

[Billing Code 6750-01-P]

FEDERAL TRADE COMMISSION

Public Comment to Aid Staff in Preparing the FACT Act Section 318(a)(2)(C) Study

AGENCY: Federal Trade Commission.

ACTION: Notice and request for public comment.

SUMMARY: The Federal Trade Commission (the "Commission" or "FTC") is conducting a study of the effects of requiring that a consumer who has experienced an adverse action based on a credit report receives a copy of the same credit report that the creditor relied on in taking the adverse action, as required by the Fair and Accurate Credit Transactions Act of 2003 (FACT Act or the Act). The Commission is requesting public comment on a number of issues to assist in preparation of the study.

DATES: Public comments must be received on or before July 16, 2004.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to "FACT Act Section 318(a)(2)(C) Study, Matter 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 H-159 (Annex M), 600 Pennsylvania Avenue, NW., Washington, DC 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. Comments filed in electronic form (except comments containing any confidential material) should be sent to the following email box:

FACTAStudy@ftc.gov.

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 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: Carolyn Cox, Economist, (202) 326-3434, Federal Trade Commission, Bureau of Economics, 601 New Jersey Avenue, N.W., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

A. Current Requirements under the Fair Credit Reporting Act

Section 615 of the Fair Credit Reporting Act currently requires parties who take an adverse action on the basis of information contained in a consumer report to provide consumers with an adverse action notice that, among other things, contains the name, address, and telephone number of the consumer reporting agency that furnished the

report, that notifies the consumer of his or her right to receive a free copy of a consumer report from the consumer reporting agency, and explains his or her right to dispute with the consumer reporting agency the accuracy or completeness of any information in that report. Section 615 provides no time limit within which the notice must be supplied. As a practical matter, however, most creditors who are required to supply an adverse action notice by the Equal Credit Opportunity Act [Section 202.9 of Regulation B, 12 CFR 202.9] , which requires notification within 30 days [Section 202.9(a)(1) of Regulation B, 12 CFR 202.9(a)(1)], combine the FCRA and ECOA notices.

A consumer who requests a copy of his or her credit report subsequent to receiving an adverse action notice may receive a credit report that looks different than the one that the creditor relied on in making its decision. For example, the report that the consumer receives may contain more up-to-date information or be in a more consumer-friendly format. In addition, if the creditor and the consumer each provided different identifying information to request a copy of the report, then the reports received by the two parties may differ. This difference could, for example, be due to errors in transcription by clerks or differences in the amount of the identifying information provided. In some instances, the creditor may even receive multiple reports from a single consumer reporting agency on an individual consumer, while the consumer only receives one report. Thus, the report that the consumer receives and the report that the creditor receives and relies on may differ.

In contrast, a consumer who experiences an adverse action regarding employment obtains a copy of the same consumer report that the party taking the adverse action relied

on. Section 604 (b) (3) (A) of the FCRA notes that, except under certain circumstances, “in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates — (i) a copy of the report; and (ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Federal Trade Commission, under section 609 (c)(1) [Section 1681g(c)(1) of this title].”¹

B. Study Required by the FACT Act

The FACT Act was signed into law on December 4, 2003. Pub.L. 108-159, 117 Stat. 1952. Section 318 (a) (2) (C) of the Act requires the FTC to examine “the effects of requiring that a consumer who has experienced an adverse action based on a credit report receives a copy of the same credit report that the creditor relied on in taking the adverse action, including — (i) the extent to which providing such reports to consumers would increase the ability of consumers to identify errors in their credit reports; and (ii) the extent to which providing such reports to consumers would increase the ability of consumers to remove fraudulent information from their credit reports.” Section 318 (a) (3) specifies that the Commission “shall consider the extent to which such requirements would benefit consumers, balanced against the cost of implementing such provisions.”²

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The exceptions have to do with interstate truckers [Section 604 (b) (3) (C) of the FCRA, 15 U.S.C. Section 1681b(b)(3)(C)] and investigations of workplace misconduct [Section 603(x) of the FCRA, 15 U.S.C. Section 1681a(x)].

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Section 318 (b) notes that “Not later than 1 year after the date of enactment of this Act, the Chairman of the Commission shall submit a report to the Committee on Banking,

We believe it is significant that the Act requires the FTC to study only the effects of a consumer receiving a copy of the “same credit report that the creditor relied on” following an adverse action. Although “credit report” is a commonly-used non-technical term for “consumer report,” because the provision refers also to “creditors,” we interpret the study to encompass only the use of consumer reports in credit transactions. Of course, consumer reports are not only used to determine credit eligibility; they may also be used for the purposes of reviewing an account or making decisions involving insurance, employment, or government benefits.³ Consumer reporting agencies may also provide reports to persons who have a “legitimate business need” for the information, such as a landlord deciding whether to rent an apartment to a consumer.⁴ The scope of the study, however, would not include situations in which these other users of consumer reports rely on a consumer report in taking an adverse action.

Although the FACT Act requires the FTC to study “the effects of requiring that a consumer ... receives a copy of the same credit report ... relied on” following an adverse action, it does not specify who would be responsible for supplying a copy of the credit report or the manner in which it would be supplied. In particular, the Act does not specify whether the consumer reporting agency or the creditor would be required to

Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives containing a detailed summary of the findings and conclusions of the study under this section, together with such recommendations for legislative or administrative actions as may be appropriate.”

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FCRA Section 604(a)(3); 15 U.S.C. Section 1681b(a)(3).

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FCRA Section 604(a)(3)(F); 15 U.S.C. Section 1681b(a)(3)(F).

supply the consumer with a copy of “the same credit report” or the manner by which they should fulfill the requirement. For example, a creditor could send a copy of the credit report or a notification of the consumer’s right to receive a credit report from them, along with each adverse action notice. Alternatively, a consumer reporting agency could comply with a requirement to supply the same report relied on by a creditor in taking an adverse action to consumers who experience an adverse action by sending a copy of the report to consumers (regardless of whether they will experience an adverse action) at the same time that they send a copy to the creditor, or by responding to requests of consumers who experience an adverse action related to credit and request a copy of their report.

The Act also does not define “the same credit report that the creditor relied on,” and it is not clear in all situations what the term means. For example, in the case of a creditor who uses a credit score to evaluate a consumer’s creditworthiness, the “same” report could consist of only the score itself or it could also include all of the information that was used to derive the score. Likewise, if a creditor received multiple scores concerning an individual, the “same” report could mean only the score or scores that the creditor chose to use or all of the scores the creditor received. In addition to issues regarding the content of the report, providing the “same” report to consumers as to creditors also raises issues concerning the format of the report. If the report that the creditor relies on is received in an electronic file that can only be understood using queries made through a specialized software package, would the “same” report consist of the unintelligible electronic files, or might it consist of a reporting of the information

contained in the files in some new, more consumer friendly format? The costs and benefits associated with providing the consumer a copy of “the same report” depend on what one means by the term “the same report”.

II. REQUEST FOR PUBLIC COMMENTS

The Commission is seeking comment on all aspects of the proposed requirement that a consumer who has experienced an adverse action based on a credit report receives a copy of the same credit report that the creditor relied on in taking the adverse action. The Commission specifically requests comment on the questions noted below, but these questions are intended to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted. Responses to these questions should cite the numbers and subsection of the questions being answered. For all comments submitted, please submit any relevant data, statistics, or any other evidence upon which those comments are based.

The Commission requests that, as a threshold matter, parties explain how they define “the same report that the creditor relied on.” In addition, in answering the questions please use both the most restrictive and the most expansive definition possible and feel free to comment on how your answer would change if an alternative definition were used. For example, in instances where a creditor used a credit score, under the most restrictive definition, the “same report” would consist of only the score, while under the most expansive definition, the “same report” would include the score and the underlying data in a consumer-friendly format. Thus, in instances where a creditor used a credit score, the Commission seeks comment on the benefits and costs under these two

scenarios, but welcomes comment on additional scenarios that might arise if an alternative definition were used.

The Commission notes that the term “adverse action” has a specific definition under the FCRA. In particular, in terms of credit, the term adverse action “has the same meaning as in section 701(d)(6) of the Equal Credit Opportunity Act [Section 1691(d)(6)] of this title” Thus, the term adverse action means “(i) a refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered; (ii) a termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor’s accounts; or (iii) a refusal to increase the amount of credit available to an applicant who has made an application for an increase.” Therefore, situations that trigger a risk-based pricing notice would not be considered an “adverse action” for the purposes of this study. The Commission requests that comments use “adverse action” as it is defined under the FCRA, but welcomes parties to opine on how a more expansive definition of the term “adverse action” (e.g., one that included situations that trigger a risk-based pricing notice) would impact specific scenarios.

A. Extent to Which the Proposed Requirement Would Benefit Consumers

1. How does the credit report received by the creditor currently differ from the information that consumers receive from a consumer reporting agency when they request a copy of their credit report in response to an adverse action notice?

a. What are the different types of consumer reports that are used by a

creditor (e.g., credit score, “in file” credit report,⁵ merged credit report)?

To what extent are credit scores, as opposed to “in file” or merged credit reports, relied on by creditors in making decisions regarding the extension of credit? To what extent do creditors rely on two or more types of consumer reports (e.g., a credit score, an “in file” credit report, and/or a merged credit report) in their decisions on whether to extend credit? Does the form in which the credit file information is revealed to creditors differ significantly among creditors? If so, how?

b. How frequently are multiple “in files” and/or multiple credit scores received in response to a request for information on a single individual?

How are multiple “in files” and/or multiple credit scores treated by parties in their credit granting decisions?

c. Does the creditor use all of the information that it receives in response to a request for information on an individual, or, in certain situations, does it use only a subset of that information? For example, if a reseller or a creditor receives multiple “in files” does the creditor rely on all of the “in files” in making its credit granting decision, or does it screen the “in files” to determine which files it will rely on in making its decision? What are the situations in which the creditor relies on a subset of the information in its credit granting decision?

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The term “in file” credit report refers to a set of information that a party (e.g., creditor or reseller) receives from a credit reporting agency in response to a request for information about an individual.

- d. Are credit scores based on more information than that which appears in a file that is disclosed to consumers? For example, is information used that is blocked or suppressed from the consumer's file?
- e. Do consumers ever receive multiple file disclosures in response to their request to see their credit file? If so, how often does this occur?
- f. What factors account for the differences in the consumer report that is relied on by a creditor versus the credit report that is seen by a consumer who requests a credit report after receiving an adverse action notice? In particular, are there differences due to (i) differences in the time at which the credit report is requested, (ii) differences in the format in which a credit report is presented to a consumer versus a creditor, or (iii) differences in the identifying information that is used to request a credit report? Are there differences due to the matching technologies used to respond to requests for information by the consumer versus the user of a consumer report? If the same identifying information was used by the creditor and the consumer to request a credit file and if the requests were placed at the same time, could the creditor receive multiple "in files" while the consumer only receives one file? Are there differences due to other factors? If so, what are these factors and why do they result in different credit reports being relied on by the creditor versus the consumer? Please describe in detail the source of any differences.
- g. What information do consumer reporting agencies require consumers

to provide to obtain a copy of their credit report? What information do consumer reporting agencies require creditors to provide to obtain information on an individual? To the extent that there are differences in the credit report seen by the creditor versus the consumer due to differences in identifying information, are these differences due to (i) differences in the amount of information that is required (e.g., a creditor is not required to provide the middle name of the individual, but the consumer is required to provide a middle name), (ii) differences in the completeness of the information (e.g., the consumer reports his name as John Doe, Jr., but the creditor reports only John Doe), (iii) typographical errors (e.g., social security number or name is typed in incorrectly by the creditor), or (iv) something else? Please describe in detail the source of any differences, as well as the extent to which they occur.

2. What current problems exist when the consumer receives a report that is different in form or content from the report relied on by the creditor? Please provide examples of specific situations in which consumers would benefit from the proposed requirement that a consumer who has experienced an adverse action based on a credit report receives a copy of the same credit report that the creditor relied on in taking the adverse action.

a. Do the problems arise primarily from differences in the scope of the information seen by the creditor versus the consumer, differences due to the time at which the report is requested, or both? For example, are the

concerns related to situations in which a consumer does not know what information led to the adverse action because the information is already corrected by the time the report is normally seen by the consumer? Or, is it more likely that any problems come from a situation where the creditor has information in a consumer report or in multiple “in files” that actually pertains to another individual?

b. Would the proposed requirement increase the ability of consumers to identify errors in their credit reports? If so, how?

c. Would the proposed requirement aid consumers who seek to have the adverse action decision reversed because of inaccuracies or incomplete information in the credit report relied on by the creditor?

d. Would the proposed requirement aid consumers who seek to obtain credit from other parties following an adverse action?

e. Would the proposed requirement increase the ability of consumers to identify identity theft and/or remove fraudulent information from their credit report? If so, how?

f. Is the proposed requirement, in and of itself, sufficient to generate the benefits noted above, or are other requirements also necessary (e.g., credit report must be provided by a certain party at a certain time in the credit granting decision process) in order for the benefits to be generated? If so, what additional requirements are necessary?

g. Would the proposed requirement generate benefits other than those

noted above? If so, what benefits would likely be generated?

3. What information would consumers gain if they receive the same credit report that the creditor relied on in taking the adverse action?

a. Is there any information that appears in the report that the creditor relied on that is not currently reported to consumers, that, if corrected or deleted, would improve the consumer's ability to obtain credit?

b. Is there any information that appears in the report that the creditor relied on that is not currently reported to consumers that would enable the consumer to detect if he/she is a victim of identity theft, or if he/she continues to be a victim of identity theft?

c. Is there information that appears in the report that the creditor relied on that is not currently reported to consumers that generates benefits other than those noted above? If so, what additional information generates the benefits and what are the benefits?

4. Are there situations in which the consumer already has an opportunity to see a copy of the credit report that the creditor is relying on prior to the creditor taking an adverse action? In particular, what is the extent to which this situation occurs in the mortgage industry?

5. Are there situations in which the consumer already receives a copy of the credit report that the creditor relied on in taking the adverse action, after the action is taken? In particular, what is the extent to which this situation occurs in the mortgage industry?

B. The Cost of Implementing the Proposed Requirement

1. What are the various means by which the proposed requirement that a consumer who has experienced an adverse action based on a credit report receives a copy of the same credit report that the creditor relied on in taking the adverse action could be implemented? What would be the costs associated with implementing the proposed requirement via these various means? Which party (creditor versus the consumer reporting agency) can provide the same report that the creditor relied on in taking the adverse action to consumers at least cost?

2. Why do consumer reporting agencies not currently give consumers a copy of the same credit report that the creditor relied on in taking the adverse action? What would be the costs to consumer reporting agencies of requiring them to do so?

a. Is the data base that is maintained by a consumer reporting agency kept in such a way that the consumer reporting agency can easily reconstruct a credit report from a prior date? If not, what would be the cost associated with requiring a change that would enable the consumer reporting agency to do that?

b. Would a consumer reporting agency know what information is drawn from a credit file by a creditor and the manner in which it is displayed to them? If not, how costly would it be for the consumer reporting agency to obtain this information?

c. Are there situations in which the cost of requiring the consumer reporting agency to provide a copy of the same credit report that the

creditor relied on in taking the adverse action to a consumer who has experienced an adverse action would be minimal and/or nonexistent? If so, what are these situations?

3. Why do creditors not currently give consumers a copy of the same credit report that the creditor relied on in taking the adverse action? What would be the costs to creditors of requiring them to do so? Does the cost vary depending on the credit granting situation (e.g., mortgages versus instant credit)? Are there situations in which the cost of requiring the creditor to provide a copy of the same credit report that they relied on in taking the adverse action to a consumer who has experienced an adverse action would be minimal and/or nonexistent? If so, what are these situations?

4. What would be the cost to consumers associated with obtaining a copy of the credit report that the creditor relied on in taking the adverse action in addition to or in lieu of the credit report that the consumer currently receives if he or she requests one after receiving an adverse action notice?

a. Would the proposed requirement lead consumers to mistakenly conclude that there are inaccuracies in their credit reports? Would giving consumers an older version lead them to dispute inaccuracies that may have already been corrected? What sort of costs might result from these disputes?

b. Would the proposed requirement make it more difficult for consumers to determine if there are inaccuracies in their credit report? Are there situations where a consumer who views the version that the creditor has

relied on might miss the opportunity to fix inaccurate information that appears on the report after it was requested by the creditor? What sort of costs (e.g., denial of future credit) might result from these situations?

c. What would be the cost to creditors associated with retooling their credit granting process to produce consumer friendly versions of the consumer report that they relied on?

d. Would the proposed requirement make it more difficult for consumers to determine if they are, or continue to be, a victim of identity theft? If so, why?

e. Could the proposed requirement unintentionally increase identity theft, particularly in situations where credit is denied because identity theft is suspected or in situations in which multiple “in files” or scores are received by the creditor in response to a request for information on a single individual?

f. Could the proposed requirement raise privacy concerns in situations in which multiple “in files” or scores are received by the creditor in response to a request for information on a single individual?

C. Additional Information

1. Do the experiences of other countries (e.g., Sweden) that have a similar, but not identical requirement that consumers receive the same report as that relied on by the creditor, inform our analysis here?

2. Do the FCRA’s Section 604 requirements regarding adverse action in

employment, where the consumer already receives a copy of the same consumer report that the party taking the adverse action relied on inform our analysis here?

3. What other additional information should the Commission consider in studying the effects of the proposed requirement?

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments addressing the issues raised by this Notice. Comments must be received on or before July 16, 2004. Comments should refer to "FACT Act Section 318(a)(2)(C) Study, Matter 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 H-159 (Annex M), 600 Pennsylvania Avenue, NW., Washington, DC 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."⁶ 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. Comments filed in electronic form (except comments containing any confidential material) should be sent to the

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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).

following email box: FACTAStudy@ftc.gov.

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By direction of the Commission.

Donald S. Clark
Secretary