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After the FACTA: State Power to Prevent Identity Theft

By Gail Hillebrand*

I. Introduction

The federal Fair and Accurate Credit Transactions Act of 2003 ("FACTA") signed into law on December 4, 2003, made significant changes and additions to the Fair Credit Reporting Act ("FCRA").[1] FACTA provides consumers with new rights, including free annual consumer credit reports, a higher standard of accuracy for information furnished to credit reporting agencies, and a right to receive a credit score from a credit reporting agency for a reasonable

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This analysis is offered to assist policymakers, law enforcement, and consumer groups to determine what state laws can continue to be enacted and enforced after the Fair and Accurate Credit Transactions Act revisions to the federal Fair Credit Reporting Act. Consumers Union does not give legal advice to consumers, businesses, or others.

[1] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (2003) (amending 15 U.S.C. §§ 1681–1681x; 20 U.S.C. §§ 9701-9708; and 31 U.S.C. § 5318 (2004)).

fee.[2] FACTA also requires lenders or brokers who use credit scores to supply free credit scores to consumers who have applied for a home loan, guarantees certain rights to identity theft victims, and provides additional measures intended to prevent identity theft.[3] The identity theft measures include imposing a duty on creditors to take certain steps before granting credit when a fraud alert is contained in a credit file or accompanies a credit score.[4]

This article focuses on the degree of preemption of state law relating to identity theft following the FACTA revisions to FCRA. First, the article describes the five types of preemption under FCRA, as amended by FACTA.[5] Second, the article describes the scope and limits of each form of post-FACTA preemption under the revised FCRA. Finally, the article focuses on categories of state laws addressing identity theft that are not preempted by the revised FCRA, describing specific state laws that would help prevent or remedy identity theft, and offering a FACTA/FCRA preemption analysis for each type of state law.

A. The FCRA Before FACTA

The history of FCRA is pertinent to understanding the changes made by FACTA to the substantive law and to the preemption rules. In 1970, the growth of the consumer reporting industry gave rise to FCRA. A key purpose of FCRA was to prevent the maintenance of secret files containing potentially inaccurate information about consumers that could possibly affect a consumer's ability to obtain credit.[6] The 1996 amendments to the FCRA were designed to address problems such as (1) chronic inaccuracy; (2) non-responsiveness and inadequate reinvestigation by consumer reporting agencies ("CRAs") and furnishers; (3) the reinsertion of previously

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[2] Fair and Accurate Credit Transactions Act § 312 (improving the accuracy standard); *see id.* § 211 (entitling consumers to obtain a free copy of their credit files from each nationwide consumer reporting agency once every twelve months).

[3] Fair and Accurate Credit Transactions Act § 111.

[4] Fair and Accurate Credit Transactions Act § 111.

[5] *See generally* NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING (2002) (providing an in-depth discussion of the Fair Credit Reporting Act and the Fair and Accurate Credit Transactions Act of 2003).

[6] Fair Credit Reporting Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (current version at 15 U.S.C. § 1681 (2004)).

deleted data; and (4) the impermissible use of consumer credit reports.[7] In the debate prior to the adoption of the 1996 amendments, consumer reporting agencies asserted that the accuracy and completeness of consumer credit files would be enhanced by national, uniform standards related to key aspects of the consumer credit reporting system.[8]

The traditional source of errors in consumer credit reports stems from design choices by credit reporting agencies to accept information which is a close, but not exact, match to information on hand about the consumer.[9] For example, a partial match on a first name paired with a partial but incomplete match on a Social Security Number might result in accurate information about a consumer's poor payment history being placed into someone else's credit file, even though the two consumers have different last names.[10]

The startling growth of identity theft has created a new type of error which appears on consumer credit reports. These errors involve persons who apply for credit using the name or Society Security Number of someone else. The credit applicant—a thief—does not pay make any payments on the new credit account. Thus, negative information is generated in the credit file of the identity theft victim.[11]

Identity theft can range from simple theft of a credit card number to far more complex schemes. For example, a criminal may open new accounts in a consumer's name, take over existing credit or bank accounts (sometimes previously dormant accounts), or even take a home mortgage or an auto loan in the victim's name.[12]

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[7] *The Role of the FCRA in the Credit Granting Process: Hearing Before Subcomm. on Fin. Insts. & Consumer Credit of the House Comm. Servs.*, 108th Cong. 109-10 (2003) [hereinafter *FCRA Hearings*] (testimony of Evan Hendricks, Editor/Publisher, PRIVACY TIMES) (pointing out that many of these problems persisted in 2003), *available at* http://financialservices.house.gov/Hearings.asp?formmode=detail&hearing=229 (last visited Oct. 31, 2004).

[8] *FCRA Hearings*, *supra* note 7, at 97 (testimony of Harry Gambill, CEO, TransUnion LLC) (discussing the proposed reform).

[9] *FCRA Hearings*, *supra* note 7, at 109-10 (testimony of Evan Hendricks, Editor/Publisher, PRIVACY TIMES).

[10] *Id.* .

[11] *Id.*

[12] *See* BOB SULLIVAN, YOUR EVIL TWIN, BEHIND THE IDENTITY THEFT

Personal financial information sufficient to create credit in the name of another can be purchased, stolen by insiders, compromised by hackers, and even poached by family members. Organized criminal activity can result in the theft of information sufficient to impersonate tens of thousands of persons at a time.[13]

Identity theft is widespread and growing. In fall 2003, the Federal Trade Commission ("FTC") estimated that twenty-seven million Americans were victims of identity theft over the previous five years.[14] An estimated 9.9 million people—4.6% of the adult population—became victims of identity theft from March 2002-2003 alone.[15] Annually, U.S. businesses lose $47.6 billion as a result of identity theft; individual victims spend $5 billion in out-of-pocket expenses and 300 million working hours to clean up the consequences of identity theft.[16]

At the very time identity theft threatens the accuracy of consumer credit files, these files have an increasingly significant impact on the economic reputations of consumers. Credit decisions today are not always about whether or not credit will be granted, but also what price the consumer will be charged and what terms the consumer will face. Nuances and gradations in price and terms are often referred to as "risk-based pricing."[17] Small to moderate changes in credit status can result in significant changes in the price of the credit to the consumer. For example, a consumer who falls below the cut-off credit score for a prime rate mortgage will pay significantly more in interest for a home loan. Travis Plunkett, Legislative Director of the Consumer Federation of America, described the fiscal impact of credit reporting errors: "Interest rates on loans with an 'A-' designation, the designation for sub-prime loans just below prime cut off, can be more than 3.25% higher than problems. Thus, over the life

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EPIDEMIC (New Jersey 2004). This new book provides an extensive discussion of the forms of identity theft.

[13] *See generally* SULLIVAN, *supra* note 12.

[14] Press Release, Federal Trade Commission, FTC Releases Survey of Identity Theft in U.S. 27.3 Million Victims in Past 5 Years, Billions in Losses for Business and Consumers (Sept. 3, 2003), *available at* www.ftc.gov/opa/2003/09/idtheft.htm.

[15] FED. TRADE COMM'N, IDENTITY THEFT SURVEY REPORT 7, tbl. 2 (Sept. 2003).

[16] *Id.* at 6.

[17] *FCRA Hearings*, *supra* note 7, at 115 (testimony of Evan Hendricks, Editor/Publisher, PRIVACY TIMES).

of a thirty-year, $150,000 mortgage, a borrower who is incorrectly placed into a 9.28% 'A-' loan would pay $317,516.53 in interest, compared to $193,450.30 in interest payments if that borrower obtained a 6.56% prime loan—the difference of $124,066.23 in interest payments."[18]

In FACTA, Congress responded to the growth of identity theft and its interference with the accuracy of consumer credit files by adding to FCRA specific new provisions for prevention or remedy of identity theft. However, Congress did not include in FCRA a comprehensive solution to identity theft. Instead, as discussed in this article, Congress left much work for states to do.

II. After FACTA: FCRA's Five Categories of Preemption Rules

FACTA was crafted and enacted in the factual context described above. Part of that context included the question of whether, and to what degree, state laws should be preempted.[19] FACTA gives a nuanced answer to that question, depending on which provision of FACTA is relied upon to assert preemption.

FACTA amends FCRA with respect to preemption of state laws in five ways:

1. FACTA adds identity theft prevention and mitigation to the basic rule that only inconsistent state laws are preempted by FCRA;

2. FACTA permanently extends the 1996 preemptions for the "subject matter regulated under" specific sections;

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[18] *FCRA Hearings*, *supra* note 7, at 182-196 (testimony of Travis B. Plunkett, Legislative Dir., Consumer Fed'n of Am.).

[19] *Concerning Errors in Credit Reports, The Rise of Identity Theft and the Need to Restore States' Rights to Protect Their Citizens: Hearing on The Fair Credit Reporting Act (FCRA): How It Functions for Consumers and the Economy Before the House Subcomm. on Financial Inst.*, 108th Cong. 5 (2003) [hereinafter *States' Rights Hearings*] (testimony of Edmund Mierzwinski, Consumer Program Dir., U.S. Public Interest Group), *available at* www.epic.org/privacy/preemption/mierzwinski6.4.03.pdf (last visited Nov. 4, 2004).

3. FACTA adds one identity theft provision and two non-identity theft provisions to the list of "subject matter regulated under" preemptive sections;

4. FACTA includes two new preemptive sections related to certain disclosures; and

5. FACTA creates a narrow preemption with respect to certain new federal protections relating primarily to identity theft. This preemption provision restricts state laws only with "respect to the conduct required by the specific provisions" of certain listed sections of FACTA.

This article discusses the preemptive effect of each of these five preemption standards in the context of the substantive rules of FACTA to which each form of preemption applies. Parts III—VII discuss each of these approaches to preemption. Part VII also discusses the substantive provisions of FACTA which trigger its new form of "conduct required" preemption. Part VIII discusses some of the many types of state laws in the area of identity theft which are not preempted. Part IX analyzes the legislative history of the new "conduct required" preemption.

III. Identity Theft Added to the General Inconsistency Rule

The general rule under FCRA is one of non-preemption, except for and to the extent of an inconsistency with any provision of the federal Act.[20] To clarify that this general "inconsistency only" preemption rule applies to state identity theft statutes, FACTA adds a reference to laws "for the prevention or mitigation of identity theft" to the section stating the general inconsistency standard.[21] Unless one of the specific sections described in Parts IV—VII, discussed *infra*, applies, state identity theft laws are preempted by the revised FCRA

[20] Fair Credit Reporting Act, Pub. L. No. 104-208, § 625(a), 110 Stat. 3009 (1996) (current version at 15 U.S.C. § 1681t(a) (2004)).

[21] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 711(1), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681t(a) (2004)).

only when, and only to the extent, that they are inconsistent with a provision of FCRA.[22]

IV. Permanent Extension of the 1996 Preemptions

FACTA permanently extends the seven areas of preemption first added to the FCRA in 1996. National consumer organizations have called this a major loss for consumers because federal preemption stymies the development of new consumer protections to respond to both old and new credit related problems.[23] State legislatures traditionally respond more quickly to emerging consumer problems than Congress. For example, many of the consumer protections adopted by Congress in FACTA were closely modeled on preexisting state consumer protection statutes.[24]

FACTA extends the temporary preemptions without change.[25] Six of the seven preexisting 1996 FCRA preemptions apply "with respect to any subject matter regulated under" listed sections or subsections.[26] Those six sections or subsections are:

Section 1681b relating to the prescreening of consumer

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[22] Fair Credit Reporting Act § 625(a); 15 U.S.C. § 1681t(a) (2004); *see infra* Parts IV-VII.

[23] Press Release, U.S. PIRG, President Signs Major Credit and Identity Theft Bill, Consumers Get Protections, But at Unacceptable High Cost of State Rights, (Dec. 3, 2003) (on file with author).

[24] *States' Rights Hearings*, *supra* note 20, at 4 (testimony of Edmund Mierzwinski, Consumer Program Dir., U.S. Public Interest Group), *available at* www.epic.org/privacy/preemption/mierzwinski6.4.03.pdf (last visited Nov. 4, 2004).

[25] Fair Credit Reporting Act, Pub. L. No. 104-208, § 624(b)(1)-(b)(2), 110 Stat. 3009 (1996) (current version at 15 U.S.C. § 1681t(b)(1)-(b)(2) (2004)). The extension does not clarify preexisting disputes. One such dispute is the interplay of the FCRA preemption provision on affiliate sharing and the authorization in the Gramm-Leach-Bliley Act for states to provide greater protection with respect to consumer privacy and information sharing by financial institutions. *Compare* Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended at 15 U.S.C. § 6807 (2004)), *with* Fair Credit Reporting Act § 624 (current version at 15 U.S.C. § 1681t (2004)) (finding that with the exception of pre-existing preemptions, this subchapter does not annul, alter, affect or exempt any person subject to these provisions from complying with the laws of any state). *See infra* Part V.

[26] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 711(3), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681t(b)(1) (2004)).

> reports;[27]
>
> Section 1681i relating to the time by which a consumer reporting agency must take any action in any procedure related to the disputed accuracy of information in a consumer's file;[28]
>
> Section 1681m(a) and (b) relating to the duties of a person who takes any adverse action with respect to a consumer;[29]
>
> Section 1681m(d) relating to the duties of persons who use a consumer report in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance;[30]
>
> Section 1681c relating to information contained in consumer reports;[31] and
>
> Section 1681s-2, related to the responsibilities of persons who furnish information to credit reporting agencies.[32]

The seventh previous preemption provision appears in FCRA section 624(b)(2), renumbered section 625(b)(2).[33] It is not accompanied by an introductory clause purporting to cover the

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[27] Fair Credit Reporting Act § 604.

[28] Fair Credit Reporting Act § 611 (exempting state laws in effect on Sept. 30, 1996).

[30] Fair Credit Reporting Act § 615(d).

[31] Fair Credit Reporting Act, Pub. L. No. 104-208, § 605, 110 Stat. 3009 (1996) (current version at 15 U.S.C. §1681c (2004)) (exempting state laws in effect on Sept. 30, 1996).

[32] Fair Credit Reporting Act § 623. *See also* Fair Credit Reporting Act § 624 (allowing preexisting state statutes in Massachusetts and California, relating to responsibilities of persons who furnish information to consumer reporting agencies, to impose requirements and prohibitions on these individuals). *See* MASS GEN. LAWS ANN. ch. 93, § 54A(a) (West 1996) and CAL. CIVIL CODE § 1785.25(a) (1996).

[33] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 711(3), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681t(b)(2) (2004)).

"subject matter regulated under" that section. That provision preempts any requirement or prohibition imposed under state law with respect to "the exchange of information among persons affiliated by common ownership or common corporate control."[34] These preemptions have been in place since the 1996 FCRA amendments and will not be discussed in this article.

V. Limited Additions to "Subject Matter Regulated Under" Preemption

FACTA adds only three sections or subsections to the "subject matter regulated under" form of FCRA preemption.[35] The added items are:

> Section 609(e), "relating to information available to victims under section 609(e);"[36]
>
> Section 624, "relating to the exchange and use of information to make a solicitation for marketing purposes;"[37] and
>
> Section 615(h), "relating to the duties of users to provide notice with respect to terms in certain credit transactions."[38]

A. Records From Businesses

Section 609(e) of the FCRA gives identity theft victims a right to receive application and transaction information from a business where an identity thief has successfully impersonated the victim.[39] Specifically, it requires a business from which an identity

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[34] Fair Credit Reporting Act § 625(b)(2) (exempting VT. STAT. ANN. tit. 9, § 2480e(a) and (c)(1)).

[35] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 151(a)(2), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681t(b)(1)(G)-(I) (2004)), *citing* Fair and Accurate Credit Transactions Act §§ 214(c)(2), 311(b).

[36] Fair and Accurate Credit Transactions Act § 151(a).

[37] Fair and Accurate Credit Transactions Act § 214.

[38] Fair and Accurate Credit Transactions Act § 311(a).

[39] Fair and Accurate Credit Transactions Act § 151(a).

thief obtained credit, products, or services to provide the victim with copies of an application, if reasonably available, and business transaction records within its control.[40] The victim must make a request, provide proof of his or her identity, and provide both a police report and an FTC identity theft affidavit when the business so requires.[41]

Section 609(e) is important because consumers who have been victimized by identity thieves frequently report that they must investigate the crime themselves. One source reports that both lending institutions and law enforcement agencies often have a high dollar threshold, such as $10,000 in stolen funds, to pursue an investigation of identity theft.[42] The well-respected non-for-profit Privacy Rights Clearinghouse states: "For victims, obtaining copies of the imposter's account application and transactions is an important step toward regaining financial health."[43]

Using these records, consumer victims can help stop the crime. Consumer victims also can use business records relating to the activities of the thief to prove to a business, a collection agency, or a consumer reporting agency that the disputed account was not opened or used by the consumer. For example, the records might show that a thief had the consumer's name and Social Security number, but sent bills and products to an address where the consumer never lived. The records may prove that the thief used stolen credit to buy items not found in the consumer's household. Further, the records might show that the thief purchased items not consistent with the consumer's lifestyle, such as sports car accessories purchased for a household owning only compact cars. While the right to get records is important, FACTA's thirty day window for the business to respond to the consumer's request somewhat limits its usefulness.[44] A criminal may move on to several new businesses and repeat the scam, causing

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[40] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 151 (a), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681t (2004)).

[41] Fair and Accurate Credit Transactions Act § 151 (a).

[42] *See* SULLIVAN, *supra* note 12, at 26.

[43] Privacy Rights Clearinghouse, *Consumers Win Some, Lose Some, Fact Sheet No. 6a: Facts on FACTA, available at* http://www.privacyrights.org/fs/fs6a-FACTA.htm (Aug. 2004).

[44] *See* 15 U.S.C. § 1681g(e)(1) (permitting a thirty day window period from the date the request from the victim is received).

more damage, before the victim can recover his or her good name and credit.

Because the contents of section 609(e) are under the general "subject matter regulated under" preemption provision, a state is limited in its ability to enact enforceable laws in this area.[45] For example, state laws that shorten the thirty day time period or that provide for an alternative way to trigger the right to receive this information are highly likely to be preempted. In addition, section 609(e) is not enforceable under the civil liability provisions of FCRA.[46] The section also contains an express protection from liability under federal, state or other law for a business that discloses the information required in good faith.[47] Thus, a state could not impose liability for failure to comply with the section. However, the preemption applies only to "information available to victims under section 609(e)."[48] Other state-imposed duties or causes of action, including a state cause of action for negligence by a creditor or other business in dealing with the impersonator, are left untouched. So, while a consumer can't sue for failure to give the business records required by section 609(e), FACTA does not affect any cause of action the consumer may have under state law for negligence by the business in granting credit to the thief in the first instance.

B. Using Information From Affiliates For Marketing Solicitations

FACTA adds a new section 624 to the FCRA, which prohibits the use of information from affiliates for marketing solicitations, subject to certain exceptions, unless the consumer is given an opportunity to opt out.[49] The language of this section only regulates the use for marketing purposes of certain information received from

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[45] Fair Credit Reporting Act, Pub. L. No. 104-208, § 625(b)(1)(G), 110 Stat. 3009 (1996) (current version at 15 U.S.C. § 1681t(b)(1)(G)).

[46] *See* 15 U.S.C. § 1681g(e)(6) (providing that Fair Credit Reporting Act §§ 616 and 617 do not apply to any violation of the subsection).

[47] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 151(a), 117 Stat. 1952(2003) (amending 15 U.S.C. § 1681g(e)(7) (2004)).

[48] *See* 15 U.S.C. §§ 1681g(e)(2), 1681t(b)(1)(G) (stating that the subsection relates to information available to victims under this subsection).

[49] *See* Fair and Accurate Credit Transactions Act § 214. Affiliates are entities with common ownership or common corporate control, such as companies owned by another company or sibling companies owned by the same parent company.

affiliates; it does not regulate the actual sharing of consumers' personal financial information.

The "subject matter regulated under" preemption formula applies to the new opt-out rule for the use of affiliate information for marketing purposes. The relevant FACTA preemption provision describes the subject matter of section 624 as "relating to the exchange and use of information to make a solicitation for marketing purposes."[50] Such a description of the "subject matter" is broader than the actual subject matter of the section, which is the use of affiliate information for marketing, not the sharing of such information.[51] The scope of any new preemption of state affiliate sharing laws is not entirely clear. Such preemption should extend, at the most, to state laws imposing conditions or restrictions on the use of personal financial information obtained from an affiliate for marketing solicitations and not for other purposes, such as credit or insurance underwriting. This is so because the preemption is no broader than the subject matter regulated under the section, and the subject matter of section 624 is marketing uses of information shared by affiliates. An example of a marketing use of affiliate information would be mailing information about a financial institution's securities brokerage company to consumers of the financial institution's bank who have certificates of deposit that are about to expire.

Large financial institutions often have hundreds, or even thousands of affiliates.[52] Financial institutions have asserted that

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[51] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 151(a), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681t(b)(1)(H) (2004)), *cf. id.* § 214 (finding that any person who receives from another person related to it by common ownership or affiliated corporate control a communication of information that would be a consumer report, may not use the information to make a solicitation for marketing purposes).

[52] For example, CitiGroup told Congress it has over 1,900 corporate affiliates. *The Role of FCRA in the Credit Granting Process Before the House Comm. on Financial Services Subcomm. on Financial Institutions and Consumer Credit*, 108th Cong. 1 (Jun. 12, 2003) (statement of Martin Wong, General Counsel, Citigroup Global Consumer Group). According to other testimony in Congress, Bank of America has nearly 1,500 affiliates. *Financial Privacy and Consumer Protection: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, 107th Cong. 2 (Sept. 19, 2003) (statement of William H. Sorrell, Attorney Gen., State of Vermont.).

FCRA preempts affiliate information sharing for non-marketing solicitation purposes. This argument that did not prevail in a recent federal district court decision holding that California's financial privacy law is not preempted by FCRA.[53]

C. Risk-Based Pricing Notice

The final new section of FCRA that was added to the list of "subject matter regulated under" preemption is FCRA section 615(h)—the risk-based pricing notice.[54] It requires notice to the consumer when credit is granted based in whole or in part on a consumer report, if the material terms are materially less favorable than the most favorable terms available to a "substantial proportion" of consumers from or through that lender or broker.[55] In other words, if many customers of that creditor receive better terms than the credit offered to a particular customer, and a consumer credit report was used, then the creditor must tell the consumer that the terms he or she is being offered are less favorable than the terms offered to the other consumers. Ultimately, preemption of the subject matter regulated under this section prevents a state from requiring an adverse action notice where it would not be required by federal law. For example,

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[53] Am. Bankers Ass'n v. Lockyer, 2004 U.S. Dist. LEXIS 12367 (E.D. Cal. June 30, 2004), *appeal docketed*, No. 04-0778 (9th Cir. June 30, 2004). There are three competing arguments about FCRA's effect, if any, on state power to restrict affiliate sharing. First, consumer advocates contend that the Gramm-Leach-Bliley Act permits more state regulation of affiliate sharing. Second, financial institutions contend that preexisting Fair Credit Reporting Act § 624(b)(2), renumbered by the Fair and Accurate Credit Transactions Act as § 625(b)(2), preempts state laws on affiliate sharing. Third, consumer advocates argue that state power is consistent with a harmonization of the Fair Credit Reporting Act and the Gramm-Leach-Bliley Act. This argument is based in part on the fact that the 1996 Fair Credit Reporting Act preemption was simply renewed without change in 2003, in spite of the 1998 intervening event of the Gramm-Leach-Bliley Act, which authorizes further state regulation to accompany the Gramm-Leach-Bliley Act's expansion of the kinds of allowable affiliate relationships. Finally, the overbroad Office of the Comptroller of the Currency ("OCC") rule on the National Bank Act preemption adopted early this year may also have an impact, if it withstands anticipated court and Congressional challenges.

[54] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 311, 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681m(h) (2004)).

[55] Fair and Accurate Credit Transactions Act § 311.

federal law would not require the notice where the terms offered are less favorable in a nonmaterial way.[56]

The risk-based pricing notice was added because there were circumstances in which a consumer was offered less favorable credit terms due to information in the consumer's credit file, and yet lenders asserted that they were not obligated to give a notice of adverse action. Lenders asserted that there was no adverse action because the consumer had not applied for and been denied a specific set of credit terms. Instead, they asserted, the consumer had either sought unspecified "best available" terms, or had received a counteroffer from the creditor which stated the proposed new terms.[57] The risk-based pricing notice is essentially a counterpart to the notice of adverse action, a type of notice for which state laws were already preempted under FCRA.[58] Thus, the application of "subject matter regulated under" preemption to the risk based pricing notice simply preempts state law in an area very closely associated with an area that they have been prevented from acting in since 1996.

VI. FACTA's New Standalone Preemption Sections

The next category of FACTA preemption is found in FCRA subsections 625(b)(3) and (b)(4).[59] These two new preemptive subsections omit both the general "subject matter regulated under" introductory language of renumbered FRCA section 625(b)(1) and the "conduct required under specific provisions" introductory language of FCRA section 625(b)(5).

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[56] A news report suggested that this section might be reopened due to an apparent error that restricts private civil liability for violations of Fair Credit Reporting Act § 615(h)(8)(A). Fair Credit Reporting Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (current version at 15 U.S.C. § 1681m (2004)). *See Regulators Scurry to Close FACT Loophole*, AM. BANKER, Dec. 12, 2003 at 3 (referring to a different loophole, but also quoting Chairman Shelby on the apparent error regarding the restriction on civil liability).

[57] Fair Credit Reporting Act, Pub. L. No. 104-208, § 625(b)(3), 110 Stat. 3009 (1996) (current version at 15 U.S.C. § 1681m(A) (2004)); *see ABA Pers. Prop. Fin. Subcomm. Discusses FACT Act Risk-Based Pricing Notice*, 8 CONSUMER FIN. SERVS. L. REP. 7, 8 (2004).

[58] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 625, 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681t(b)(3)-(4) (2004)).

[59] Fair and Accurate Credit Transactions Act § 212(e).

A. Notice of Federal Credit Reporting Related Rights

The first of these two new preemptive sections is FCRA section 625(b)(3).[60] It covers the disclosures "required by subsections 609(c), (d), (e) or (g);" and subsection 609(f) ". . . relating to the disclosure of credit scores for credit granting purposes."[61]

Subsections 609(c) and (d) are the notices of the right to obtain a consumer report and credit score and to dispute information, plus the summary of FCRA rights.[62] A consumer reporting agency that gives a section 609(c) notice must also tell the consumer that he or she may have "additional rights under State law."[63] Thus, this notice does not purport to be a complete summary of all consumer rights, but only of the federal rights provided under FRCA. This suggests that even though the FCRA preempts as to the contents of the federally mandated notice, states retain the right to impose, and to require notice of, additional rights.

The inclusion of subsection 609(e), covering disclosure of records by businesses to identity theft victims, in this standalone preemption section appears redundant because the disclosures required by this section are also preemptive under the "subject matter regulated under" style preemption.[64] However, it could be argued that the "subject matter regulated under" type of preemption applies only to the disclosures required under section 609(e). Under this approach, the rest of the section, including the identification requirements to trigger the disclosure obligation, would be covered only under the standalone preemption provision of section 625(b)(3), which does not use the "subject matter regulated under" formula.

B. Credit Score Disclosure

The first of the two new FACTA standalone preemption sections also includes the provisions "relating to the disclosure of credit scores for credit granting purposes" under FCRA section

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[60] Fair and Accurate Credit Transactions Act § 212(e).

[61] Fair and Accurate Credit Transactions Act § 212(e).

[62] Fair and Accurate Credit Transactions Act §§ 211(c), 151(a)(1).

[63] Fair Credit Reporting Act, Pub. L. No. 104-208, § 609(c)(2)(D), 110 Stat. 3009 (1996) (current version at 15 U.S.C. § 1681g(c)(2) (2004)).

[64] Fair Credit Reporting Act, § 625.

609(f) and the disclosures under section 609(g).[65] Section 609(f) addresses the disclosure of credit scores by consumer reporting agencies.[66] Section 609(g) addresses credit score disclosures by home loan lenders and brokers.[67] Neither section creates an obligation to give credit scores on the part of other types of creditors, such as auto or credit card lenders. Also, preexisting state credit score disclosure laws in California and Colorado are expressly exempted from preemption.[68]

A credit score is a number used to predict the probability that a particular consumer will default on a credit account.[69] It is generated by a complex, statistical mathematical model, which uses information from the consumer's credit file as data inputs.[70] A consumer's credit score depends not only on the information in the credit file, but also on the model's prediction of the consumer's projected likelihood of default—a prediction based partly on the payment patterns of other consumers with similar credit characteristics.[71] Although credit scores affect the price consumers pay for credit, their nature and importance still is not widely understood by consumers. In a consumer poll released by the Consumer Federation of America on September 21, 2004, only one third of 1,000 Americans surveyed correctly understood that credit scores predict the risk of nonpayment alone.[72] More than half of those

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[65] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § § 212(b), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681g(f)—(g) (2004)); Fair and Accurate Credit Transactions Act § 211(e).

[66] Fair and Accurate Credit Transactions Act § 212(b).

[67] Fair and Accurate Credit Transactions Act § 212(c).

[68] The exempted state laws are CAL. CIV. CODE §§ 1785.10, 1785.15-1785.15.2, 1785.16, 1785.20 (West 2003), and COLO. REV. STAT. §§ 5-3-106(2), 212-14.3-104.3 (2003).

[69] Federal Trade Commission, *Credit Scores, available at* www.ftc.gov/bcp/online/pubs/credit/scoring.htm (last visited Nov. 4, 2004).

[70] *Id.*

[71] *A New Assault on Your Credit Rating*, CONSUMER REP., *available at* www.consumerreports.org (Jan. 2001).

[72] Eileen Alt Powell, *Survey: Most Consumers Don't Understand Credit Scores*, ASSOCIATED PRESS, Sept. 21, 2003, *available at* http://biz.yahoo.com/ap/040921/credit_scores_5.html.

surveyed incorrectly thought that a married couple would have a joint credit score.[73]

Credit score preemption under FACTA is narrow. The preemption does not apply to all types of credit scores or to all aspects of credit score disclosure. Instead, this preemption applies to disclosures under section 609(f), which covers consumer reporting agency disclosure of credit scores "for credit granting purposes," and the disclosures under section 609(g), which are made by mortgage lenders and mortgage brokers.[74] Thus, a state law could not be enforced if it required that a mortgage lender or a consumer reporting agency to provide more key reasons why the score was not higher than the four to five reasons which are required under FACTA. However, because FCRA section 609(g) is silent on the obligations of non-home secured lenders to disclose credit scores, a state law requiring these types of lenders to disclose credit scores should not be preempted.[75] States also should remain free under FCRA to regulate credit scores with respect to issues other than disclosure, such as what can be considered in a credit scoring model. Finally, states can regulate credit score disclosure by consumer reporting agencies when credit scores are generated or used for purposes other than credit granting purposes. Because the preemptive language of FCRA section 625(b)(3) refers only to disclosure, it also should leave states free to impose substantive, non-disclosure requirements or prohibitions on the uses of credit scores even when used for credit granting purposes. [76]

An insurance score is similar to a credit score, but is designed for and used by insurers in connection with decisions about providing and pricing insurance policies to individuals.[77] FACTA expressly preserves state authority over insurance scoring.[78] FCRA states that it

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[73] *Id.*

[74] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 212(b), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681t(b)(3) (2004)).

[76] Fair Credit Reporting Act, Pub. L. No. 104-208, § 625(b)(3), 110 Stat. 3009 (1996) (current version at 15 U.S.C § 1681j(a) (2004)).

[77] Christopher Cruise, *How Credit Scores Affect Your Insurance Rates*, *available at* http://www.bankrate.com/brm/news/insurance/credit-scores1.asp (last visited Oct. 31, 2004).

[78] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 212(b), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681t(b)(3) (2004)).

"shall not be construed as limiting, annulling, affecting, or superseding any provision of the laws of any State regulating the use in an insurance activity, or regulating disclosures concerning such use, of a credit-based insurance score of a consumer by any person engaged in the business of insurance."[79]

C. Annual Free File Disclosures

The second of the two standalone preemption sections added by FACTA preempts with respect to the frequency of disclosure of free annual consumer credit files. FCRA section 612(a) provides for a free annual credit report from each of the nationwide consumer reporting agencies and nationwide specialty consumer reporting agencies.[80] Specialty agencies compile files relating to medical records, payments, residential tenant history, check writing history, employment history or insurance claims.[81] Consumer advocates and financial advisors have long recommended that consumers check their credit reports once a year, and report and pursue any errors. Error rates in consumer credit files illustrate the importance of this vigilance. According to *Consumer Reports*, the Consumer Federation of America found in a 2002 study that mistakes in consumer credit files "cause twenty-nine percent of Americans' credit ratings to vary significantly from one agency to another."[82] A U.S. Public Interest Research Group Study in 1998 revealed that seven in ten credit reports examined had errors, and three in ten of examined reports included an error that was significant enough to affect the cost or availability of credit.[83] Government researchers also have found significant error rates in consumer credit files. A 2003 study by Federal Reserve Board researchers examined 250,000 consumer credit files. They found that seventy percent were missing

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[79] Fair and Accurate Credit Transactions Act § 212(b).

[80] Fair Credit Reporting Act, Pub. L. No. 104-208, § 612(a), 110 Stat. 3009 (1996) (current version at 15 U.S.C. § 1681j(a) (2004)).

[81] Fair Credit Reporting Act § 612(a); *see* Fair Credit Reporting Act §§ 603(p), 603(w) for definitions of nationwide consumer reporting agencies and nationwide specialty consumer reporting agencies.

[82] *Take Arms Against a Faulty Credit Record*, CONSUMER REP., Jan. 2004, *available at* www.consumerreports.org.

[83] SULLIVAN, *supra* note 12, at 94.

information and thirty-three percent had errors that might cause a denial of credit.[84]

Preemption of free consumer credit reports is addressed in two sections of FACTA. The standalone section preempts "with respect to the frequency of" any disclosure under section 612(a), which is the free credit report section.[85] The statute also includes section 612(a) in the list of "conduct required under" preempted sections.[86] That list refers to the subsection without a separate reference to the "frequency" requirement.

Preexisting laws in the seven states that provided for free annual credit reports are exempt from the new standalone preemption in FCRA section 625(b)(4),[87] but not from the "conduct required" preemption in section 625(b)(5). This suggests that the inclusion of the free annual report section on the list of provisions which preempt as to the conduct they require is simply an error.

The scope of free consumer credit report preemption should be restricted to the issue of frequency of free reports from nationwide consumer reporting agencies under either standard. First, the standalone preemption refers only to the frequency of disclosure. Thus, states could impose a free annual report requirement on regional consumer reporting agencies and regional specialty agencies, such as a regional landlord-tenant database, from which section 612(a) does not require a free annual report. Second, the same result should be reached under the conduct required preemption standard, because the preemption under that provision is limited to the conduct required, and section 612(a) does not require any conduct of regional consumer reporting agencies.[88]

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[84] Robert Avery, *An Overview of Consumer Data and Credit Reporting*, FED. RES. BULL., Feb. 1, 2003, at 56.

[85] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 212(b), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681t(b)(4) (2004)).

[86] Fair Credit Reporting Act, Pub. L. No. 104-208, § 625(b)(5), 110 Stat. 3009 (1996) (current version at 15 U.S.C. § 1681t(b)(5) (2004)).

[87] *See* COLO. REV. STAT. § 12-14.3-105(1)(d) (2003); GA. CODE ANN. § 10-1-393(29)(C) (2004); ME. REV. STAT. ANN. tit. 10, § 316.2 (West 2003); MD. CODE ANN., [COMMERCIAL] §§ 14-1209(a)(1), 14-1209(b)(1)(i) (2004); MASS. GEN. LAWS ch. 93, §§ 59(d) to 59(e) (2004); N.J. REV. STAT. ANN. § 56:11-37.10(a)(1) (West 2004); VT. STAT. ANN. Tit. 9, § 2480c(a)(1) (2004).

[88] Fair Credit Reporting Act § 612(a).

VII. Narrow Preemption for Certain Conduct Required by FCRA

Unlike the preexisting "subject matter regulated under" form of FCRA preemption, most of the new FCRA identity theft provisions are accompanied by a very narrow new form of preemption. This preemption is limited to the "conduct required under the specific provisions" of listed sections or subsections. As discussed in Part III, the phrase "or for the prevention or mitigation of identity theft" is added to the general rule of non-preemption except for inconsistency with federal law.[89] After adding identity theft laws to the "inconsistency rule, FACTA then creates a new exception to the inconsistency rule in subsection 625(b)(5). The new exception preempts state laws only "with respect to the conduct required by the specific provisions" of particular sections or subsections.[90]

The conduct required by the listed provisions both defines and limits the scope of their preemptive effect. To understand the effect of these exceptions to the general no-preemption rule, it is necessary to examine the substance of each provision listed as an exception. This section describes the conduct required under each provision covered by this new form of preemption.

A. Truncation on Receipts

Section 605(g) prohibits printing more than the last five digits of a debit or credit card number, or the expiration date, on a credit or debit card receipt which is electronically printed after a delayed effective date.[91] Obtaining card numbers from printed receipts is one of the ways that identity thieves use account numbers to make new credit cards or order merchandise over the phone or Internet. According to the nonprofit Privacy Rights Clearinghouse, "Receipts

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[89] Fair Credit Reporting Act, Pub. L. No. 110 Stat. 3009, § 625(a), 110 Stat. 3009 (199) (current version at 15 U.S.C. § 1681t(a) (2004)); *see also supra* Part III.

[90] The listed provisions are Fair Credit Reporting Act §§ 605(g); 605A; 605B; 609(a)(1)(A); 612(a); 615(e), (f), (g); 621(f); 623(a)(6); 628 (codified at 15 U.S.C. §§ 1681t(b)(5); 1681c(g); 1681c-1; 1681c-2; 1681g(a)(1)(A); 1681j(a); 1681m(3), m(f); 1681s(f); 1681s-2(a)(6); 1681w (2004).

[91] Fair Credit Reporting Act § 605(g).

that include full account numbers and expiration dates are a gold mine for identity thieves."[92]

B. Fraud Alerts

Section 605A requires certain consumer reporting agencies to place initial and extended fraud alerts and active duty military consumer alerts in consumer credit files and to provide those alerts with both credit reports and credit scores.[93] An initial alert can be placed when the consumer has a good faith suspicion that he or she has been or is about to be a victim of identity theft.[94] An extended alert is for a consumer who has been a victim of identity theft.[95] Both types of alerts put prospective creditors on notice that an applicant using the consumer's identity may be a thief. The user of a credit report or a credit score containing or accompanied by an extended alert must contact the consumer at the phone number provided by the consumer in the alert or by another method designated by the consumer to confirm that the application or request is not the result of result of identity theft.[96]

The inclusion of a requirement that the fraud alert accompany the credit score is important because a credit score can be used to determine the price or availability of credit even if the creditor does not review the contents of the consumer credit file. In such cases, a creditor would not even see a fraud alert that was contained in the

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[92] *See* Privacy Rights Clearinghouse, *Consumers Win Some, Lose Some, Fact Sheet No. 6a: Facts on FACTA* (Aug. 2004) *available at* http://www.privacyrights.org/fs/fs6a-FACTA.htm (last visited Oct. 31, 2004).

[93] Fair Credit Reporting Act, Pub. L. No. 104-208, § 605A, 110 Stat. 3009 (1996) (current version at 15 U.S.C § 1681c-1 (2004)). The Fair and Accurate Credit Transaction Act's fraud alert provision is similar to preexisting anti-identity theft laws in California and Louisiana. *See* CAL. CIVIL CODE § 1785.11.1 (West 2004); LA. REV. STAT. ANN. 9:3571.1(H)-(L) (West 2004). An active duty military alert is an alert which may be placed by active duty military personnel who are assigned to service away from their usual duty stations. Fair Credit Reporting Act § 605A. It is designed to help protect military personnel who are serving away from home from identity theft. Fair Credit Reporting Act § 605A.

[94] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 112(a), 117 Stat. 1952 (2003) (amending 15 U.S.C § 1681c-1(a)(1) (2004)).

[95] Fair and Accurate Credit Transactions Act § 112(a).

[96] Fair and Accurate Credit Transactions Act § 112.

consumer credit file unless the alert accompanied the credit score.[97] Creditors should not be able to choose to ignore a fraud alert simply because it is cheaper to issue credit to an identity thief than to lose a credit application from a valid consumer. Under the law before FACTA, victims routinely reported problems with the failure of creditors to contact them, despite a filed fraud alert.[98]

Where there is an initial alert, or an active duty military consumer alert, the user must employ reasonable policies and procedures to form a reasonable belief that the user knows the identity of the applicant.[99] It remains to be seen whether the FACTA regulations will require strong enough identity verification following a fraud alert to resolve the problem of credit being granted without an adequate verification of the applicant's identity.[100]

C. Blocking Trade Line Information

FCRA section 605B requires a consumer reporting agency to block information in a consumer credit file if the consumer has identified the information as resulting from identity theft. The consumer must provide a police report, or an identity theft report filed with a federal, state, or local law enforcement agency, to trigger this right.[101] Blocking is an important part of reversing the damage done by identity theft to a consumer's credit standing. Since identity thieves do not make payments on accounts opened in the victim's name, the identity theft victim will have soiled credit until he or she

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[97] SULLIVAN, *supra* note 12, at 85.

[98] An ongoing survey conducted in 2004 by the Identity Theft Resource Center of identity theft victims that contact the center confirms that consumers find additional credit is issued without consumer contact despite the presence of a fraud alert: fifty-one percent of respondents who placed a seven year alert under state law had credit issued after the alert was placed, without any contact; and thirty-nine percent of respondents who placed a six month alert under state law had credit issued after the alert was placed, without any contact. Letter from Gail Hillebrand, Senior Attorney, Consumers Union, to Naomi Lefkovitz, Federal Trade Commission, and Amy Friend, Office of the Currency (March 26, 2004) (on file with author).

[99] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 112(a), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681c-1 (2004)).

[100] SULLIVAN, *supra* note 12, at 183.

[101] Fair Credit Reporting Act, Pub. L. No. 104-208, §§ 605B, 603(q)(4), 110 Stat. 3009 (1996) (current version at 15 U.S.C. §§ 1681c-2, 1681a(q) (2004)).

can discover and block information about unpaid accounts the opened by the thief from his or her consumer credit file.

D. Omitting a Consumer's Full Social Security Number From the File Sent to Consumer

Section 609(a)(1)(A) provides that, at a consumer's request, the first five digits of the consumer's Social Security number will be omitted on a disclosure of a consumer credit file sent to the consumer.[102] This is one more way to keep a Social Security number out of the mail, from which it might be intercepted.

E. Free Annual File Disclosures

Section 612(a) provides for a free annual credit report from each of the nationwide consumer reporting agencies and nationwide specialty consumer reporting agencies.[103] Under the implementing rule, these free credit reports become available beginning in the Western states on December 1, 2004, then moves eastward quarterly until full implementation on September 1, 2005.[104] The free credit report provision is listed as one of the "conduct required" preemption sections and also has its own, standalone preemption section. As discussed in Part V.C, *infra*, the use of "conduct required" preemption and the narrow phrasing of the standalone section for free credit reports both suggest that a state law to require free credit reports from entities not covered by the federal law would not be preempted.

F. "Red Flag" Guidelines

Subsection 615(e) requires the federal banking regulatory agencies, the National Credit Union Administration ("NCUA") and the FTC to prescribe "red flag" identity theft guidelines and related

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[102] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 115, 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681g(a)(1)(A) (2004)).

[103] Fair and Accurate Credit Transactions Act § 211; *see* Fair and Accurate Credit Transactions Act §§ 111(p), 111(w) (defining "nationwide" and "nationwide specialty" in relation to consumer reporting agencies).

[104] Free Annual File Disclosures, 16 C.F.R. §§ 610, 689 (2004).

regulations.[105] It also requires regulations for card issuers to respond to requests for an additional or replacement card within a short period of time after a change of address notice.[106] The red flag guidelines could be an opportunity to impose stronger identity matching requirements on creditors, such as a requirement to match an applicant's age to his or her Social Security number, which would thwart some thieves.[107] The guidelines may or may not require the use of certain pre-credit granting verification methods rather than simply looking for fraud after it occurs.[108] If the red flag guidelines do not require specific steps to be taken, states will remain free to impose such requirements under the "conduct required" standard.

G. Collecting Debt Resulting From Identity Theft

Subsection 615(f) prohibits a person from selling, transferring or placing for collection a debt after the person has been notified under section 605B that the debt resulted from identity theft.[109] In other words, if the consumer asks the consumer reporting agency or entity that provided the information to block information about a debt because that debt resulted from identity theft, the creditor must not sell that debt, transfer that debt, or place that debt for collection.[110] However, there are exceptions for repurchase, securitization, merger and sale of an entity.[111]

Subsection 615(g) requires a third party debt collector to inform the creditor for whom it is collecting the debt if the collector is notified that the debt may be fraudulent or may be the result of

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[105] Fair and Accurate Credit Transactions Act § 114 (requiring financial institutions and creditors to establish guidelines and regulations regarding identity theft).

[106] Fair and Accurate Credit Transactions Act § 114.

[107] An example of an obvious theft attempt would be an application for a car loan made by a seven-year-old. SULLIVAN, *supra* note 12, at 48.

[108] *See id.* at 63-90 (providing a discussion of the economics of "instant" credit and how it creates opportunities for identity theft).

[109] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 154(b), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681m(f) (2004)).

[110] Fair and Accurate Credit Transactions Act § 154(b).

[111] Fair and Accurate Credit Transactions Act § 615.

identity theft.[112] This subsection also requires a third party debt collector to provide to the consumer, on request, with the same information that the consumer would be entitled to if the debt in fact belonged to the consumer.[113]

H. Referral Procedures

Section 621(f) requires national consumer reporting agencies to maintain procedures for referrals to each other regarding initial and extended fraud alerts, and concerning blocked information.[114] This provision should prevent a consumer from having to make three separate reports about a single instance of compromised personal information. Making one report instead of three should help to reduce the amount of time identity theft victims must spend to unravel the problems caused by this crime.

I. Reasonable Procedures to Avoid Re-reporting of Erroneous Information

Section 623(a)(6) addresses the re-reporting of information that has been blocked from a credit file because it resulted from identity theft.[115] It requires entities who furnish information to a consumer reporting agency to have reasonable procedures to prevent re-furnishing of blocked information. These procedures are required only for the re-furnishing of information that the furnisher is told has been blocked under section 605B.[116] Section 623(a)(6) also prohibits a furnisher who is provided an identity theft report from reporting information about accounts flagged as opened or used by a thief unless the furnisher subsequently knows or is informed by the consumer that the information is correct.

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[112] Fair and Accurate Credit Transactions Act § 155.

[113] Fair and Accurate Credit Transactions Act § 615.

[114] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 153, 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681m (2004)).

[115] Fair and Accurate Credit Transactions Act § 154(a).

[116] Fair and Accurate Credit Transactions Act § 154(a).

J. Disposal of Certain Documents

Section 628 requires the federal banking agencies—including the NCUA, the Federal Trade Commission ("FTC") and the Securities and Exchange Commission ("SEC"), to issue regulations requiring any person who maintains consumer information derived from consumer reports for a business purpose to "properly dispose" of any such information or compilation of such information.[117]

Each of the FACTA provisions discussed in this part preempts state law only to the extent of the conduct which that provision requires. The next section discusses some types of state anti-identity theft laws that are not preempted using the "conduct required" preemption standard.

VIII. States Retain Significant Authority to Protect Their Residents Against Identity Theft

The basic FCRA preemption rule for state identity theft statutes is one of non-preemption except for inconsistency with specific provisions of the statute. This was accomplished by adding the subject of identity theft prevention or mitigation to the general rule of "no preemption except for inconsistency."[118] The key exception is narrow, preempting state laws only with respect to the "conduct required" under specific sections or subsections. States remain free to impose: further requirements and prohibitions in areas in which the federal law is silent, obligations on persons not covered by the federal law, and supplemental requirements and prohibitions. Examples of some of the many types of state laws which should not be preempted follow.

A. Security Freeze

A security freeze is a right of the consumer to freeze access to the credit file that a consumer reporting agency holds about that consumer.[119] The consumer can give access to selected users of the

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[117] Fair and Accurate Credit Transactions Act § 216.

[118] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 711(1), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681t(a) (2004)).

[119] Amy C. Fleitas, *Californians Can Freeze Their Credit*, *at* http://www.bankrate.com/brm/news/cc/20030613c1.asp (June 13, 2003).

credit file through a password or a temporary exemption to the freeze.[120] A security freeze provides stronger consumer protection than a fraud alert, because the freeze allows a consumer to control which prospective creditors see the contents of his or her credit file. A creditor who can't view the file is unlikely to extend credit to a thief. California and Texas have security freeze laws that predate FACTA.[121] FACTA does not require any conduct with respect to a security freeze, thus leaving this issue to the states.[122]

B. Obligation To Take a Police Report

Consumers must have a police report to exercise the right to require businesses to provide to the consumer copies of records of transactions that an identity thief has performed while impersonating the consumer.[123] A police report also can be used to trigger the extended fraud alert and the blocking of theft-related information from a credit file.[124] Identity theft victims may be unable to obtain a police report due to local policies, staff shortages at the local police department, or an unwillingness of a local police department to take a report when the identity thief is operating from another jurisdiction. In 2000, the International Association of Chiefs of Police adopted a resolution encouraging law enforcement agencies to take identity theft reports.[125] In spite of this resolution, only thirty-six percent of

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[120] *Id.*

[121] CAL. CIVIL CODE § 1785.11.2 (West 2004); TX. BUS. & COM. §§ 20.034—20.039 (West 2004).

[122] There is a weak argument that a security freeze relates to the content of a credit report, and thus is preempted under the prior Fair Credit Reporting Act § 624(b)(1)(E), renumbered § 625(b)(1)(E). However, that section preempts state laws relating to the information contained in a report. A security freeze should not be preempted because it is not a requirement relating to the information contained in the report, but instead a requirement restricting access to the report. Access to credit reports, rather than their contents, is not addressed by any of the 1996 preemptions nor by any of the new preemption sections.

[123] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 151(a)(1), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681g(e) (2004)).

[124] Fair and Accurate Credit Transactions Act §§ 112(a), 152(a).

[125] International Association of Chiefs of Police, *Curbing Identity Theft*, *available at* http://www.theiacp.org/Resolutions/index.cfm?fuseaction=dis_public_view&resolution_id=20&CFID=1423899&CFTOKEN=82845963 (last visited Oct. 31, 2004).

victims had filed identity theft reports with law enforcement by 2004.[126] Another ten percent of victims had tried to file a report with law enforcement, but the law enforcement agencies they contacted either could not, or would not, take a report.[127] The San Diego-based Identity Theft Resource Center, which serves identity theft victims nationwide, reports that half of the victims it assists have been unable to secure a police report.[128] Nothing in FCRA, as revised by FACTA, prevents a state from requiring local police departments to take police reports.

C. Requiring Businesses to Destroy Records

FACTA does not impose a conduct requirement to destroy records, although it does require that the agencies issue regulations on how to properly dispose of records or compilations containing consumer information derived from consumer reports if the records are disposed of.[129] The more places that the personal financial information of a consumer is stored, the more opportunities there are for theft of that information. Requiring periodic destruction of records containing personal information, such as Social Security numbers, is one way to reduce the opportunities for theft.

Section 628 expressly preserves other provisions of law related to maintaining records.[130] Section 628(b)(2) says that nothing

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The resolution states in relevant part: "RESOLVED, that the International Association of Chiefs of Police calls upon all law enforcement agencies in the United States to take more positive actions in recording all incidents of identity theft and referring the victims to the Federal Trade Commission's hotline at 1-877-IDTHEFT or mail to the Identity Theft Clearinghouse, 600 Pennsylvania Avenue, NW, Washington, DC 20580." *Id.*

[126] *Integrating the Role of Law Enforcement in Identity Theft Reporting Systems, Results of Focus Groups*, Sponsored by the Private Sector Liaison Committee of the International Association of Chiefs of Police (Aug. 1, 2004) (unpublished draft manuscript sponsored by the Private Sector Liaison Committee of the International Association of Chiefs of Police) (on file with the author).

[127] *Id.* California requires local police departments to take police reports from all local identity theft victims. CAL. PENAL CODE § 530.6 (West 2004).

[128] Interview with Linda Foley, Identity Theft Resource Center Co-Director (2003).

[129] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 216(a), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681w(a) (2004)).

[130] Fair and Accurate Credit Transactions Act § 216.

in the section shall be construed "to alter or effect any requirements imposed under any other provision of the law to maintain or destroy such a record."[131] Thus, FCRA should not preempt a state law requiring that businesses periodically destroy records containing personal financial information.

D. State Liability for Violations of Most FACTA Obligations

FCRA's liability sections and liability restrictions are not included in the list of existing or newly preempted sections. However, a few of the new obligations are added to existing sections with restricted liability, and two of the new sections contain their own restrictions on private enforcement. For example, FACTA restricts the liability of businesses for failure to comply with the new FACTA duty to give application and transaction information to victims.[132] Further, FACTA adds some duties on furnishers of information to consumer reporting agencies, but places those duties into FCRA section 623(a) and (c), for which the preexisting FCRA already restricted private enforcement.[133] Finally, FACTA imposes a duty on users of consumer credit reports to give an adverse action-type "risk-based pricing" notice, but this duty is to be enforced exclusively by the federal regulatory agencies.[134]

In most other areas, a state could enact an enforceable civil penalty or otherwise impose additional consequences on persons other than furnishers of information to consumer reporting agencies who violate the identity theft prevention and mitigation requirements of FACTA. Such a state law could be challenged only under the general "inconsistency" rule.[135] By contrast, a new state liability on furnishers of information to consumer reporting agencies would be preempted under one of the preexisting FCRA preemptions sections.[136] There is no similar general liability restriction in FCRA with

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[131] Fair and Accurate Credit Transactions Act § 216.

[132] Fair and Accurate Credit Transactions Act § 151(a).

[133] Fair and Accurate Credit Transactions Act §§ 154(a), 217(a), 312(c), 412(a), (f), 312(e).

[134] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 311(a), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681m (2004)).

[135] Fair and Accurate Credit Transactions Act § 711(1).

[136] Fair Credit Reporting Act, Pub. L. No. 104-208, § 625(b)(1)(F), 110 Stat.

respect to the obligations of consumer reporting agencies or with respect to most of the obligations placed on users of credit reports. A state law imposing responsibility for violations of the federal law is unlikely to be inconsistent with that federal law. State laws outlawing unfair and deceptive acts and practices ("UDAP statute") also would be measured under the general inconsistency standard. Because they are not inconsistent with FCRA, a state UDAP statute should not be preempted by it.

E. Credit Scores and Insurance Scores

States remain free to enforce laws with respect to all but two aspects of credit scores. The two areas of preemption are the disclosure of credit scores by consumer reporting agencies for credit granting purposes and the disclosure of credit scores by persons who make or arrange home-secured loans. Any other aspect of the use or disclosure of credit scores for credit purposes is not "conduct required" by FCRA. Further, FCRA, as revised by FACTA, expressly FACTA leaves the issue of insurance scores to the states.[137] State powers with respect to credit scores and insurance scores are discussed in detail in Part VI.B *supra.*

F. Medical Privacy

FACTA's section 411 restricts the provision of medical information by consumer reporting agencies.[138] That section is not included in any list of preemptive sections. Thus, FCRA does not preempt further state law addressing medical privacy. However, the obligation of a furnisher of information to notify the consumer reporting agency of its status as a medical information furnisher is placed in a section of FCRA which is not privately enforceable.[139] Thus, while FCRA does not prevent a state from requiring entities that hold medical information to keep it confidential, FCRA probably

3009 (1996) (current version at 15 U.S.C. § 1681t(b)(1)(F) (2004)).

[137] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 212(e), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681t(b)(2)(c) (2004)). *See also* Part VI.B, *supra.*

[138] Fair and Accurate Credit Transactions Act § 411.

[139] Fair and Accurate Credit Transactions Act § 411.

preempts a state's imposition of private civil liability for violations of FCRA's medical information provisions.

G. Additional and Supplemental Preventative Identity Theft Requirements

States should also be able to require users of credit reports and others to engage in additional preventative behavior, such as nonuse of Social Security numbers as customer identifiers, purging of personal information from records, and other identity theft prevention steps, if these approaches are not addressed in the red flag identity theft guidelines.

Although the "red flag" section will preempt only to the extent it requires conduct,[140] the statute leaves to the regulatory process to determine what conduct will be required.[141] It is not yet known whether the guidelines will require any specific conduct, or merely recommend conduct. The section contemplates guidelines, plus regulations. The regulations are to require financial institutions and creditors to institute "reasonable polices and procedures for implementing the guidelines."[142] The more that the regulators attempt to craft guidelines which are not binding, the less likely it is that those guidelines will have any preemptive effect under FCRA, since the section is preemptive only to the extent of the "conduct required." Advisory guidelines do not require conduct. In addition, states can continue to act in a variety of identity theft prevention areas upon which the guidelines are silent.

States also remain free to act in identity theft prevention areas touching on the conduct of persons other than financial institutions and creditors, for whom federal law does not contemplate any federal identity theft prevention guidelines. This could include sellers of goods and services who collect and maintain personal information, such as retailers.

Finally, state laws that give more rights to victims in the same areas in which federal law requires some, but more limited, conduct, may have to be tested. For example, California's requirement that

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[140] Fair and Accurate Credit Transactions Act § 625.

[141] Fair Credit Reporting Act, Pub. L. No. 104-208, § 615(e)(1)(A)—(B), 110 Stat. 3009 (1996) (current version at 15 U.S.C. § 1681m(e)(1)(A)—(B) (2004)).

[142] Fair Credit Reporting Act § 615(e)(1)(A)—(B).

victims be given twelve free credit reports in the first year after a fraud alert[143] is arguably supplemental to the federal "conduct required," which is to give two free reports in the first year to victims who file an extended alert.[144]

H. Requirements on Persons Not Covered by a Listed Federal Provision

States remain free to impose and enforce conduct requirements on persons who are not covered by the federal requirements. For example, the fraud alert system created by FACTA applies only to nationwide credit reporting agencies, so-called "603(p) agencies."[145] An existing or future state law that requires fraud alerts for nationwide or regional specialty agencies, such as landlord tenant registries, or for regional consumer reporting agencies, should not be displaced by "conduct required" preemption. Federal law simply does not impose a conduct requirement with respect to fraud alerts on these types of consumer reporting agencies. By contrast, the FACTA blocking requirement is not restricted to nationwide consumer reporting agencies, so a state's blocking requirement would probably be preempted.[146]

I. Disclosure To Consumers of Data Security Breaches

The principles discussed in Part VIII.G-H, *supra*, can be applied to a state statute requiring that consumer be told if the security of a database containing personal information is compromised. California has such a law, which has resulted in widespread public attention to data security.[147] Since no part of FCRA requires conduct with respect to notice of data security for

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[143] CAL. CIVIL CODE § 1785.15.3 (West 2004).

[144] Fair Credit Reporting Act § 605A(6)(2)(A).

[145] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 112(a), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681c-1 (2004)).

[146] Fair and Accurate Credit Transactions Act § 152(a).

[147] CAL. CIVIL CODE § 1798.29. (West 2004); *see also* Part VIII, *infra*; David Lazarus, *A Simple Theft Nets Wells a World of Woe, Break-in Behind Bar Puts Clients' Data at Risk*, SAN FRANCISCO CHRON., Nov. 21, 2003, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2003/11/21/MNGLT37MH71.DTL.

non-financial institutions, this field should prove open for states with respect to disclosure to consumers of data security breaches by entities which are not financial institutions. To evaluate a state law applying to financial institutions, it will be necessary to examine the final content of the red flag guidelines to see whether the revised FCRA requires "conduct" in area of notice to consumers of security breaches.[148]

IX. Legislative History of "Conduct Required" Preemption

There is some conflict in the legislative history on the meaning and scope of "conduct required under specific provisions" preemption. On balance, however, the legislative history and the regulatory interpretations strongly support the conclusion that "conduct required" preemption is narrow. The Joint Explanatory Statement of the Committee of Conference mentions the permanent extension of the 1996 preemptions but is wholly silent on the meaning of the "conduct required" preemption treatment.[149] Congressman Michael Oxley stated orally on November 21, 2003 that the identity theft provisions "will be national, ensuring uniform protection for consumers in all fifty States."[150] His extended remarks go on to characterize the preemptive effect of the bill on identity theft:

> The final FCRA legislation states that no requirement or prohibition may be imposed under the laws of any State with respect to the conduct required under the nine specific provisions included in the new identity theft preemption provision of the law. Accordingly, States cannot act to impose any requirements or prohibitions with respect to the conduct addressed by any of these provisions or the conduct addressed by any of the federal regulations adopted under these nine provisions. All of the rules and

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[148] For nationally chartered banks and thrifts, non-Fair Credit Reporting Act preemption rules should also be considered. *See,* e.g. OCC Preemption Rule, Bank Activities and Operations, Real Estate Lending and Appraisals, 12 C.F.R. §§ 7—12 (2004); *see also* 12 C.F.R. § 560 (2004).

[149] 149 CONG. REC. H12,198, H12,214 (2003).

[150] 149 CONG. REC. H12,198 (2003).

> requirements governing the conduct of any person in these areas are governed solely by federal law and any State that attempts to impose requirements or prohibitions in these areas would be preempted. Although the legislation lists the provisions to be preempted, to the extent such provisions would enjoy preemption under another provision in the FCRA, the other provision would control.[151]

In the same remarks however, Congressman Oxley went on to say that the Conference committee provided "that the new uniform national standards on identity theft created by this legislation apply with respect to the conduct required by those specific provisions."[152]

The Conference report was presented to the Senate on November 24, 2003.[153] Senator Paul Sarbanes's floor statement interprets the identity theft preemption much more narrowly: "After careful consideration by the conferees, the conference report provides for preemption of the States with respect to conduct required by specific listed provisions of the Act on identity theft. This narrowly focused preemption will leave States free to supplement these protections and to develop additional approaches and solutions to identity theft."[154]

The text of the statute supports Senator Sarbanes's interpretation that states can continue to develop new identity theft rights and solutions. FACTA requires that when a consumer reporting agency makes a written disclosure to a consumer, it must provide both an FTC summary of consumer rights and "[a] statement that the consumer may have additional rights under State law, and that the

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[151] 149 CONG. REC. H12,198, H12,215 (2003). In extended remarks dated Dec. 9, 2003, after the bill was signed, Congressman Oxley further states that the bill "clarifies that all of the new consumer protections added by the FACTA Act are intended to be uniform national standards, by enumerating as additional preemptions the 11 new provisions of the FACTA Act that do not contain specific preemptions in those sections." 149 CONG. REC. H2,512—2,518 (2003).

[152] 149 CONG. REC. H12,198, H12,215 (2003).

[153] 149 CONG. REC. H12,198, H12,214 (2003); H.R. CONF. REP. 108-396 (2003), *reprinted in* 2003 U.S.C.C.A.N. 1753, 1754.

[154] 149 CONG. REC. S15,806, S15,807 (2003). The "conduct required" approach was not added until the Conference Report, so legislative history with respect to identity theft preemption prior to November 21, 2003 should be irrelevant to the meaning and scope of "conduct required" preemption. H.R. CONF. REP. 108-396 (2003), *reprinted in* 2003 U.S.C.C.A.N. 1753, 1754.

consumer may wish to contact a state or local consumer protection agency or a state Attorney General (or the equivalent thereof) to learn of those rights."[155]

Post-enactment statements by the regulators strongly support the conclusion that the "conduct required" preemption is very narrow. On December 16, 2003, the FTC and the Board of Governors of the Federal Reserve System issued Joint Interim Final Rules to establish December 31, 2003 as the effective date for a list of preemption sections of FACTA.[156] All of FACTA section 711, including subsection 711(2) which is the new "conduct required" preemption subsection, was included in the list of sections to become effective December 31, 2003.[157] However, the rule called for the substantive provisions requiring conduct which are referenced in section 711(2) to become effective later than the effective date for the preemption provisions.[158] Consumers Union, the Consumer Federation of America, and U.S. PIRG expressed concern that this created a risk that the early effective date of FACTA's section 711 could arguably preempt state identity theft laws before the federal protections modeled on those state laws became effective.[159] The regulators clarified the meaning and effect of conduct required preemption in a responsive letter of December 23, 2003 signed by the General Counsel of the Federal Reserve Board and the FTC's Director of the Bureau of Consumer Protection.[160] In this letter, the two agencies

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[155] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 211(c), 117 Stat. 1952 (2003) (amending 15 U.S.C. § 1681c(2)(D) (2004)).

[156] Effective dates for the Fair and Accurate Credit Transaction Act of 2003, 16 C.F.R. 602 (2003), *available at* www.ftc.gov/os/2003/12/03/2/6fcrinterim.pdf (last visited Oct. 31, 2004).

[157] *Id.*

[158] *Id.*

[159] Letter from Consumers Union, Consumer Fed. of Am., and U.S. PIRG to the Federal Trade Commission (Dec. 16, 2003) (on file with author); Letter from Consumers Union, Consumer Fed. of Am, and U.S. PIRG to the Federal Reserve Board (Dec. 19, 2003) (on file with author).

[160] Letter from J. Virgil Mattingly Jr., General Counsel, Bd. of Governors of the Federal Reserve System, and J. Howard Beales III, Director, Bureau of Consumer Protection, Federal Trade Commission, to Travis Plunkett, Gail Hillebrand, and Edmund Mierzwinski (Dec. 23, 2003) [hereinafter *FACTA Letter*], *available at* http://www.ftc.gov/os/2004/01/040102frbletter.pdf (last visited Oct. 31, 2004).

plainly state that "conduct required" preemption does not begin until the substantive provisions of federal law which require conduct are in effect.[161]

The letter states that the rules establishing an effective date for section 711 "do not speak to how or when the preemption provisions. . .will apply and do not alter the relationship between those newly-enacted provisions and state laws in these areas."[162] The letter then describes "conduct required" preemption as applying only when "the referenced federal provisions that require conduct by the affected persons are in effect."[163] It goes on to say that even under the "subject matter regulated under" form of preemption, there is no federal override of state law until there is "a federal provision in effect that regulates the subject matter."[164]

The same discussion about the timing and scope of preemption from this letter appears nearly verbatim in the section-by-section explanation accompanying the Joint Final Rule on Effective

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[161] *Id.*

[162] *FACTA Letter*, *supra* note 160.

[163] *Id.*

[164] *Id.* The letter reads in relevant part:

> Section 711(2) of FACT adds a new provision to the FCRA that bars any requirement or prohibition under any state laws "'*with respect to the conduct required by* the specific provisions'" of the FCRA, as amended by FACT. The joint rules are based on our opinion that the specific protections afforded under the FCRA override state laws only when the referenced federal provisions that require conduct by the affected persons are in effect. Similarly, section 151(a)(2) of the FACTA Act adds a new provision to section 625(b)(1) of the FCRA which preempts any state law "*with respect to any subject matter regulated under*" that provision, and thus overrides state laws only when a federal provision is in effect that regulates that subject matter. In other words, we believe that a requirement that applies under an existing state law will remain in effect until the applicable specific provision of the FCRA, as amended by the FACTA Act, becomes effective. Consequently, because the substantive federal provisions actually will become effective at different times, from six months to three years after the FACTA Act was enacted, establishing December 31, 2003, as the effective date for the preemption provisions would allow the state law to continue in effect until the respective federal protections come into effect.

Id.

Dates.[165] Like the letter, the Joint Final Rule on Effective Dates concludes that no preemption becomes effective until the underlying substantive provision also is effective.[166] In that material, the FTC and Federal Reserve Board state:

> The Agencies note that section 711(2) of the FACTA adds a new provision to the FCRA that bars any requirement or prohibition under any state laws "*with respect to the conduct required by the specific provisions*" of the FCRA, as amended by the FACTA Act. The joint final rules are based on the Agencies' view that the specific protections afforded under the FCRA override state laws only when the referenced federal provisions that require conduct by the affected persons are in effect because that is the time when conduct is required by those provisions of the FCRA. Similarly, section 151(a)(2) of the FACTA adds a new provision to section 625(b)(1) of the FCRA which preempts any state law "*with respect to any subject matter regulated under*" that provision. Only when a federal provision is in effect does the subject matter become regulated under that section and, consequently, state law preempted.[167] In both of these situations, the Agencies believe that a requirement that applies under an existing state law will remain in effect until the applicable specific provision of the FCRA, as amended by the FACTA, becomes effective. Consequently, because the substantive federal provisions actually will become effective at different times, from six months to three years after the FACTA was enacted, establishing December 31, 2003, as the effective date for the preemption provisions would allow the state law to continue in effect until the respective federal protections underlying each of the federal preemption provisions

[165] Federal Reserve System, Fair Credit Reporting, 12 C.F.R. § 222 (2003); 16 C.F.R. § 602 (2003) (listing the effective Dates for the Fair and Accurate Credit Transactions Act of 2003).

[166] Federal Reserve System, Fair Credit Reporting, 12 C.F.R. § 222 (2003); 16 C.F.R. § 602 (2003).

[167] Identical language in the FCRA prefaces the preemption provisions established in FACTA §§ 214(c) and 311(b), and similar language prefaces the preemption provision established in § 212(e).

comes into effect.[168]

This interpretation published by the agencies along with the Final Rule on Effective Dates strongly supports a narrow view of the scope of "conduct required" preemption.

X. Conclusion

After FACTA, states retain significant authority to protect their residents in the area of identity theft. States can still develop solutions in areas which are not addressed by the federal Act. Examples of state laws which should not be preempted include a security freeze, an obligation to take police reports, an obligation to destroy records which contain sensitive personal information, restrictions on the use of Social Security numbers as personal identifiers and an obligation to notify consumers of data security breaches. States also can still act in areas such as medical privacy, insurance scoring, and most credit score issues. It is vital that states continue to play a role in protecting their consumers from becoming one of the nearly ten million victims of identity theft in the United States each year.

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[168] *FACTA Letter*, *supra* note 160.