity theft, a state may not simply bring an action for damages on behalf of its residents.[30](#) Rather, the state must first obtain an injunction against the violator that prohibits the violator from violating the FCRA, and then the state may only seek damages for violations that occur after the injunction. Given that the FCRA preempts state regulation of these obligations and eliminates the right of consumers' to enforce them, violators have little to fear from flouting them.

Identity Theft Prevention, Credit History Restoration, & Consumer Information Accuracy

The Fair and Accurate Credit Transactions Act of 2003 ("FACTA") added to the FCRA significant provisions designed to prevent identity theft, control the consequences of identity theft to victims' credit records, and help victims cleanse their credit records of identity-theft related information. In addition, FACTA added provisions to enhance the accuracy and integrity of information reported to agencies by furnishers. The FCRA, as amended, sets up a web of communication among consumers, agencies, and furnishers that if properly implemented and employed could synchronize consumer reports and purge theft-related information from agencies' and furnishers' files. As described in more detail below, a consumer who is the victim of identity theft can seek an extended fraud alert from a nationwide consumer reporting agency and identify for the agency fraudulent information in the consumer's report; the agency must then notify the other nationwide agencies of the alert which will require them to also place the alert in their files on the consumer; the initial agency must also block the fraudulent information and notify the furnisher of that information who must reinvestigate it and take steps to prevent it from being refurnished to any agency.

Identity Theft Prevention

Consumers able to issue one-call fraud alerts, extended fraud alerts, and active military duty alerts. FACTA adds a new section to the FCRA that provides for three varieties of alerts that consumers may add to their files with nationwide consumer reporting agencies; they differ in their initiation requirements, time periods, and limits on users. However, all three require the agency receiving the alert to refer it to the other nationwide agencies which allows consumers to issue the alert to all the agencies with "one call." Since the new section does not limit liability consumers can enforce it against agencies and users pursuant to the willful and negligent noncompliance provisions of the FCRA.[31](#) States, however, are preempted from imposing any "requirement or prohibition" with respect to the "conduct required" by § 605A.[32](#)

Fraud alerts . New section 605A provides for “one-call” fraud alerts that allow consumers who believe that they are or might be victimized by fraud – identity theft fraud or any other sort - to add a fraud alert to their files with a nationwide consumer reporting agency.³³ The agency must refer the alert to other nationwide agencies and all the agencies must not only include the alert in the consumer’s file but provide the alert each time they generate that consumer’s credit score. The agency must notify the consumer of the right to a free credit report and must provide a requested report within 3 business days of the consumer’s request. This fraud alert stays active for only 90 days; for a sustained alert the consumer may obtain an extended fraud alert, described below, by providing the agency with an identity theft report. The FTC must define an “identity theft report” in regulations, but at a minimum the definition must include: (1) allegations of identity theft; (2) a copy of an official, valid report filed by a consumer with Federal, State or local law enforcement agency, and subject the consumer to criminal penalties if information is false.³⁴

Extended fraud alerts. Section 605A also provides that a consumer may include an extended fraud alert that lasts for 7 years by submitting an identity theft report to a nationwide consumer reporting agency.³⁵ As with the fraud alert, the agency must refer the alert to the other nationwide agencies, and they all must provide the alert each time they generate the consumer’s credit score. In addition, the agencies must exclude the consumer from any lists generated to sell to users for transactions not initiated by the consumer (prescreening lists) for 5 years and must notify the consumer of the consumer’s right to 2 free credit reports within 12 months of the request. As with the fraud alert, an agency must provide the consumer’s file to the consumer within 3 business days of the consumer’s request.

Active military duty alerts. Section 605A also allows consumers on active military duty to add an alert of their status to their files.³⁶ Consumers on active duty include reservists who are on active duty, other than at their usual station.³⁷ Once a military consumer requests the active duty alert, it will become part of his/her credit report for a 12 month period. For 2 years the consumer is to be excluded from any lists generated to sell to users for transactions not initiated by the consumer.³⁸

The active duty alert should be helpful to use the special protections under the Soldier and Sailors Relief Act³⁹ with respect to relief for interest on debts and lease obligations when collection activity is sought. This alert will also be useful to alert creditors of the status of an applicant. It can also help to deter identity theft on military personnel who are stationed away from old addresses. Unlike the fraud alert and extended alert, an active duty alert does not entitle a consumer to a free credit report.

Substance of alerts and users’ responsibilities to verify identity. All three varieties of alerts must state that the consumer does not authorize new credit (other than an extension under an existing open-end credit account, that is, a credit card), an additional card on an existing account, or any increase in the credit limit of any existing account. Users have new responsibilities as well; a user may not proceed with a credit transaction unless the user “utilizes reasonable policies and procedures to form a reasonable belief that the user

knows the identity of the person making the request.”⁴⁰ Consumers may provide a telephone number in the alert which the user must use to verify the requester’s identity if the alert is an extended fraud alert, unless the consumer designated another reasonable method of contact.⁴¹ However, if the alert is an initial fraud alert or an active duty alert the user can “take reasonable steps” to verify the consumer’s identity instead of calling the consumer.⁴²

Creditors to implement red-flag guidelines and regulations. Another new identity theft prevention provision calls for the FTC, the NCUA, and specified banking agencies to issue regulations that will require financial institutions and creditors to “establish reasonable policies and procedures” for implementing to-be-issued “red flag” guidelines regarding identity theft.⁴³ A more concrete provision calls for regulations to prevent “account-takeover” identity theft by imposing special verification procedures when a card issuer receives a notification of a change of address from a cardholder and subsequently receives a request for an additional or replacement card.⁴⁴ States are preempted from regulating the conduct required by the new red flag provision.⁴⁵ It’s not clear whether consumers will be able to enforce the red flag guidelines pursuant to an action under the provision, since the FCRA only indirectly imposes obligations on the institutions and creditors.

Businesses must provide identity theft victims with business transaction information. The revised FCRA gives requires businesses who have dealt with an identity thief to provide information about the transactions to the thief’s victim and to law enforcement agencies.⁴⁶ However, the provision imposes many prerequisites that a victim must meet and allows a business to decline to provide the information if the business determines “in the exercise of good faith” that any of the following exceptions exists: the business does not have a “high degree of confidence in knowing the true identity of the individual” requesting the information, the request is based on a misrepresentation of fact, or the information requested is “Internet navigational data or similar information.”⁴⁷ Since consumers appear to have no private right to enforce the business transaction provision⁴⁸ and states are preempted from regulating not just the conduct required by the new provision, but the subject matter regulated under the provision itself⁴⁹ the effectiveness of this provision will depend upon the willingness of businesses to comply with it.

Businesses must protect certain consumer information. FACTA adds two provisions that seek to protect key consumer information. Section 605 will require merchants to truncate credit and debit card numbers on electronically printed receipts (though with delayed and staggered effective dates).⁵⁰ Section 609 will now allow consumers requesting a report to order the agency to withhold the last 5 digits of the consumer’s social security number on the report.⁵¹ In addition, forthcoming regulations are to require users to dispose of the consumer information they acquire through consumer reports.⁵²

Credit History Restoration

Agencies must block identity-theft-related information. FACTA adds a new section, 605B, to the FCRA that requires agencies to block identity-theft related information

within 4 days of receiving specified information: proof of the consumer's identity, a copy of an identity theft report, the consumer's identification of the fraudulent information, and the consumer's statement that the information does not relate to any transaction by the consumer.[53](#) The agency must also notify the furnisher of the block, [54](#) and furnishers must implement procedures to prevent them from re-furnishing such information (to anyone, apparently, not just the notifying agency).[55](#) Although the new provision allows an agency to rescind the block under certain circumstances, the agency must both notify the consumer of the rescission and the specific reason for the rescission within 5 business days, just as an agency must notify a consumer that it is reinserting formerly deleted information.[56](#) If the consumer notifies a reseller that a report contains identity-theft-caused information the reseller must block the report.[57](#) Although a reseller need not notify the original furnisher of the information, it must identify the consumer agency from which the reseller obtained the fraudulent information, which will allow the consumer to enforce the right to block the information with that agency, who will then be required to notify the original furnisher. Check services companies are exempted from the blocking requirements although the provision requires them to block information identified as fraudulent for 4 business days.[58](#) Although states are preempted from regulating the conduct required of agencies and resellers under the new blocking section,[59](#) consumers may use the FCRA's liability provisions to enforce it.

Furnishers must cease furnishing identity-theft-related information. As noted above, agencies must block information that a consumer properly identifies as resulting from identity theft and must notify the furnisher of the false information of the block. In turn, the FCRA now requires furnishers who have received such a notice to have reasonable procedures to prevent them from refurnishing the information.[60](#) The consumer can also trigger that responsibility by notifying the furnisher directly that the furnisher has furnished fraudulent information.[61](#) However, it appears that a private right of enforcement of these provisions against furnishers by consumers is not authorized under this law.[62](#) States are preempted from regulating the subject matter of the provisions.[63](#)

Furnishers may not sell or place for collection identity theft debt. Once a furnisher has been notified that an agency has blocked a consumer's information as having resulted from identity theft, the furnisher may not sell or transfer the debt or place it for collection.[64](#) This is not limited to third-party collectors. In addition, an exception exists for securitization, but securitizing known identity theft debt will likely be a UDAP violation. States are preempted from regulating this conduct.[65](#)

Debt collectors must notify creditors of fraudulent debt. FACTA imposes new notification responsibilities on debt collectors; once a consumer notifies a debt collector that a debt may be fraudulent or may have resulted from identity theft, the debt collector must notify the creditor of that allegation and must provide the consumer with all information about the debt to which the consumer would be entitled if the consumer were in fact the liable party, [66](#) a provision that appears to require the collector to comply with the debt validation provisions of the Fair Debt Collection Practices Act.[67](#) Consumers may enforce the provision,[68](#) but states are preempted from regulating the required conduct.[69](#)

Agencies to provide FTC's summary of rights of identity theft victims. The FTC is to prepare a summary of the new rights of identity theft and fraud victims under the FCRA which agencies must provide to any victim who contacts an agency about such theft or fraud.[70](#) States are preempted from regulating the required disclosures, though several state laws are exempted from the preemption, and the federal notice must tell consumers that they have additional rights.[71](#)

Agencies must coordinate complaints. Another credit history restoration feature, described above in the discussion of the new fraud alerts, requires a nationwide consumer reporting agency that receives a consumer's complaint of identity theft or request for a fraud alert to notify the other nationwide agencies.[72](#) Here, too, states are preempted from regulating the required conduct.[73](#)

Information Accuracy

Agencies to issue new accuracy and integrity regulations for furnishers. The agencies that enforce the FCRA will establish guidelines for furnishers regarding the accuracy and integrity of furnished information and will issue regulations requiring furnishers to establish reasonable policies and procedures for implementing those guidelines.[74](#) However, consumers may not privately enforce these new responsibilities[75](#) and states are preempted from regulating the subject matter of the provision.[76](#)

Consumers may dispute furnished information directly with the furnisher. The prior version of the FCRA had no provision by which a consumer could dispute an inaccurate item of information directly with the furnisher; rather, the consumer had to dispute the item with the agency which the FCRA then required to notify the furnisher.[77](#) The FCRA, prior to amendment by FACTA, required the furnisher to reinvestigate the item only upon receiving the agency's notice, notice from the consumer was irrelevant and ineffective.[78](#) Now a consumer may trigger a furnisher's responsibility to reinvestigate by disputing the item directly with the furnisher where the circumstances of the dispute meet the conditions of to-be-prescribed regulations.[79](#) The new provision specifically provides, however, that such a reinvestigation responsibility will not be initiated by a notice from or prepared by a credit repair organization,[80](#) and furnishers need not respond to "frivolous" disputes (though the furnisher must notify the consumer within 5 business days that it considers the dispute frivolous, why it considers the dispute frivolous, and what information the consumer must provide to convert the dispute into one that will start a reinvestigation).[81](#) The furnisher must investigate the dispute and report the results back to the consumer in the same time frame allowed agencies for reinvestigation.[82](#) If the furnisher finds the information to be inaccurate the furnisher must correct the information with each agency to which the furnisher furnished the information.[83](#) Like the pre-existing reinvestigation responsibilities that arise upon notice from an agency, states are preempted from regulating the subject matter of the provision;[84](#) however, unlike those responsibilities, under this law it appears that consumers may not privately enforce this provision against furnishers.[85](#)

To be safe, lawyers should not send these disputes but consumers should send their own disputes. One problem will be when information has previously been disputed but not properly investigated. The consumer will still need the relief, but the furnisher can consider a second investigation request frivolous and refuse to perform any new investigation. A significant concern is that this requirement only exists in § 623(a), which has been interpreted to be free from enforcement by any private right of action against furnishers who simply refuse to comply.⁸⁶ This should, however, not affect private enforcement under § 623(b). State UDAP laws might also be a source to attach a remedy to violations of this duty.

Furnishers to comply with new standard in reporting information. The prior version of the FCRA prohibited a furnisher from reporting to agencies information that it “[knew] or consciously avoid[ed] knowing” was inaccurate.⁸⁷ Now a furnisher may not report information that it “knows or has reasonable cause to believe” is inaccurate.⁸⁸ This stricter standard appears at first likely to enhance the accuracy of consumer information.⁸⁹ It appears that this provision is unenforceable by private actions brought by consumers⁹⁰ and preempted from state regulation.⁹¹

Financial institution furnishers to notify customers of negative information. The FCRA now requires a financial institution to notify a customer that it is furnishing negative information about that customer;⁹² however, financial institutions may take advantage of a safe harbor provision.⁹³ Once notified about an account, it appears there is no other requirement entitling the consumer to receive further notices when additional negative information is reported about that account.⁹⁴ The notice must be given within 30 days of reporting negative information.⁹⁵ The Federal Reserve Board is to provide a model notice not to exceed 30 words.⁹⁶ A financial institution may provide the notice without submitting the negative information.⁹⁷ This is an unusual means of providing notice since it would not be accurate. The notice may not be included with disclosures under § 127 of the Truth In Lending Act.⁹⁸ This provision appears to be unenforceable by private consumers actions under this law.⁹⁹

Debt collectors must use creditor’s date of account delinquency. The FCRA now provides rules regarding the date of an account’s delinquency for reporting purposes and specifies how debt collectors should designate the date to ensure that the date of delinquency precedes the date the creditor placed the account for collection,¹⁰⁰ which should curb the reporting of obsolete information. If no date can be determined by these procedures, then the furnisher must establish and follow reasonable procedures to ensure that the date reported precedes the date on which the account is placed for collection, charged to profit or loss, or subjected to any similar action.¹⁰¹ A problem may exist here in that some collectors will claim a stale account was never placed for collection or charged to profit or loss until long after it actually went delinquent. Again, this new date designation requirement only exists under § 623(a) so it is not subject to a private right of action under the FCRA, but the duty should be enforceable against debt collectors regulated by the FDCPA.

States are preempted from regulating the subject matter covered.¹⁰²

Agencies must notify furnishers of reinvestigation results. Now an agency that reinvestigates an item of information upon a consumer's dispute must notify the furnisher that furnished the information if the agency deletes or modifies it from the consumer's file because the agency found it to be inaccurate, incomplete or unverifiable.[103](#)

Furnishers must block unverifiable information. Under the prior version of the FCRA, once an agency notified a furnisher that a consumer disputed information that the furnisher had reported to the agency, the furnisher had to reinvestigate that item and report the results of the investigation back to the agency.[104](#) Now the furnisher must also take steps to modify, delete or block that information to prevent it from re-reporting the inaccurate information.[105](#) Consumers may enforce this provision.

Resellers must reinvestigate information disputed by consumer. Resellers must now investigate a consumer's dispute made to the reseller, and if the reseller determines that the information is incomplete or inaccurate as a result of the reseller's act or omission, the reseller must correct or delete the information within 20 days.[106](#) If, however, the reseller does not find that the alleged inaccuracy resulted from the reseller's act or omission the reseller must notify the agency from whom the reseller obtained the information, who must then reinvestigate the information.[107](#)

Agencies must reinvestigate upon notice from reseller. The FCRA extends the responsibilities of agencies to reinvestigate consumer information by requiring them to reinvestigate upon notice from a reseller that a consumer has disputed the item;[108](#) the agency must then report the results of its reinvestigation back to the reseller, who must then reconvey the results back to the consumer.[109](#) This provision basically treats the reseller as a consumer for purposes of the agency's reinvestigation responsibilities. States are preempted only from regulating the time requirements set for the agency's actions.[110](#)

Agency's reinvestigation must be "reasonable." The FCRA's agency reinvestigation provision has been revised to provide as follows:

Subject to subsection (f), if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer or reseller.[111](#)

Accordingly, the FCRA now explicitly provides that the reinvestigation of information must be reasonable, a standard lower than that of § 607's "reasonable procedures to assure maximum possible accuracy" which applies to the initial preparation of the consumer report.[112](#) This seems like an improvement, but it raises questions about its

effect on furnisher investigations under § 623(b), a section of the FCRA which does not explicitly include the “reasonable” language.

Industry may argue that because Congress saw it necessary to put “reasonable” in regarding the agency’s investigation duty, it does not require that the investigation under § 623(b) be reasonable. This argument should not work. The word “reasonable” is inserted here because of the addition of the words “whether the disputed information is accurate.” By adding these words, the statute without the word “reasonable” could be construed to create a strict liability standard that requires the agency to conclusively determine whether the information is accurate. Congress clearly did not want advocates to argue that it created a strict liability standard by the addition of what had to be determined (the accuracy), and thus the word “reasonable” is used to foreclose that possible strict liability argument. It is not used to modify the plain word “investigation” nor even to modify the term “investigate the accuracy of the disputed information” but is really being used to modify the requirement “to determine whether the disputed information is accurate.” This language, which by itself is susceptible of a strict liability reading, does not appear in § 623(b) because it requires “an investigation with respect to the disputed information.” Consequently, § 623(b)’s language is not susceptible of a strict liability reading and does not need the word “reasonable.”

It appears that by adding this “reasonable” language in § 623(a), Congress has sought to address positions taken by some furnishers that a reinvestigation only required an investigation into whether the consumer reporting agency was accurately reporting the information provided by the furnisher, rather than an investigation into whether the information itself was accurate. This new provision forecloses that argument entirely; the investigation has to be about the accuracy of the disputed information. The consumer reporting agency must act reasonably in making that investigation. Because the agency will contact the furnisher and then claim to “reasonably” rely on the furnisher, the furnisher’s investigation into the accuracy of the information must necessarily be reasonable. Otherwise, it is not reasonable to rely on an unreasonable or inadequate investigation. Consequently, because the furnisher’s duty is truly how the reasonable requirement of the agency’s investigation is implemented, both must be reasonable.

Free Credit Reports

Agencies must provide consumers with a free annual credit report. Consumers now have a right to a free annual credit report from nationwide and nationwide specialty consumer reporting agencies.¹¹³ On an annual basis consumers may obtain a free credit report from each of the nationwide agency within 15 days, after making the request by telephone, Internet or mail.¹¹⁴ The 15 day period is calculated from the date the credit reporting agency receives the request, a period that is rather lengthy considering that the credit reporting agencies can make the reports available immediately to businesses. This right is in addition to what already exists under the FCRA regarding free reports (e.g., unemployed, adverse action is taken or if a consumer receives public benefits).

The FTC must, within one year, establish a centralized source for consumers to obtain these reports from each of the three nationwide repositories – sort of one-stop shopping for credit reports. The nationwide credit reporting agency does not have to respond to a request unless the consumer uses the special centralized source established by the FTC to make the request.[115](#)

FACTA also provides consumers with the right to obtain one free report annually from “nationwide specialty credit reporting agencies” (e.g., landlord-tenant, employment, insurance), a newly defined category of agencies.[116](#) The FTC must also establish regulations pertaining to this process within six months. The regulations become effective six to nine months after becoming final.[117](#)

States are preempted from regulating this newly required conduct.[118](#)

Agencies must provide free reports to fraud victims. An independent provision of FACTA allows a consumer who requests a one-call fraud alert to obtain a free copy of the consumer’s report from each of the nationwide consumer reporting agencies.[119](#) A consumer who requests an extended fraud alert by providing an agency with an identity theft report may obtain two free copies of the consumer’s report over the subsequent 12 months.[120](#) States are preempted from regulating this conduct as well.[121](#)

Credit Scores

The prior version of the FCRA specifically provided that agencies were not required to disclose credit scores to consumers,[122](#) though it did not preempt states from requiring their disclosure. Nonetheless, agencies and Fair, Isaac recently began to voluntarily provide scores to consumers for a fee, though without necessarily guaranteeing that these scores were the same as those provided to their customers. The FCRA now requires disclosure of credit scores and will standardize the fees for the disclosure, but it also preempts states from imposing new credit score disclosure requirements.

Agencies and mortgage lenders must disclose credit scores and related information. The FCRA now requires agencies to disclose to a consumer the consumer’s credit score, the range of possible scores under the scoring model, the key factors that adversely affected the score, the date the score was created, and the source of the credit score or the file that produced the score.[123](#) Agencies may charge a “fair and reasonable fee,” to be prescribed by the FTC, for disclosing the score.[124](#) Mortgage lenders of loans secured by one to four units of residential real property must also disclose a credit score and related information that the lender obtained from an agency or, if the lender uses an automated underwriting system, must disclose that system’s credit score and the score’s key factors.[125](#) Mortgage lenders must also give a prescribed notice to the consumer.[126](#) Although state laws regarding these disclosures are preempted, several existing state laws are exempt from the preemption.[127](#)

Agencies must provide FTC's summary of rights. The FCRA now requires agencies to give consumers the FTC's summary of rights to dispute information and obtain credit scores,[128](#) under the prior version agencies could substitute their own summary.

Risk-Based Pricing Notices

Users must provide consumers with a risk-based pricing notice. Consumers now have a right to a new notice relating to risk-based pricing.[129](#) Whenever a creditor extends credit on terms "materially less favorable than the most favorable terms available to a substantial proportion of consumers," the creditor must provide to consumers a notice that explains that the terms are based on information in a credit report and that the consumers can request a free copy of the report. This notice requirement will address a current flaw in the Act where creditors fail to provide notice to consumers when they charge higher interest fees, or other charges based on a credit report. This flaw was specifically highlighted in testimony by FTC Chairman, Timothy Muris.[130](#)

The "risk-based pricing" notice must be given at the time of application or at the time of communication of the approval.[131](#) This notice may be given orally, in writing or electronically.[132](#)

The credit industry may take the position that this new subsection should affect how to interpret the current definition of "adverse action" found in the Act under § 603(k)(1)(B)(iv). This current definition includes an action taken on an application that "is adverse to the interest of the consumer" and because it also involves account reviews, it must necessarily refer to credit transactions. This definition also kicks in current requirements for a notice under § 615(a) of the Act for actions adverse to the interests of a consumer on the basis of information in consumer reports. The industry may incorrectly argue that the new risk-based pricing notice required under § 615(h) makes clear that the definition of adverse action in § 603(k)(1)(B)(iv) does not apply to credit applications because otherwise this new risk-based pricing notice required under (h) would not be necessary. This argument is untenable for several reasons.

First, a plain reading of § 603(k)(1)(B)(iv) requires a court to apply the term "adverse to the interests of the consumer" to any action made in connection with a consumer's application. If a court finds conduct that meets this definition, regarding an application made by the consumer, then the § 615(a) notice is required. The court must construe the definition consistently with § 603(k)(1)(A) that first includes anything that qualifies as an adverse action under the Equal Credit Opportunity Act (ECOA),[133](#) and thus, the phrase "adverse to the interests of the consumer" should include something more than or other than an ECOA adverse action. No basis exists in the language to conclude that § 603(k)(1)(B)(iv) does not apply to credit applications.

Second, the new risk-based pricing notice requirement regulates a broader area than that of § 603(k)(1)(B)(iv). Consider, a person who has never been given credit or has really bad credit and is then approved for credit by a bank (which does not seem adverse to their interests). Although the industry may argue that the approval was not adverse to the

consumer and thus not notice is required, the consumer still did not get the most favorable terms generally available. The new notice required under FACTA then comes into play and must be provided to the consumer. Similarly, a person applying for credit at a car dealership might have the finance and insurance manager only plan to sell the credit contract to subprime assignees, and discuss with the consumer only a high interest loan. The consumer may be happy with getting credit to buy the car, even though the car dealer finances a substantial proportion of customers at 0%. Again, the industry may argue that no decision was made adverse to the consumer's interests because the consumer was given credit at the expected terms and thus no adverse action notice pursuant to § 615(a) is required. The new notice requirement under FACTA (§ 615(h)) simply plugs the gap by requiring the creditor to notify the consumer in such circumstances that the offered terms are not as good as those offered to other consumers. Consequently, given the type of decisions that are made and the potential for a court to accept the argument that getting credit at less than the most favorable terms is not "adverse to the interests" of many subprime consumers, the new FACTA notice supplements the application of existing notice requirements in § 603(k)(1)(B)(iv) of the Act.

Third, Congress made clear that the new risk-based pricing notice overlapped with the adverse action notice required under § 615(a). If the user provides a notice under § 615(a), then they do not have to give the risk-based pricing notice; the notice provided under § 615(a) will suffice. This contemplates that in some situations both would be required. The point that both can be required in the same transaction is further covered by the provision that the new notice (which is shorter) cannot be used in place of a notice under § 615(a). Thus, no basis exists to claim that if a situation is covered by the risk-based pricing notice, it cannot be an adverse action under § 615(a). The use of the phrase "materially less favorable than the most favorable terms" cannot be read to be necessarily mutually exclusive of § 603(k)(1)'s phrase "adverse to the interests of the consumer."

The most important aspect of the risk-based pricing notice is the fact that it must be provided at the time of application or the time the decision is communicated to the consumer, while the consumer still has an opportunity to use the notice to check the validity of the information being used to make the determination. The timing requirement is significant because other notice under the FCRA (§§ 615(a) and (b)) are not given any timing requirement in the statute. Without a statutory basis for their decision, the industry seems to have decided that these notices follow the ECOA notice timing requirement. They are normally given too late to be of any use when they are given at all.

Assuming the new FACTA risk-based pricing notice requirements are enforced, this notice will have tremendous effects throughout the retail credit sale industry. Right now, many in the credit industry ignore the proper definition of adverse action and FCRA notices are not given unless it is also an ECOA adverse action situation. This practice is based on the false assumption that § 603(k)(1)(b)(iv) does not apply to credit transactions. The new requirements in FACTA makes clear that risk-based pricing notices must be provided even if the consumer is given and accepts credit, and clearly require a FCRA notice even when no ECOA notice is required. There is great potential for these notices to have beneficial effects. For instance, wherever a lender has discretion

over a yield spread premium that is of a sufficiently significant amount to render a loan with that premium “materially less favorable” than one without a premium (or with a lower premium) than the consumer who is offered the credit with the higher premium is entitled to the notice. Thus, a car dealer who takes a 3% yield spread would have to provide the risk-based pricing notice. Prior to FACTA the notice did not have to tell the consumer what happened, and the statute did not require the creditor to even tell the consumer that more favorable terms are given to some people, but not them.

The FTC and the FRB are jointly to promulgate regulations, and those regulations will further define “materially less favorable” and the required content of the notice. The true meaning of this provision will not be apparent until these regulations are seen. These regulations will be extremely important for determining when this notice is required. A problem may arise if the agencies define “materially less favorable” to require a huge difference from the most favorable terms; courts might use that definition to interpret “adverse to the interests of the consumer” for the § 615(a) notice. Thus, if the new risk-based pricing notice under § 615(h) is administratively regulated to apply to only a narrow range of credit decisions, that provision may effectively lead courts to correspondingly interpret the breadth of § 615(a)’s adverse action notices more narrowly.

A major drawback to the new risk-based pricing notice requirement is that it can only be enforced through Federal agencies and officials under § 621 of the Act¹³⁴ and states are preempted from regulating the subject matter of the provision.¹³⁵

Prescreened Offers

Agencies to extend prescreened offer opt-out period. FACTA extends the opt-out period for prescreened offers from 2 years to 5.¹³⁶

Agencies to conform to new rules for the format of prescreened offer notices. The FTC is to issue rules for the prescreened offer notice that will ensure such notices are “simple and easy to understand,” and agencies must present the notice in that format and must also include the address and telephone number of the opt-out notification system. ¹³⁷

Affiliate Marketing

Affiliates must allow consumers to opt out of marketing notices. The FCRA exempts from the definition of “consumer report” information relating to transactions or experiences between the consumer and a person, the communication of such information between affiliates, and the communication of other information among affiliates, though consumers have the right to opt out of the last.¹³⁸ Now a consumer may opt out of the use by an affiliate of this exempt information to market its products or services, and affiliates must also notify the consumer both of the possibility that an affiliate may use the consumer’s information for marketing and of the consumer’s right to opt out of such use.¹³⁹ The opt-out lasts for 5 years and consumers may extend it for an additional 5 years.¹⁴⁰ States are preempted from regulating the subject matter of this provision.¹⁴¹

Medical Information

Agencies further restricted from furnishing consumer reports containing medical information. The revised Act continues to prohibit agencies from furnishing a report for employment purposes or in connection with a credit or insurance transaction that contains medical information without the consumer's consent.¹⁴² However, now the consumer's consent to furnishing such a report for employment purposes or in connection with a credit transaction (though not an insurance transaction) must be written, must be specific, and must describe the use for which the agency will furnish the information.¹⁴³ An agency may furnish medical information that pertains solely to financial transactions so long as the agency ensures that the information does not disclose the specific provider of medical services or the nature of such services.¹⁴⁴ In addition, FACTA added a new provision prohibiting users from redisclosing these reports.¹⁴⁵

Agencies may not identify medical information furnishers in reports. Agencies are now prohibited from including the name, address, and telephone information of medical information furnishers in consumer reports unless the agency formats the information such that it does not disclose either the specific provider or the nature of the medical services, though the agency may provide such information in a report to an insurance company.¹⁴⁶ States are preempted from regulating the subject matter of this prohibition.¹⁴⁷ The large-scale transaction exception to § 605, which allows agencies to include otherwise-to-be-excluded information in reports if the dollar value of the transaction meets a designated amount, does not apply to the prohibition against identifying medical information furnishers.¹⁴⁸

Creditors may not obtain or use consumer medical information. Creditors may no longer obtain or use a consumer's medical information in connection with any determination of the consumer's eligibility of continued eligibility for credit.¹⁴⁹ However, the federal banking agencies and the National Credit Union Administration are to issue regulations that will permit such use to protect "legitimate operational, transactional, risk, consumer and other needs."¹⁵⁰

Certain medical information communicated to an affiliate now considered a consumer report. The FCRA generally excludes from the definition of consumer report communications to affiliates;¹⁵¹ as amended, however, communications of medical information to affiliates that would otherwise meet the definition of a "consumer report"¹⁵² will remain consumer reports (and therefore protected by the FCRA) if the information consists of one of the following:

- Medical information, as defined;
- An individualized list or description based on the consumer's payment transactions for medical products or services; or
- An aggregate list of identified consumers based on payment transactions for medical products or services.¹⁵³

However, the FCRA provides an exception to this exception to the affiliate exclusion, which allows affiliates to communicate the following information with each other without having to comply with the FCRA:

- Disclosures in connection with the business of insurance or annuities;
- Disclosures for any purpose permitted without authorization under the Department of Health & Services' Standards for Individually Identifiable Health Information, necessary to process a payment transaction (as allowed by 42 U.S.C. § 1320d-8), or excluded from the protections of the Gramm-Leach-Bliley Act's privacy provisions (15 U.S.C. § 6802(e)); and
- Disclosures allowed by regulations of identified governmental authorities.[154](#)

Nonetheless, FACTA added a provision prohibiting affiliates from redisclosing such information.[155](#)

Medical information furnishers must notify agencies of their status. In order to help agencies implement the revised restrictions on medical information, persons in the business of providing medical services, products, or devices and who furnish information to agencies must notify the agencies of their status as medical information furnishers.[156](#) States are preempted from regulating the subject matter of this provision.[157](#)

Employee Investigations

Employer's investigations of employees now excluded from the FCRA. FACTA amended the FCRA to exclude certain communications related to employers' investigation of employees.[158](#) To fall within the exclusion the communication must be made to an employer, and must be in connection with an investigation of one of the following:

- suspected misconduct relating to employment;
- compliance with federal, state, or local laws;
- compliance with the rules of a self-regulatory organization; or
- compliance with the preexisting written policies of the employer.

Furthermore, the communication must not be for the purpose of investigating a consumer's creditworthiness, credit standing, or credit capacity (in other words, the communication must only bear on the employee's character, general reputation, personal characteristics, or mode of living) and must not be provided to anyone other than the employer (or the employer's agent), a governmental authority, or a self-regulatory organization with regulatory authority over the employer.[159](#) Employees will have a right to notice if the employer takes adverse action based on communications resulting from an investigation. They also have the right to a summary of the nature and substance of the communications.[160](#)

Statute of Limitations

Statute of limitations revised to date from consumer's discovery. The FCRA's statute of limitations now provides that the 2 year limitations period dates from the consumer's discovery of the violation, not the date of the violation itself, effectively overruling *Andrews v. TRW*,[161](#) which held that the discovery rule did not apply to the FCRA's limitations period. However, the consumer must bring the action within 5 years of the date of the violation, regardless of discovery.[162](#)

Effective Dates

FACTA was signed into law on December 4, 2003, and accordingly those provisions without a designated effective date went into effect then. However, the effective dates of many of the important provisions of the FCRA are delayed either expressly or because they depend upon to-be-issued regulations, as follows:

- The effective date for the new rule requiring truncation of consumer account numbers on electronically printed receipts will become effective on December 4, 2006, for machines in use before January 1, 2005, and on December 4, 2004, for machines first put into use after January 1, 2005.[163](#)
- The effective date for FACTA's provision requiring businesses that have done business with an identity thief to provide transaction information to the victim is June 3, 2004.
- The effective date of FACTA's provision allowing consumers a free annual credit report from nationwide consumer reporting agencies may be delayed until December 4, 2004 since the FTC has 6 months to issue regulations that will create the centralized source through which consumers are to make their requests, and the regulations will not become effective until 6 months after they become final.[164](#)
- Similarly, the effective date of FACTA's provision allowing consumers a free annual credit report from nationwide specialty consumer reporting agencies may be delayed until March 4, 2005.[165](#)
- The effective date of the new obligations of users of consumer information to dispose of that information may be delayed until December 4, 2004, by which time final regulations implementing the obligations are to be issued.[166](#)
- The effective date of the new provision prohibiting nationwide consumer reporting agencies from circumventing their treatment under the FCRA may be delayed until March 3, 2004, by which time the FTC is required to have issued final regulations implementing that provision.[167](#)
- The regulations that will allow creditors to obtain or use medical information pertaining to a consumer in connection with a determination of the consumer's eligibility for credit are to be issued by June 4, 2004.[168](#)

In addition, the FCRA requires the following regulations to be issued by no particular time:

- The regulations regarding the policies and procedures that a user of a consumer report that has an address discrepancy must employ.[169](#)
- The regulations defining what constitutes appropriate proof of identity for the purposes of § 605A (identity theft prevention; fraud alerts and active duty alerts), § 605B (block of information resulting from identity theft), and § 609(a)(1)(requiring an agency to truncate the SSN of a consumer on a report issued to a consumer).[170](#)
- The red-flag guidelines that financial institutions are to follow to prevent and detect identity theft.[171](#)
- The model summary of rights to obtain and dispute information in consumer reports and to obtain credit scores.[172](#)
- The regulations which creditors must comply with regarding risk-based pricing notices.[173](#)
- The regulations identifying the circumstances under which a furnisher must reinvestigate information upon a consumer's dispute.[174](#)
- The guidelines for furnishers to follow regarding the accuracy and integrity of consumer information that furnishers furnish to agencies.[175](#)
- The model disclosure that financial institutions may use to comply with the new requirement that they disclose to a customer that the institution is furnishing negative information about that customer, the use of which will be deemed to comply with the requirement.[176](#)
- The regulations to implement the new right of consumers to opt out of an affiliate's marketing solicitations.[177](#)

Financial Literacy

Title V of FACTA establishes a new Financial Literacy and Education Commission that is "to improve the financial literacy and education of persons in the United States through development of a national strategy to promote financial literacy and education."[178](#) Among other duties, the Commission is to help educate Americans in creating household budgets, saving for long term goals such as education and retirement, managing credit and spending, becoming aware of the significance of credit reports and credit scores and of the impact of financial decisions on their credit scores, and avoiding abusive, predatory, or deceptive credit offers and financial products.[179](#) The Commission must also emphasize the financial literacy and education of consumers who may be reached through multilingual programs.[180](#)

1 NCLC would like to acknowledge the significant contributions of Elizabeth De Armond and those of Tom Domonoske, and Joanne Faulkner, to this analysis.

2 Sen. Rep. No. 108-166, 108th Congress, 1st Sess, Amending the Fair Credit Reporting Act, p. 6-7

(Oct. 17, 2003); H. Rep. No. 108-263, 108th Congress, 1st Sess, Fair and Accurate Credit Transactions Act of 2003, p. 7 (Sept. 4, 2003).

3 Pub. L. No. 108-159 (2003), § 511 (2003).

4 Pub. L. No. 108-159 (2003), § 514 (a)(2)(J).

5 Pub. L. No. 108-159 (2003).

6 15 U.S.C. § 1681 et. seq.
7 § 625(d)(2).
8 Pub. L. No. 108-159, § 711 (2003).
9 §§ 625(b)(1)(A)-(F), 625(b)(2).
10 § 625(b)(1)(G), added by Pub. L. No. 108-159, § 151 (2003).
11 § 625(b)(1)(H), added by Pub. L. No. 108-159, § 214 (2003).
12 § 625(b)(1)(I), added by Pub. L. No. 108-159, § 311(b) (2003).
13 § 625(b)(3), added by Pub. L. No. 108-159, § 212 (2003).
14 §§ 625(b)(3)(A) and (B).
15 § 625(b)(3)(C).
16 § 625(b)(4), added by Pub. L. No. 108-159, § 212 (2003).
17 §§ 625(b)(4)(A)-(G), added by Pub. L. No. 108-159, § 212 (2003).
18 15 U.S.C. § 1681t, as amended by Pub. L. No. 108-59 (2003) (emphasis added).
19 § 625(b)(5), added by Pub. L. No. 108-159, § 711 (2003).
20 *Lorillard Co. v. Reilly*, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001).
21 § 623(c).
22 § 609(e).
23 Added by Pub. L. No. 108-159, § 151 (2003).
24 Added by Pub. L. No. 108-159, § 311 (2003). An argument exists that § 615(h)'s new limitation of liability provision limits liability for any violation of § 615, since the provision refers to "any failure by any person to comply with this section," whereas other references within the subsection to itself refer to "subsection." See, e.g., § 615(h)(3). However, such an interpretation would drastically constrict consumers' enforcement rights by eliminating civil actions for nearly all of the obligations the FCRA imposes on users, and is not supported by the placement of the limitation of liability provision within a subsection as opposed to at the level of the other subsections that would be the subject to the limitation.
25 Added by Pub. L. No. 108-159, § 312 (2003).
26 Added by Pub. L. No. 108-159, § 312 (2003).
27 § 621.
28 § 623(a), as amended by Pub. L. No. 108-159 (2003).
29 § 623(e), added by Pub. L. No. 108-159, § 312 (2003).
30 § 621(c)(5), added by Pub. L. No. 108-159, § 312 (2003).
31 §§ 616, 617.
32 § 625(b)(5)(B), added by Pub. L. No. 108-159, § 711 (2003).
33 § 605A(a), added by Pub. L. No. 108-159, § 112 (2003).
34 Pub. L. No. 108-159, § 111 (2003).
35 § 605A(b), added by Pub. L. No. 108-159, § 112 (2003).
36 § 605A(c), added by Pub. L. No. 108-159, § 112 (2003).
37 *Id.*
38 *Id.*
39 50 U.S.C. § 501.
40 § 605A(h)(1)(B)(i), added by Pub. L. No. 108-159, § 112 (2003).
41 § 605A(h)(2)(B), added by Pub. L. No. 108-159, § 112 (2003).
42 § 605A(h)(1)(B)(ii), added by Pub. L. No. 108-159, § 112 (2003).
43 Pub. L. No. 108-159, § 114 (2003), amending FCRA § 615.

44 Id.
45 § 625(b)(5)(F), as amended by Pub. L. No. 108-159, § 711 (2003).
46 § 609(e), as amended by Pub. L. No. 108-159, § 151 (2003).
47 Id.
48 § 609(e)(6).
49 § 625(b)(1)(G), added by Pub. L. No. 108-159, § 151 (2003).
50 Pub. L. No. 108-159, § 113 (2003).
51 § 609(a)(1), as amended by Pub. L. No. 108-159, § 115 (2003).
52 § 628, added by Pub. L. No. 108-159, § 216 (2003).
53 § 605B(a), added by Pub. L. No. 108-159, § 152 (2003).
54 § 605B(b), added by Pub. L. No. 108-159, § 152 (2003).
55 § 623(a)(6), added by Pub. L. No. 108-159, § 154 (2003).
56 § 605B(c) (citing § 611(a)(5)), added by Pub. L. No. 108-159, § 152 (2003).
57 § 605B(d), added by Pub. L. No. 108-159, § 152 (2003).
58 § 605B(e), added by Pub. L. No. 108-159, § 152 (2003).
59 § 625(b)(5)(C), as amended by Pub. L. No. 108-159, § 711 (2003).
60 § 623(a)(6)(A), as amended by Pub. L. No. 108-159, § 154 (2003).
61 § 623(a)(6)(B), as amended by Pub. L. No. 108-159, § 154 (2003).
62 § 623(c), as amended by Pub. L. No. 108-159, § 312 (2003).
63 § 625(b)(5)(H), added by Pub. L. No. 108-159, § 711 (2003).
64 § 615(f), added by Pub. L. No. 108-159, § 154 (2003).
65 § 625(b)(5)(G), added by Pub. L. No. 108-159, § 711 (2003).
66 § 615(g), added by Pub. L. No. 108-159, § 155 (2003).
67 15 U.S.C. § 1692g.
68 Assuming that the limitation of liability provision of the new § 615(h)(8) applies only to that subsection.
69 § 625(b)(5)(F).
70 § 609(d), added by Pub. L. No. 108-159, § 151 (2003).
71 § 625(b)(3), added by Pub. L. No. 108-159, § 212 (2003).
72 § 621(f), as amended by Pub. L. No. 108-159, § 153 (2003).
73 § 625(b)(5)(G). An argument exists that since the new provisions only directly impose requirements on the identified agencies, and not on furnishers, actions against the furnishers are not preempted.
74 § 623(e), added by Pub. L. No. 108-159, § 312 (2003).
75 § 623(c)(2), added by Pub. L. No. 108-159, § 312 (2003). However, consumers may bring an action against furnishers for behavior that independently violates § 623(b). Id.
76 § 625(b)(1)(F).
77 § 611(a)(2).
78 § 623(b).
79 § 623(a)(8), added by Pub. L. No. 108-159, § 312 (2003).
80 § 623(a)(8)(G). Even notices from or prepared by organizations that are not defined to be credit repair organizations under the Credit Repair Organizations Act [16 U.S.C. § 1679a] because of their non-profit status will not trigger a reinvestigation. Id.
81 § 625(a)(8)(F).
82 § 625(a)(8)(E), added by Pub. L. No. 108-159, § 312 (2003).
83 Id.

84 § 625(b)(1)(F).
85 § 623(c)(1), added by Pub. L. No. 108-159, § 312 (2003).
86 Pursuant to the limitation of liability provisions in § 623(c).
87 § 623(a)(1)(A).
88 § 623(a)(1)(A), as amended by Pub. L. No. 108-159, § 312 (2003) (emphasis added).
89 The effect of this new standard warrants further analysis to determine the extent of its impact on accuracy.
90 § 623(c)(1), as amended by Pub. L. No. 108-159, § 312 (2003).
91 § 625(b)(1)(F).
92 § 623(a)(7), added by Pub. L. No. 108-159, § 217 (2003).
93 The safe harbor protects the institution from liability if it maintained reasonable compliance policies and procedures or reasonably believed that it was prohibited by law from contacting the consumer. § 623(a)(7)(F).
94 § 623(a)(7)(A)(ii).
95 § 623(a)(7)(B)(i).
96 § 623(a)(7)(A)(ii).
97 Id.
98 § 623(a)(7)(D)(i).
99 § 623(c)(1), as amended by Pub. L. No. 108-159, § 312 (2003).
100 § 623(a)(5), as amended by Pub. L. No. 108-159, § 312 (2003).
101 Id.
102 § 625(b)(1)(F).
103 § 611(a), as amended by Pub. L. No. 108-159, § 313 (2003).
104 § 623(b).
105 § 623(b), as amended by Pub. L. No. 108-159, § 314 (2003).
106 § 611(f), added by Pub. L. No. 108-159, § 316 (2003).
107 Id.
108 § 611(a), as amended by Pub. L. No. 108-159, § 316 (2003).
109 § 611(f), added by Pub. L. No. 108-159, § 316 (2003).
110 § 623(b)(1)(B).
111 § 611(a)(1)(A), as amended by Pub. L. No. 108-159, §§ 316, 317 (2003) (emphasis added).
112 § 611(a)(1)(A), as amended by Pub. L. No. 108-159, § 317 (2003).
113 § 612(a), as amended by Pub. L. No. 108-159, § 212 (2003).
114 Pub. L. No. 108-159, § 211 (2003).
115 Id.
116 Pub. L. No. 108-159, § 211 (2003).
117 Id.
118 § 625(b)(5)(E), added by Pub. L. No. 108-159, § 711 (2003).
119 § 605A(a)(2), added by Pub. L. No. 108-159, § 112; § 612(d), as amended by Pub. L. No. 108-159, § 211 (2003).
120 § 605A(b)(2), added by Pub. L. No. 108-159, § 112; § 612(d), as amended by Pub. L. No. 108-159, § 211 (2003).
121 § 625(b)(5)(E), added by Pub. L. No. 108-159, § 711 (2003).
122 § 609(a).
123 § 609(f), added by Pub. L. No. 108-159, § 212 (2003). The agency need only

disclose 4 of the key factors, though if the number of inquiries to the file impacted the score the agency must disclose that fact regardless of the number of other key factors disclosed. Id.

124 Id.

125 § 609(g), added by Pub. L. No. 108-159, § 212 (2003).

126 Id.

127 § 625(b)(3), added by Pub. L. No. 108-159, § 212 (2003).

128 § 609(c), as amended by Pub. L. No. 108-159, § 211 (2003).

129 Pub. L. No. 108-159, § 311 (2003), amending § 615(h).

130 Prepared Statement of the Federal Trade Commission on the Fair Credit Reporting Act Before the Senate Banking Committee on Banking, Housing and Urban Affairs, July 10, 2003, pp. 11-12.

131 Pub. L. No. 108-159, § 311 (2003).

132 Id.

133 15 U.S.C. § 1691.

134 § 615(h)(8)(A), added by Pub. L. No. 108-159, § 311 (2003).

135 § 625(b)(1)(I), added by Pub. L. No. 108-159, § 311 (2003).

136 § 604(e), as amended by Pub. L. No. 108-159, § 213 (2003).

137 § 615(d)(2), as amended by Pub. L. No. 108-159, § 213 (2003).

138 § 603(d)(2)(A).

139 § 624, added by Pub. L. No. 108-159, § 214 (2003). Certain exemptions apply. Id. at § 624(a)((4).

140 § 624(a)(3), added by Pub. L. No. 108-159, § 214 (2003).

141 § 625(b)(1)(H), added by Pub. L. No. 108-159, § 214 (2003).

142 § 604(g), added by Pub. L. No. 108-159, § 411 (2003).

143 § 604(g)(1)(A)(ii), added by Pub. L. No. 108-159, § 412 (2003).

144 § 604(g)(1)(C), added by Pub. L. No. 108-159, § 411 (2003).

145 Pub. L. No. 108-159, § 411 (2003), adding § 604(g)(4).

146 § 605(a)(6), added by Pub. L. No. 108-159, § 412 (2003).

147 § 625(b)(1)(E).

148 § 605(b), as amended by Pub. L. No. 108-159, § 412 (2003).

149 § 604(g)(2), added by Pub. L. No. 108-159, § 412 (2003).

150 § 604(g)(5)(A), added by Pub. L. No. 108-159, § 412 (2003).

151 § 603(d)(2)(A).

152 § 603(d)(1).

153 § 603(d)(3), added by Pub. L. No. 108-159, § 411 (2003).

154 § 604(g)(3), added by Pub. L. No. 108-159, § 412 (2003).

155 Pub. L. No. 108-159, § 411 (2003), adding § 604(g)(4).

156 § 623(a)(9), added by Pub. L. No. 108-159, § 412 (2003).

157 § 625(b)(1)(F).

158 §§ 603(d)(2)(D), (x), amended by Pub. L. No. 108-159, § 611 (2003).

159 § 603(x)(1)(C).

160 § 603(x)(D)(v)(2), amended by Pub. L. No. 108-59, § 611 (2003)

161 534 U.S. 19 (2001).

162 § 618, as amended by Pub. L. No. 108-159, § 156 (2003).

163 § 605(g)(3), added by Pub. L. No. 108-159, § 411 (2003).

164 Pub. L. No. 108-159, § 211 (2003). Furthermore the provision does not apply to a nationwide agency that has not been furnishing consumer reports on a continuing basis for the twelve months preceding a consumer's request. § 612(a)(4), added by Pub. L. No. 108-159, § 211 (2003).

165 § 612(a)(1)(C), added by Pub. L. No. 108-159, § 211 (2003).

166 § 628(a), added by Pub. L. No. 108-159, § 216 (2003).

167 § 629, added by Pub. L. No. 108-159, § 211 (2003).

168 § 604(g)(5), added by Pub. L. No. 108-159, § 411 (2003).

169 § 605(h)(2), added by Pub. L. No. 108-159, § 315 (2003).

170 Pub. L. No. 108-159, § 211 (2003).

171 § 615(e), added by Pub. L. No. 108-159, § 114 (2003).

172 § 609(c)(1), added by Pub. L. No. 108-159, § 211 (2003).

173 § 615(h)(6), added by Pub. L. No. 108-159, § 311 (2003).

174 § 623(a)(8)(A), added by Pub. L. No. 108-159, § 312 (2003).

175 § 623(e), added by Pub. L. No. 108-159, § 312 (2003).

176 § 623(a)(7)(D), added by Pub. L. No. 108-159, § 217 (2003).

177 § 624(a), added by Pub. L. No. 108-159, § 214 (2003).

178 Pub. L. No. 108-159, § 513 (2003).

179 Pub. L. No. 108-159, § 514(a) (2003).

180 Pub. L. No. 108-159, § 514(a)(H) (2003).