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June 15, 2004

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex J),
600 Pennsylvania Avenue, NW
Washington, DC 20580

**Re: FACTA Identity Theft Rule,
Matter No R411011**

Dear Sir or Madam,

The American Bankers Association (“ABA”) is pleased to submit our comments on the Federal Trade Commission’s (“Commission”) proposed rules implementing certain provisions of the Fair and Accurate Credit Transactions Act of 2003 (the “Act”) which amended the Fair Credit Reporting Act (“FCRA”) published in the *Federal Register* on April 28, 2004. The proposed rule establishes 1) definitions for the terms “identity theft” and “identity theft report;” 2) the duration of an “active duty alert;” and 3) the “appropriate proof of identity” for purpose of sections 605A (fraud alerts and active duty alerts), 605B (consumer report information blocks), and 609(a)(1) (truncation of Social Security numbers) of the FCRA, as amended by the Act.

The ABA brings together all elements of the banking community to represent the interests of this rapidly changing industry. Its membership – which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies, and savings banks – makes ABA the largest banking trade association in the country.

Generally. Overall, we support the Commission’s thoughtful proposal that attempts to address concerns we share about the potential misuse of the Act’s provisions, but we recommend modifications. Like the Commission, we are concerned that the proposal, especially the broad definitions of identity theft and identity theft report, will be used as tools for unscrupulous people and organizations to delete negative, but accurate information from their consumer reports, leading to the deterioration of the integrity of consumer reports. As a result, creditors will be unable to make sound and fair decisions, which will increase the cost of credit and compromise the safety and soundness of financial institutions.

Section 602 of Fair Credit Reporting Act indicates that Congress found:

The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

Congress made every effort to balance the need for identity theft victims to correct their consumer reports quickly and the need for consumer reports to be accurate predictors of creditworthiness. We believe that the broad proposed definitions of identity theft and identity theft reports tip this balance toward reducing accuracy without benefiting identity theft victims.

In the Supplementary Information, the Commission notes that the definition of identity theft is critical because it defines the scope of fraudulent conduct that entities must take steps to prevent and determines who may take advantage of the Act's rights. Identity theft reports confer related rights. Specifically, the Commission notes that the definitions are critical to the alert provisions and the provisions that allow consumers to block the reporting of information related to identity theft.

However, we note that under Section 603(q), the statutory definitions of "identity theft" and "identity theft report" only relate to fraud alerts: they do not apply, for example, to the information blocking sections of Sections 605(b) and 623(a)(B). Accordingly, we urge the Commission to limit the application of the definitions to the alert provisions as the Act does. Otherwise, we believe that the broad definitions, if applied to these information blocking provisions, will allow the Act to be used for "unscrupulous purposes, such as clearing negative but legal information from their credit records," which the Commission has indicated it strongly wishes to avoid. In any case, the Commission should narrow the definitions to ensure that the regulation is not used inappropriately to remove or block accurate but negative information in consumer reports.

Identity theft definition. The proposal defines "identity theft," as a "fraud committed or attempted using the identifying information of another person without lawful authority." The proposal then defines the term "identifying information" to mean "a name or number that may be used, alone or in conjunction with any other information, to identify a specific individual." It then lists examples including name, social security number, date of birth, unique biometric data, unique electronic identification number, and telecommunication identifying information or access device.

If the Commission applies the identity theft provision to the blocking provisions, we recommend that the Commission narrow the definition of

identity theft to exclude specifically “unauthorized credit or deposit account transactions to legitimately opened existing accounts, absent some indication that the thief has taken steps to assume control of the account, such as changing the account address.” Thus, the definition would include new account fraud and account takeover, but would not encompass traditional fraud such as isolated unauthorized transactions that are already covered by other federal regulations and that are not reported to consumer reporting agencies.

Our concern with the proposed broad definition of identity theft is that a consumer who has experienced, for example, an unauthorized card transaction, may file a legitimate, but general identity theft report and then block other, unrelated, accurate, but negative information. While the proposal provides that the furnisher and consumer reporting agency may request more specific information before blocking information, it does not require the consumer to provide it, nor does it allow the consumer reporting agency or furnisher to decline the request if additional information is not provided (except where the consumer reporting agency suspects there has been a misrepresentation or there is an “indication that the report was obtained fraudulently”).

Thus, a consumer could legitimately obtain an identity theft report on the basis of a single unauthorized credit card transaction and then demand that consumer reporting agencies not report negative but accurate information about that account and other accounts. The consumer could also demand that another creditor with whom the consumer has an account, stop reporting negative, but accurate information about that account, which the Commission has indicated it does not want to encourage.

The problem is exacerbated because Footnote 9 of the Supplementary Information classifies as an identity theft report, complaints filed with the Commission’s Identity Theft Data Clearinghouse. These reports are simply filed on-line by a consumer without any verification, and as the Commission notes, are not “designed to vouch for the truth of each individual complaint.”

Even if Commission’s Identity Theft Data Clearinghouse complaint is removed from the definition, the ease with which information may be blocked will encourage the production of false police reports, which is already a problem. However, unlike today, under the proposal, the consumer reporting agencies and furnishers of information have little if any discretion to decline a request. The ultimate effect is the deterioration of the integrity of consumer reports. The less reliable the information, the less able creditors and other financial institutions are able to judge creditworthiness, ultimately affecting the cost and availability of credit and creating safety and soundness concerns.

Allowing unauthorized transactions to trigger information blocking rights hands over to credit repair organizations as well as other criminals trying to abuse the system, a carte blanche for cleaning out negative but accurate information from consumer reports, ultimately compromising the integrity of consumer reports and putting the lending industry at risk.

These threats of abuse should not be underestimated. Those with intent to game the system have historically proved very imaginative and aggressive. The Commission itself in the proposal expresses its concern about the potential for such abuse and the ramifications.

Moreover, we do not believe that Congress intended to include within any Fair Credit Reporting Act definition of identity theft, fraud that is wholly unrelated to consumer reports. Unauthorized credit and debit card transactions on existing accounts are simply traditional fraud and are not reported to consumer reporting agencies or on consumer reports directly. Accordingly, the Act's identity theft victims' rights have no application to these transactions: blocking the reporting of information or placing alerts generally has no impact on or connection to unauthorized transactions. Congress could not have meant to trigger rights and responsibilities related to consumer reports with information not a part of a consumer report.

Furthermore, Congress has already addressed this type of traditional fraud in other statutes. Consumers for decades have had rights to dispute unauthorized transactions on existing credit accounts and electronic debits on existing deposit accounts under the Truth in Lending Act and Electronic Funds Transfer Act respectively. Those statutes provide generous rights to consumers: they put the burden of proof to show a transaction was authorized on the financial institution and require financial institutions to resolve disputes in a timely fashion. There is no complaint that they do not work well for consumers. Indeed, the Commission's own *Identity Theft Survey Report* released in September, 2003 showed that identity theft victims were generally very satisfied with the credit card companies' response to identity theft complaints. (The Commission's very broad definition of identity theft included unauthorized transactions.) Disputes involving other deposit account transactions are covered under state Uniform Commercial Codes about which there are few, if any, complaints.

Finally, adopting a narrower identity theft definition that excludes unauthorized transactions on existing accounts will not harm consumers or identity theft victims: they may still place initial alerts, even though in most cases, it will not be necessary as claims of unauthorized transactions are not reported; and an extended alert is not appropriate for unauthorized transactions on existing accounts.

The definition of identity theft should also exclude “attempted” identity theft. The qualifier is not included in the Act’s definition. In addition, covering attempted fraud poses the same problems that including unauthorized transactions of existing account does. A single incidence of an imposter attempting, but failing to open an account in a consumer’s name will trigger rights to block other unrelated negative but accurate information.

It is also not clear how including attempted fraud in the definition will help identity theft victims or consumers. If the failed attempt results in an “inquiry” which might lower a credit score, consumers already have a remedy: FCRA already requires consumer reporting agencies and furnishers of information to correct inaccurate information. If information is disputed, they must investigate and verify the information or delete it within a specific time period. In addition, consumers may still place an initial alert if there has been an attempted but failed identity theft. The shorter, 90-day alert is in fact more appropriate than the seven-year extended alert.

Identity theft report. As noted earlier, the Act limits the identity theft report definition to the provisions related to alerts. However, if the Commission applies the identity theft definition to the blocking of information provisions, it should still limit the definition to reports from agencies with the authority to arrest those who falsely provide reports. The final regulation should also specifically exclude complaints filed with the Commission’s Identity Theft Data Clearinghouse.

For the same reasons that it is critical that the identity theft definition be narrowed, it is important that the identity theft report definition be narrowed to cover only official reports from criminal law enforcement agencies with the authority to arrest a person who has filed a false report. Refining the definition is necessary to prevent unscrupulous people and organizations from using easily-obtained, unverified reports as a passport to block accurate but negative information from being reported. Indeed, absent a substantial and real threat for filing false complaints, this provision will present an open invitation for credit repair organizations and others to rapidly and without consequence delete accurate information from consumer reports.

Even with the threat of arrest and prosecution, we believe that this provision will be abused. Already today, people use false identity theft police reports to demand that information be removed from consumer reports. The problem will worsen if they can simply print off a complaint filed with the Commission’s Identity Theft Data Clearinghouse. As we have already observed in the discussion on the proposed definition of identity theft, this will have grave consequences for the integrity and reliability of consumer reports.

The Act supports this interpretation. It defines identity theft report as a report:

- That alleges an identity theft;
- That is a copy of an **official**, valid report filed by a consumer with an **appropriate** Federal, State or local law enforcement agency, including the United States Postal Inspection Service, or such other government agency deemed appropriate by the Commission; and
- The filing of which subjects the person filing the report to **criminal penalties** relating to the filing of false information if, in fact, the information in the report is false. (Emphasis added.)

The Act's reference to an "appropriate" law enforcement agency, coupled with the provision that subjects a person filing a false report to criminal penalties strongly suggests that Congress envisioned that the identity theft reports would be connected to criminal law enforcement agencies with the authority to make arrests. This would include, for example, the U.S. Postal Inspection Service,¹ which the Act specifically references.

Complaints filed with the Commission's Identity Theft Data Clearinghouse should be excluded, unless the Commission has authority to arrest a person filing a false report. In any case, such complaints should be excluded because they are not "official," which suggests that the report is in some fashion recognized or authorized by the "office" or agency, for example, by a signature, seal, or stamp. As the Commission itself has noted, such complaints are not "designed to vouch for the truth of each individual complaint."

Identity Theft Reports and Requests for Additional Information. The Commission, concerned about the potential for the misuse of identity theft reports, has proposed safeguards. Specifically, it includes in the definition of identity theft report:

¹ Under 39 USC 233.1, the US Postal Inspectors have authority to serve warrants and subpoenas and to make arrests. In addition to making arrests for crimes committed in their presence, Inspectors may make arrests without warrant for "felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony." This would include, for example, violations of 18USC 1001(a) which makes it a federal crime to make false statements to a federal agency for which violators may be imprisoned for up to five years.

[A]dditional information or documentation that an information furnisher or consumer reporting agency reasonably requests for the purpose of determining the validity of the alleged identity theft, provided that the information furnisher or consumer reporting agency makes such request not later than five business days after the date of receipt of the copy of the report form identified in paragraph (2) or the request by the consumer for the particular service, whichever shall be the later.

The proposal then lists examples of the specific information that furnishers and consumer reporting agencies may request.

ABA appreciates the Commission's concerns and its efforts to include this safeguard and we encourage it to retain it. However, we do not believe that it will be very useful against those trying to take advantage of the Act's identity theft victims' rights absent explicit discretion for the furnisher or consumer reporting agency to decline a request based on a reasonable believe that the information is actually accurate and should not be blocked.

Nevertheless, the Commission should retain the provision. We suggest some modifications. First, five business days will be insufficient in many cases to process the claim and determine what additional information is needed. We suggest that the Commission permit ten business days.

Second, the Commission should permit more than a single request. In many cases, it will be necessary to request additional information in order to properly handle the claim as it progresses. In addition, those filing claims will be able to circumvent this safeguard by simply responding vaguely.

Third, in the examples, the Commission proposes that a "law enforcement report containing detailed information about the identity theft and the signature, badge number . . . should be sufficient on its face to support a victim's request." However, "detailed information" is undefined or explained. We suggest that the final regulation refer back to the earlier examples of 603.3(b) to provide additional guidance and strengthen the safeguard.

Finally, in that example, the proposal states that it would not be reasonable to request additional information "without an identifiable concern such as an indication that the report was obtained fraudulently." We strongly urge the Commission to retain this provision.

* * * * *

ABA appreciates the opportunity to comment on this important proposal. We urge the Commission to make the changes necessary to ensure that the Act's provisions are not abused to eliminate negative but accurate information that will render consumer reports less accurate and therefore less predictive or usable. We are happy to provide any additional information.

Regards,

A handwritten signature in black ink, reading "Nessa Feddis". The signature is written in a cursive, flowing style.

Nessa Eileen Feddis