

April 23, 2004

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

RE: FACTA Interim Final Rule Prohibiting Circumvention, Project No. P044804

I. Introduction

Equifax Information Services LLC (EIS) is a consumer reporting agency that furnishes consumer reports to its financial institution customers, other businesses that have a permissible purpose as defined in the FCRA, and consumers.¹ It is a subsidiary of Equifax Inc., a 105-year-old company and member of the Standard & Poor's (S&P) 500® Index, a global leader in turning information into intelligence, serving customers across a wide range of industries and markets, including financial services, retail, telecommunications, utilities, mortgage, brokerage, insurance, automotive, healthcare, direct marketing and transportation. Equifax Inc. is not a consumer reporting agency. However, the circumvention rule potentially impacts both Equifax Inc. and EIS. These comments are submitted by both companies and references herein to Equifax shall mean both companies.

Equifax appreciates the opportunity to submit formal written comments in the above referenced matter. Because EIS is engaged in multiple consumer information and other businesses, Equifax has a profound interest in the circumvention rule. The rule has serious implications for the ability of Equifax management to make future business decisions about strategy, operational matters and market developments with the flexibility required in a fast moving marketplace. It is imperative that the rule not impact legitimate business decisions in a competitive free market.

II. Corporate Considerations by Equifax

Since its parent is a publicly traded company, EIS requires precision in the regulatory framework governing its businesses so that decisions can be made knowledgeably on a level playing field with its competitors, which are not publicly traded in the United States. As a publicly traded company, Equifax Inc., its board of directors and its management are subject to significant legal and regulatory obligations. These additional obligations raise issues in connection with the rule that require careful consideration by the FTC.

¹ The rule does not define §603(p) consumer reporting agencies. For purposes of this comment, we will assume that Equifax Information Services LLC is a §603(p) agency.

Recent scandals at high-profile public companies have led to heightened scrutiny of, and greater accountability for, boards of directors and management of publicly traded companies. These increased demands and accountability require boards and management to execute their duties and responsibilities to their shareholders with increasing certainty and precision.

For Equifax Inc.'s board of directors and management appropriately to discharge their myriad responsibilities in the public arena, legal certainty is a critical issue. Accordingly, the Commission must balance the need to ensure that all obligations imposed by the rules do not conflict at a practical level with the other important obligations and responsibilities imposed upon EIS or Equifax Inc.

A. Fiduciary Obligations

As a general proposition, the board of directors and management of Equifax Inc. are required to act at all time with due care and in the best interests of the company and its shareholders. In the context of this fiduciary obligation, the rule is inappropriately broad and vague and fails to provide sufficient guidance. Rather than identifying the prohibited activities or conduct, the rule, without definition, simply states that a §603(p) consumer reporting agency cannot circumvent treatment as such through a corporate organization, reorganization, structure, or restructuring, including merger, acquisition, dissolution, divestiture or asset sale of a consumer reporting agency. The rule does not define the elements necessary to determine whether circumvention or evasion has occurred. Instead, the rule lists numerous types of transactions, all of which are routinely entered into for legitimate purposes. The rule thus casts doubt over the legitimacy of any such transaction in which EIS or Equifax Inc. might engage. In fact, the fiduciary duties of Equifax Inc.'s board and management in many circumstances could compel them to pursue transactions of these types for the benefit of shareholders. By injecting an element of doubt with respect to the legitimacy of transactions otherwise in the best interests of shareholders, the rule as proposed runs contrary to the recent trend emphasizing corporate fidelity to shareholder interests.

B. Reporting and Disclosure Obligations

As a public company, Equifax Inc. is routinely required to report on and disclose to the SEC and its public investors the results of its operations, its financial status, significant events, and risks in its business including its consumer reporting subsidiary, EIS. One of the important features of these reporting and disclosure obligations is the requirement that Equifax Inc. describe the risks inherent in its business operations including that of its consumer reporting subsidiary, EIS.

The breadth of the rule as proposed, coupled with the disclosure obligations imposed under various SEC rules and regulations, could mandate that Equifax Inc. disclose regulatory risks, and attendant risks of civil penalties or liabilities, in connection with routine corporate transactions involving EIS, simply to prevent any argument that Equifax Inc. failed to disclose that it could face a highly-subjective claim that it was attempting to “circumvent” the FCRA or FACTA. Additionally, Equifax Inc. could be required to attempt to quantify the financial impact of the business risk of a claim of “circumvention” – a near impossible task given the lack of guidance and legal uncertainty of the rule.

These uncertainties will make Equifax Inc.’s compliance with its disclosure obligations far more difficult and expensive while placing it at significant risk.

C. Effect on Third Parties

Similarly, without further clarity in the rule, Equifax Inc.’s ability to engage in normal commercial and corporate transactions with third parties in regard to EIS will be constrained. A third party considering a transaction with EIS will have a choice: it may avoid becoming subject to an assertion that a transaction it proposes with EIS constitutes “circumvention” simply by choosing not to consider a transaction with EIS. The rule could thus have a chilling effect on the willingness of third parties to consider transactions with EIS. Moreover, Equifax Inc. or EIS’s ability to compete with other companies for attractive opportunities will be adversely affected.

D. Other Consequences

Legal uncertainties of the type described above could lead to increased costs of compliance and costs of operations by EIS. Any such costs must be borne by someone. In this case, any such costs could be visited upon not only the shareholders of Equifax Inc., but also upon its employees, vendors, and customers, and ultimately on consumers as a consequence of the increased cost of credit.

Accordingly, we believe that the Commission should modify the rule in a variety of ways, as discussed below, to eliminate the uncertainty of its effects.

III. Overview of the Rule

The rule is breathtaking in its sweep. It potentially regulates corporate business decisions regarding mergers, acquisitions, dissolutions, divestitures or sales of assets, as well as technology decisions regarding operational matters such as database management. Since these matters involve critical decisions that Equifax management makes on a regular basis, and must often make expeditiously, certainty in the rule is essential. Yet, given this sweep, the rule falls far short of the congressional mandate and fails to provide necessary guidance. There are no standards or principles in the interim rule by which to judge whether legitimate business decisions regarding corporate or operational matters that are fully compliant with other laws, such as the anti-trust laws or the internal revenue code, are in violation of this rule.

The interim final rule essentially repeats the general language of FACTA and provides four examples that may or may not be relevant to future business decisions of Equifax. Repeating the language of the law does not provide guidance. We urge the Commission to adopt standards and principles by which we can make business and operational decisions and determine whether they are in compliance with the law. Short of that, the rule will impede the development and functioning of the consumer reporting business, and thereby, the credit economy in the United States.

FACTA added §629 to the FCRA. This section instructs the Commission to prescribe regulations “to prevent a consumer reporting agency from circumventing or evading treatment as a consumer reporting agency described in §603(p)... (1) by means of a corporate reorganization or restructuring....or (2) by maintaining or merging public record and credit account information in a manner that is substantially equivalent to that described in paragraphs (1) and (2) of section 603(p) in the manner described in §603(p).” This language was added to FACTA without any hearings, record or legislative history.

Unfortunately, the rule fails to provide sufficient guidance to covered entities. The rule also fails to properly interpret and apply the legislative mandate. These fatal flaws and the ambiguous examples provided in the rule demand that it be revised to correspond to the law and legislative intent and provide clear guidance to affected entities.

IV. Definitions

A. Section 603(p)

The prohibition as to circumvention and evasion does not apply to all consumer reporting agencies (CRAs) but only those defined in §603(p). Section 603(p) defines a “consumer reporting agency that compiles and maintains files on consumers on a nationwide basis” as a CRA that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports... regarding consumers residing nationwide: (1) Public record information. (2) Credit account information from persons who furnish that information regularly and in the ordinary course of business.”

Significantly, FACTA did not change this definition, which was added by the 1996 amendments to the FCRA, and did not give the FTC the authority to change the definition. A “consumer reporting agency that compiles and maintains files on consumer on a nationwide basis” continues to include only a CRA that **assembles** and **maintains** information for the purpose of furnishing consumer reports on consumers residing **nationwide**. Notwithstanding the circumvention rule, a CRA that does not meet all the elements of the definition cannot be subject to the provisions that apply only the §603(p) CRAs. The circumvention rule cannot be construed to alter the definition.

Only if the failure to meet one of the elements of the definition is the result of a circumvention or evasion (discussed below) through a corporate reorganization or by maintaining or merging public record and account information in a manner that is substantially equivalent to that described in §603(p) does the rule apply. The rule should make clear that the definition in the law has not changed.

B. Circumvention or evasion

A CRA that does not assemble and maintain both public record information and credit account information that it receives regularly in the ordinary course of business cannot be a §603(p) CRA. In other words, the rule cannot call something that is white under the statutory definition, black. Circumvention or evasion must mean something other than not meeting the statutory definition. If it had been congressional intent that something that does not meet the definition can by rule still fall within the definition, Congress would have changed the definition or given the Commission the authority to define §603(p) CRAs. It is therefore essential for the rule to define what constitutes a circumvention or evasion. Unfortunately, the interim rule fails to do so, and fails to provide any guidance.

“Circumvention” and “evasion” should be defined as the avoidance of coverage under §603(p) through some technical or corporate transaction that leaves the CRA operating essentially the same as before, but changes only the paper relationships or operational structure. To carry the above analogy further, something that is black cannot be made to appear white through rose colored glasses. That would be a circumvention or evasion.

A CRA that maintains consumer reports containing public record and credit account information cannot circumvent or evade coverage by transferring one of the two types of information to a subsidiary or affiliate, but furnish consumer reports that contain both. A CRA that operates nationwide cannot circumvent or evade coverage by separately incorporating agencies in multiple states and still furnish reports with the specified information on consumers residing nationwide. It in effect still assembles and maintains and furnishes reports nationwide. The examples in the rule correctly reflect this principle. But if the CRA does not in reality directly maintain and furnish both types of information or in reality does not assemble and maintain records nationwide, it does not meet the necessary elements of the definition.

C. Types of circumvention or evasion

By almost any standard, the circumvention language in § 211 of FACTA (new § 629 of the FCRA) is bold and aggressive language. If broadly or carelessly applied, the language may well be unconstitutional, in that the language impinges and constricts on the very core elements of ownership². Certainly, if broadly or carelessly applied the language defeats Equifax’s fiduciary

² In the seminal case, *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), the Supreme Court articulated a three-part balancing test for assessing whether a regulatory action constitutes a taking under the Fifth Amendment. The factors to be considered include: 1) the economic impact of the regulation; 2) whether the government action interferes with reasonable investment-backed expectations; and 3) the character of the government action. *Id.* at 124.

A final rule that adopts a “once a § 603(p) agency, always a § 603(p) agency” philosophy is subject to challenge as a regulatory taking under *Penn Central* and its progeny. Existing § 603(p) agencies would bear a significant economic impact if a final rule purported to restrict their ability to dispose of their assets in a way that might result in a loss of § 603(p) status. Furthermore, such an approach would be inconsistent with the investment-backed expectations of the existing § 603(p) agencies at the time they built their systems because, under prior law, these agencies were always free to change their businesses in such a way that they were no longer § 603(p) agencies. *See, e.g., Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (compensation case could proceed where a change in law mandated disclosure of trade secrets previously submitted under a statutory grant of confidentiality because the disclosure of these trade secrets was inconsistent with investment-backed expectations). Finally, the character of the “once a § 603(p) agency, always a § 603(p) agency” approach may be such that there is an insufficient nexus between the goal of the regulation and the means employed by the FTC to achieve that goal. While there may be a governmental interest in preventing technical evasion of § 603(p) status, such an interest does not justify forcing entities to remain § 603(p) agencies in perpetuity.

obligations as a publicly traded corporation and potentially cripples Equifax's marketplace discretion.

These considerations argue for a cautious and prudent interpretation of the statutory language. And yet, the rule takes the very opposite tack and announces that circumvention is accomplished not just by corporate or technological means, as expressly referenced in the statute and, indeed, as embodied in the very title of new § 629, but "by any means." Certainly, had Congress intended to expand the ambit of circumvention in such an explosive way, Congress would have done so by express language and not left it to the FTC to do so by administrative fiat.

We urge the Commission to revise the rule to limit circumvention to the two types of activities expressly identified by Congress.

It is inconceivable that a company can be expected to know what a violation of the rule is when the rule does not define what "circumvention or evasion" means, and then tops it off with "by any means." What decisions of a company must be assessed against such a broad rule? Are any actions left out? A "by any means" standard provides no guidance and makes it impossible to monitor compliance.

We believe the Commission should define the two types of transactions listed in the rule and provide principles by which conduct that may constitute a circumvention or evasion can be evaluated. Each must be considered separately.

- i. First, FACTA provides that a circumvention or evasion can occur through a "corporate reorganization or restructuring, including a merger, acquisition, dissolution, divestiture, or asset sale of a consumer reporting agency." It would not make sense for this to mean that a §603(p) CRA is always a §603(p) CRA and cannot ever do anything so that it does not meet the definition. A covered CRA should be able to sell its assets, dissolve or divest parts of its business and stop being a CRA altogether or stop being a nationwide CRA—for any reason or for no reason.³ These actions are only problematic if the CRA plans to stay in the business defined in §603(p) but has taken some action that makes it appear to no longer to fit the definition. In other words, the corporate action must be interpreted in light of the reality of the business

³ For example, EIS provides computer services to an independent CRA operating in a multi-state area pursuant to a services agreement. If, as a result of this agreement, EIS is deemed to be a nationwide consumer reporting agency, the failure to renew the agreement should not be considered a circumvention or evasion whether such failure is due to an inability to renew the agreement on satisfactory terms or a decision to no longer provide such outsourcing services.

after the transaction. Example 4 discussed below acknowledges this principle. However, the principle should be in the rule not only in an example.

Accordingly, the only way for this section to make sense, would be for it to mean that a §603(p) CRA cannot engage in a paper transaction that leaves the reality of its business the same as before. A §603(p) CRA cannot merge, acquire, dissolve or divest and continue to assemble and maintain and furnish, through corporate affiliates or subsidiaries the specified information on consumers residing nationwide.

Therefore, we believe the first part of the definition of circumvention or evasion should be defined as follows:

“A §603(p) CRA is circumventing or evading treatment as a §603(p) CRA through a corporate reorganization or restructuring, including a merger, acquisition, dissolution, divestiture, or asset sale of a consumer reporting agency, if after such transaction it continues directly or indirectly through the other party to the transaction or otherwise to assemble or evaluate, and maintain and furnish consumer reports to third parties consisting of public record information and credit account information on consumers residing nationwide, but does not comply with the obligations of a §603(p) consumer reporting agency.”

- ii. Second, FACTA provides that a circumvention or evasion can occur “by maintaining or merging public record and credit account information in a manner that is substantially equivalent to that described in paragraphs (1) and (2) of section 603(p) in the manner described in section 603(p).” This is somewhat convoluted, but the focus is on “substantially equivalent.” It clearly states that for the “merging” to be a circumvention the agency must be “substantially equivalent” to how it was before the “merging.” As discussed above, this also appears to mean a paper transaction that leaves the reality of the transaction “substantially equivalent” to what it was before the transaction. A transaction that changes the fundamental nature of the CRA so that it is not “substantially equivalent” after the change is not a circumvention or evasion.

In other words, a circumvention or evasion is a technical or operational change that leaves the reports assembled or maintained and furnished by the CRA substantially the same as prior to the transaction. An operational change by which the CRA no longer maintains both types of information, and thereby no longer meets the definition of a §603(p) CRA cannot be a circumvention or evasion.

Accordingly, we believe the second part of the definition of circumvention or evasion should be defined as follows:

“A §603(p) CRA is circumventing or evading treatment as a §603(p) CRA by maintaining or merging public record and credit account information in a manner that is substantially equivalent to that described in paragraphs (1) and (2) of section 603(p) if after such transaction it continues directly or indirectly to assemble or evaluate, and maintain and furnish consumer reports to third parties consisting of public record information and credit account information on consumers residing nationwide but does not comply with the obligations of a §603(p) consumer reporting agency.”

V. General Prohibition

The rule establishes a substantial expansion to the directive provided by Congress. FACTA instructs the Commission to prescribe regulations that prevent circumvention through a corporate “reorganization or restructuring.” The Commission expands this to include corporate “organization and structuring,” purportedly to include new entrants into the marketplace.

However, the language goes too far. An existing CRA that does not meet the definition of §603(p) because of its existing structure or organization cannot be deemed to be circumventing or evading the applicability of §603(p). If an existing CRA does not maintain information on consumers residing nationwide because of its corporate structure or technical capability, for example, it is not circumventing coverage of 603(p). If an existing CRA does not maintain credit account information on consumers residing nationwide, it is not circumventing §603(p) by maintaining its existing organization and structure.

The effect of adding “organization and structuring” to the “reorganization and restructuring” is to potentially force a CRA to reorganize or restructure so that it meets the §603(p) definition. Congress did not authorize the Commission to impose a requirement on a CRA to organize in a certain way. Therefore, the general prohibition should be changed to refer only to reorganization and restructuring as the statute provides.

VI. Examples

A. Example 1. This example addresses a 603(p) CRA that uses an affiliate to assemble the public record information, but continues to operate as a CRA. The example calls this a circumvention or evasion but does not make clear whether in continuing to operate as a CRA, the entity continues to furnish full reports consisting of both public record and credit account information, or only credit account information.

If the CRA no longer includes public record information in its consumer reports, it no longer meets the definition of §603(p). If it continues to sell full consumer reports and merely “obtains” the public record information from its affiliate, the transaction would be a circumvention or evasion, since it only changes the paper relationships.

To make that distinction clear, the example should be reworded to say the following:

“(1) Circumvention Through Reorganization By Data Type. XYZ Inc. is a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis. It restructures its operations so that public record information is assembled and maintained only by its corporate affiliate, ABC Inc. XYZ continues operating as a consumer reporting agency and continues to assemble or evaluate, and maintain public record and credit account information, directly or indirectly, for the purpose of furnishing consumer reports that contain such information. But, XYZ ceases to comply with the FCRA obligations of a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, asserting that it no longer meets the definition found in FCRA section 603(p), because it no longer maintains public record information. XYZ’s conduct is a circumvention or evasion of treatment as a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, and thus violates section 603.2 of this part.”

B. Example 2. This example describes a §603(p) CRA that reorganizes into affiliates each of which covers only one state. The rule calls this a circumvention or evasion because the entity continues to operate as a CRA. However, the example does not make clear whether the reorganization changes the manner in which consumer reports are furnished, or if there is an operational change. If the affiliates operate independently and do not furnish consumer reports relating to consumers in other states, they are not operating on a nationwide basis. Only if the transaction has no real effect on the business and the reality of the marketplace for consumer reports stays the same would this be a circumvention or evasion.

To make that clear, the example should be reworded to say the following:

(2) Circumvention Through Reorganization By Regional Operations. PDQ Inc. is a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis. It restructures its operations so that corporate affiliates separately assemble and maintain all information on consumers residing in each state. *Each of PDQ's affiliates continues to effectively be consumer reporting agency on a nationwide basis and furnishes consumer reports pertaining to consumers residing nationwide.* But PDQ ceases to comply with the FCRA obligations of a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, asserting that it no longer meets the definition found in FCRA section 603(p), because it no longer operates on a nationwide basis. PDQ's conduct is a circumvention or evasion of treatment as a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, and thus violates section 603.2 of this part.

C. Example 3. This example describes a new entrant into the market that organizes as two entities. The point made above regarding Example 1 applies. If the two entities operate separate businesses and do not furnish both public record information and credit account information in single consumer reports, the transaction would not be a circumvention or evasion. In other words, if public record information were part of one type of report sold to one type of customer and credit account information part of and sold to another, there would be no circumvention or evasion. On the other hand, if the reality of the business is the same after the transaction and the CRA were furnishing both types of information in single reports, the CRA would be attempting a circumvention or evasion.

D. Example 4. This example discusses an arms-length transaction with an unaffiliated third party. The nationwide CRA sells its public record information business to an unaffiliated company in a bona-fide transaction. This is not a circumvention or evasion according to the example and we agree with that analysis. However, the facts in the example include that the CRA no longer offers reports containing public record information.

That goes too far. The CRA should be able to purchase for resale information from the third party like any other company. If the CRA were to purchase public record information for inclusion in some of its reports from an independent third party, but not maintain the information, it would not meet the definition of a §603(p) CRA. Any other result would mean that the definition would be meaningless.

To make that clear, the example should be reworded to say the following:

(4) Bona Fide, Arms-Length Transaction With Unaffiliated Party. Foster Ltd. is a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis. Foster Ltd. sells its public record information business to an unaffiliated company in a bona fide, arms-length transaction. Foster Ltd. ceases to assemble, evaluate and maintain public record information for the purpose of furnishing consumer reports on consumers residing nationwide [Delete: *and ceases to offer reports containing public record information*]. Foster Ltd.’s conduct is not a circumvention or evasion of treatment as a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis. Foster Ltd.’s conduct does not violate this part.

VII. Liability

The rule does not address liability for violations except to say, in §603.3, that “a person that is otherwise in violation of §603.2 shall be deemed to be in compliance with this part if such person is in compliance with all obligations imposed... (on §603(p) agencies).” EIS agrees with this provision since a corporate transaction or operational change should not lead to a violation of FACTA. The objective of the circumvention rule is to ensure consumers have the benefits of FACTA, not to restrict the corporate governance or operational freedom of CRAs.

However, in the event a CRA fails to comply with obligations imposed by FCRA on §603(p) CRAs because it believed that it is not a §603(p) CRA, there should be no liability if the court finds that the CRA is a §603(p) CRA but committed a circumvention or evasion. That conduct should not be the basis of a separate cause of action. In other words, in keeping with the intent of §603.2 of the rule, the violation of FCRA should arise from substantive conduct, not from a violation of the rule. The Commission should not claim the CRA violated the substantive provisions of FCRA as well as the circumvention rule in such a circumstance as a separate offense.

In addition, the consumer causes of action under FCRA arise under §§616 and 617. Both sections apply to violations of any requirement of FCRA “with respect to any consumer.” Since a violation of the circumvention rule is not “with respect to any consumer”, it appears appropriate for the rule to state that violations of §629 and the rule should not give rise to a consumer cause of action under §§616 or 617.

Accordingly, we suggest that §603.3 of the rule clarify this principle by adding the following sentence:

“A violation of this part shall not be considered a separate violation of the Fair Credit Reporting Act.”

VIII. Conclusion

We appreciate this opportunity to provide comments on the interim rule. We urge the Commission to consider these comments in the constructive manner in which they are intended and to consider the serious impact the rule can have on the healthy development and progress of a vital industry that impacts all consumers and financial institutions in the United States.

Sincerely yours,

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