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FEDERAL TRADE COMMISSION

16 CFR Part 603

RIN 3084-AA94

Prohibition Against Circumventing Treatment as a Nationwide Consumer

Reporting Agency

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Interim final rule, request for comment.

SUMMARY: The recently enacted Fair and Accurate Credit Transactions Act of 2003 (FACT Act or the Act) requires the FTC to adopt rules to prevent consumer reporting agencies from avoiding treatment as nationwide consumer reporting agencies. In this action, the FTC is adopting, and seeking comment on, an interim final rule that prohibits consumer reporting agencies from avoiding these obligations through any means, including corporate structuring or technological methods.

DATES: Comments must be received by April 23, 2004. The interim final rule is effective on March 3, 2004.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to “FACTA Interim Final Rule Prohibiting Circumvention, Project No. P044804” to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room 159-H (Annex C), 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Comments containing confidential material must be filed in paper form, as

explained in the Supplementary Information section. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

An electronic comment can be filed by (1) clicking on <http://www.regulations.gov>; (2) selecting “Federal Trade Commission” at “Search for Open Regulations;” (3) locating the summary of this Notice; (4) clicking on “Submit a Comment on this Regulation;” and (5) completing the form. For a given electronic comment, any information placed in the following fields -- “Title,” “First Name,” “Last Name,” “Organization Name,” “State,” “Comment,” and “Attachment” -- will be publicly available on the FTC Web site. The fields marked with an asterisk on the form are required in order for the FTC to fully consider a particular comment. Commenters may choose not to fill in one or more of those fields, but if they do so, their comments may not be considered.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at www.ftc.gov. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the

FTC's privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

FOR FURTHER INFORMATION CONTACT: Helen Foster or Sandra Farrington, Attorneys, Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, (202) 326-3224.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The FACT Act was signed into law on December 4, 2003. Pub. L. 108-159, 117 Stat. 1952. In part, the Act amends the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq., (FCRA) by imposing new requirements on consumer reporting agencies that compile and maintain files on consumers nationwide (nationwide CRAs), as such entities are defined by section 603(p) of the FCRA, 15 U.S.C. 1681a(p). These additional requirements include the obligation to provide, upon request, one free file disclosure to the consumer annually.

The FTC is adopting this interim final rule to implement section 211(b) of the FACT Act, Pub. L. 108-159, 117 Stat. 1952, 15 U.S.C. 1681y, (sec. 629 of the FCRA) which directs the FTC to issue regulations to prevent consumer reporting agencies from circumventing or evading the obligations imposed on nationwide CRAs. The interim final rule prohibits such circumvention through any means, including but not limited to corporate organization, reorganization, structuring, or restructuring, or by maintaining or merging public record and credit account information in a manner that is substantially equivalent to the manner described in section 603(p) of the FCRA.

II. Overview of Rule

A. Rule of Construction

Section 603.1 of the interim final rule sets out a rule of construction to clarify the effect of the examples used in the interim final rule. Given the breadth of the statutory language, and the potential impact of the rule on a variety of entities and transactions, the

Commission has elected to provide examples of conduct that would, and would not, comply with the interim final rule. This section provides that these examples are not intended to be exhaustive; rather they are intended to illustrate how the interim final rule would apply in specific circumstances. The Commission invites comment on whether including examples in the rule is useful and suggestions on additional or different examples that may be helpful.

B. General Prohibition

Section 603.2 of the interim final rule prohibits consumer reporting agencies from using any means to circumvent or evade treatment as a nationwide CRA, and thereby avoiding the obligations that the FCRA and FACT Act impose on such entities.

Nationwide CRAs are defined under the FCRA as consumer reporting agencies that “regularly engage[] in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer’s credit worthiness, credit standing, or credit capacity” both public record information and “credit account information from persons who furnish that information regularly and in the ordinary course of business” regarding consumers residing nationwide. FCRA sec. 603(p), 15 U.S.C. 1681a(p).

Even prior to the FACT Act, nationwide CRAs were subject to special obligations in addition to the obligations placed on all consumer reporting agencies. Specifically, under the FCRA, prior to the FACT Act, nationwide CRAs were required to: (1) participate in a joint opt-out notification system for prescreened credit or insurance offers, FCRA sec. 604(e)(6), 15 U.S.C. 1681b(e)(6); (2) maintain a toll-free telephone

number during normal business hours with personnel accessible to consumers who have received their file disclosures, FCRA sec. 609(c)(1)(B), 15 U.S.C. 1681g(c)(1)(B); and (3) utilize an automated system through which furnishers of information may report reinvestigation results, FCRA sec. 611(a)(5)(D), 15 U.S.C. 1681i(a)(5)(D). The FACT Act places several new obligations upon nationwide CRAs, including requirements to: place fraud alerts in consumer files and communicate such alerts to other nationwide CRAs, Pub. L. 108-159, 117 Stat. 1952, sec. 112(a), FCRA sec. 605A(a), 15 U.S.C. 1681j(a); provide free file disclosures once annually upon request through a centralized source, Pub. L. 108-159, 117 Stat. 1952, sec. 211(a), FCRA sec. 612(a), 15 U.S.C. 1681j(a); and participate in a process of consumer complaint sharing and review, Pub. L. 108-159, 117 Stat. 1952, sec. 313(a), FCRA sec. 611(e), 15 U.S.C. 1681i(e).

Section 603.2 prohibits any method of circumvention or evasion of treatment as a nationwide CRA, including, but not limited to, a corporate organization, reorganization, structuring, or restructuring, or by maintaining or merging public record and credit account information in a manner that is substantially equivalent to the manner described in section 603(p) of the FCRA.

The language of section 603.2 closely tracks the language of the FACT Act, with two exceptions. First, the interim final rule prohibits circumvention “by any means.” The FACT Act describes two types of conduct that Congress sought to prevent when used as means of circumventing treatment as a nationwide CRA. The first type is “corporate reorganization or restructuring, including a merger, acquisition, dissolution, divestiture, or asset sale of a consumer reporting agency.” The second is “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).” The Act does not, however, limit the Commission’s authority to prohibit circumvention to these two types. Accordingly, the Commission concludes that Congress has granted it broad authority to prevent all circumvention, by any means, including, but not limited to, the specific types of circumvention described in the FACT Act.

Second, the FACT Act section 211(b)(1) includes “reorganization or restructuring” as examples of circumvention to be prevented. The interim final rule addresses “organization” and “structuring” as well as reorganization and restructuring. The references to “organization” and “structuring” are included in the interim final rule to make it clear that the prohibition against circumvention applies not only to existing nationwide CRAs, but also to any new entrants into the marketplace. The Commission believes that, in order to ensure a level playing field in the industry, newly formed consumer reporting agencies should be prohibited from circumvention or evasion of nationwide CRA responsibilities in the initial organization and structuring of their entities, just as existing nationwide CRAs are prohibited from it in reorganization or restructuring.

C. Limitation on Applicability

Section 603.3 clarifies the application of this interim final rule to entities that comply with all obligations of nationwide CRAs. It states that an entity that is otherwise in violation of the rule, but which complies with all obligations of nationwide CRAs, will

be deemed in compliance with the interim final rule. The purpose of the circumvention provision of the FACT Act is to prevent evasion of the obligations of nationwide CRAs—if there is no evasion of these obligations, it would be anomalous to impose liability under the interim final rule.

III. Good Cause for Interim Final Rule and Immediate Effective Date

The Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., generally requires an agency to publish a notice of a proposed rule and afford interested persons an opportunity to provide comments prior to promulgation of the rule. Notice of the proposed rule and an opportunity for public comment are not required “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(3)(B). Furthermore, a rule may not be made effective fewer than thirty days after publication, unless otherwise provided by the agency for good cause found and published with the rule. 5 U.S.C. 553(d). See also 16 C.F.R. 1.26(e).

The Commission finds good cause for adopting this interim final rule and making it effective without advance public notice or comment and within thirty days of its publication. The FACT Act requires that the prohibition against circumventing the requirements imposed on nationwide consumer reporting agencies become effective “not later than 90 days after the date of enactment of this section.” Therefore, the prohibition must become effective on or before March 3, 2004. The 90-day effective date requirement imposed upon this rulemaking is significantly shorter than the rulemaking

timelines imposed by Congress in the FACT Act's other substantive provisions. See, e.g. Pub. L. 108-159, 117 Stat. 1952. In imposing this deadline, Congress manifested an intent for the prohibition on circumventing the obligations imposed on nationwide consumer reporting agencies to be in place on an expedited basis, prior to the promulgation of the rules that will extend those obligations. To delay promulgation of an effective rule would frustrate Congress' purpose in imposing an accelerated rulemaking deadline for this provision.

In addition, the other upcoming FACT Act rules that are to be promulgated by the Commission in a six-month or longer time frame, place significant new obligations on nationwide CRAs. Increased regulatory burden provides an incentive for organizations to avoid or minimize that burden. The FACT Act itself, however, does not prohibit circumvention directly, but rather only requires the promulgation of a rule. Without the rule, there is no prohibition on circumvention. Thus, it is in the public interest for the Commission to promulgate this as an effective interim final rule as quickly as possible, to prevent organizations from attempting to circumvent the new FACT Act obligations.

For these reasons, the FTC finds that issuing this rule with prior notice and comment is impracticable, unnecessary, and contrary to the public interest. Accordingly, the Commission finds that there is good cause for adopting this interim final rule as effective less than thirty days from when it is published, on March 3, 2004, without prior public comment. Nonetheless, the FTC invites public comment on the interim final rule. Based on comments received, the FTC may adjust the interim final rule as necessary.

IV. Invitation to Comment

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments concerning the interim final rule. The Commission invites written comments to assist it in ascertaining the facts necessary to reach a determination as to whether to adopt as final the interim final rule. Written comments must be submitted on or before April 23, 2004. Comments should refer to “FACTA Interim Final Rule Prohibiting Circumvention, Project No. P044804” to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room 159-H (Annex C), 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled “Confidential.”¹ The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

An electronic comment can be filed by (1) clicking on <http://www.regulations.gov>; (2) selecting “Federal Trade Commission” at “Search for Open Regulations;” (3) locating the summary of this Notice; (4) clicking on “Submit a Comment on this Regulation;” and (5) completing the form. For a given electronic

¹ Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission’s General Counsel, consistent with applicable law and the public interest. See Commission Rule 4.9(c), 16 CFR 4.9(c).

comment, any information placed in the following fields -- “Title,” “First Name,” “Last Name,” “Organization Name,” “State,” “Comment,” and “Attachment” -- will be publicly available on the FTC Web site. The fields marked with an asterisk on the form are required in order for the FTC to fully consider a particular comment. Commenters may choose not to fill in one or more of those fields, but if they do so, their comments may not be considered.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at www.ftc.gov. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC’s privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

V. Communications by Outside Parties to Commissioners and Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner’s advisor will be placed on the public record. 16 CFR 1.26(b)(5).

VI. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3506; 5 CFR 1320 Appendix A.1, the FTC has reviewed the interim final rule. The Commission has

determined that the interim final rule contains no collection of information requirements subject to Office of Management and Budget review under the Paperwork Reduction Act. The interim final rule does not require any entity to collect, maintain, disclose, or submit any records or other information.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612, requires an agency to provide an Initial Regulatory Flexibility Analysis (IRFA) with a proposed rule and a Final Regulatory Flexibility Analysis (FRFA) with the final rule, if any, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 603-605.

The FTC does not anticipate that the interim final rule will have a significant economic impact on a substantial number of small entities. The interim final rule applies to only those entities that compile and maintain files on consumers on a nationwide basis, as defined under section 603(p) of the Fair Credit Reporting Act, 15 U.S.C. 1681a(p). The Commission believes that there are few, if any, small entities that meet this definition. This document serves as notice to the Small Business Administration of the agency's certification of no effect. Nonetheless, the Commission has determined that it is appropriate to publish an IRFA in order to inquire into the impact of the interim final rule on small entities. Therefore, the Commission has prepared the following analysis:

A. Description of the Reasons That Action by the Agency Is Being Taken.

The recently enacted Fair and Accurate Credit Transactions Act of 2003 (FACT Act or the Act) requires the FTC to adopt rules to prevent consumer reporting agencies

from avoiding the statutory obligations imposed on nationwide consumer reporting agencies. In this action, the FTC is adopting an interim final rule that prohibits consumer reporting agencies from avoiding these obligations through any means, including corporate organization, reorganization, structuring, restructuring, and/or technological or data merging methods.

B. Statement of the Objectives of, and Legal Basis for, the Interim Final Rule.

The objective of the interim final rule is to prohibit entities from using any means of circumventing or evading treatment as a nationwide consumer reporting agency. It is authorized by and based upon section 211(b) of the FACT Act, which added new section 629 of the FCRA, 15 U.S.C. 1681y.

C. Small Entities to Which the Interim Final Rule May Apply. The Commission has not identified any small entities that are subject to the interim final rule. The Commission invites comment and information on this issue.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements. The interim final rule contains no recordkeeping, filing, or disclosure requirements.

E. Duplicative, Overlapping, or Conflicting Federal Rules.

The Commission has not identified any other federal statutes, rules, or policies that would duplicate, overlap, or conflict with the interim final rule.

F. Significant Alternatives to the Interim Final Rule. The interim final rule does not contain reporting requirements, timetables, or design standards. The Commission is not aware of any alternative method of compliance that would further reduce the impact

(if any) of the interim final rule on small entities. The Commission invites comment and information on this issue.

VIII. Questions for Comment on the Interim Final Rule

The Commission seeks comment on all aspects of the interim final rule. Without limiting the scope of issues on which it seeks comment, the Commission is particularly interested in receiving comments on the questions that follow. Responses to these questions should include detailed, factual supporting information whenever possible.

1. Is section 603.2(a) of the interim final rule adequate to prevent a consumer reporting agency from circumventing or evading treatment as a consumer reporting agency described in section 603(p) of the FCRA, 15 U.S.C. 1681a(p)? What other methods of possible circumvention or evasion, if any, should the Commission consider prohibiting in the final rule, consistent with the authority granted to it in section 629 of the FCRA, 15 U.S.C. 1681y?

2. Do the examples provided offer helpful guidance for complying with the rule? What additional examples might be helpful if included?

3. Please provide comment on any or all of the provisions in the interim final rule with regard to (a) the impact of the provision(s) (including any benefits and costs), if any, and (b) what alternatives, if any, the Commission should consider, as well as the costs and benefits of those alternatives, paying specific attention to the effect of the interim final rule on small entities in light of the above analysis. Costs to “implement and comply” with the interim final rule should include expenditures of time and money for any employee training, attorney, computer programmer or other professional time.

4. Please describe ways in which the interim final rule could be modified, consistent with the FACT Act's mandated requirements, to reduce any costs or burdens for small entities.

5. Please provide any information quantifying the economic costs and benefits of the interim final rule for regulated entities, including small entities.

6. Please identify any relevant federal, state, or local rules that may duplicate, overlap or conflict with the interim final rule.

List of subjects

16 CFR Part 603

Fair Credit Reporting Act, Consumer reports, Consumer reporting agencies, Credit, Trade practices.

Accordingly, for the reasons set forth in the preamble, the FTC adds 16 CFR Part 603 as follows:

PART 603 – Prohibition Against Circumventing Treatment as a Nationwide

Consumer Reporting Agency

Sec.

603.1 Rule of Construction

603.2 General Prohibition

603.3 Limitation on Applicability

Authority: Pub. L. 108-159, sec. 211(b); 15 U.S.C. 1681y.

§ 603.1 Rule of Construction

The examples in this part are illustrative and not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part.

§ 603.2 General Prohibition

(a) A consumer reporting agency shall not circumvent or evade treatment as a “consumer reporting agency that compiles and maintains files on consumers on a nationwide basis” as defined under section 603(p) of the Fair Credit Reporting Act, 15 U.S.C. 1681a(p), by any means, including, but not limited to:

(1) corporate organization, reorganization, structure, or restructuring, including merger, acquisition, dissolution, divestiture, or asset sale of a consumer reporting agency; or

(2) 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) of the Fair Credit Reporting Act, 15 U.S.C. 1681a(p).

(b) Examples:

(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 but 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.

(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. PDQ continues to operate as a consumer reporting agency but 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.

(3) Circumvention By a Newly Formed Entity. Smith Co. is a new entrant in the marketplace for consumer reports that bear on a consumer's credit worthiness, standing and capacity. Smith Co. organizes itself into two affiliated companies: Smith Credit Co. and Smith Public Records Co. Smith Credit Co. assembles and maintains credit account information from persons who furnish that information regularly and in the ordinary course of business on consumers residing nationwide. Smith Public Records

Co. assembles and maintains public record information on consumers nationwide. Neither Smith Co. nor its affiliated organizations comply with FCRA obligations of consumer reporting agencies that compile and maintain files on consumers on a nationwide basis. Smith Co.'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.

(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 on consumers residing nationwide, 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.

§ 603.3 Limitation on Applicability

Any person who is otherwise in violation of section 603.2 shall be deemed to be

in compliance with this part if such person is in compliance with all obligations imposed upon consumer reporting agencies that compile and maintain files on consumers on a nationwide basis under the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq.

By direction of the Commission.

Donald S. Clark
Secretary