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May 4, 2004

The Honorable Timothy J. Muris, Chairman
Federal Trade Commission
Office of the Secretary
Room 159-H (Annex C)
600 Pennsylvania Ave., NW
Washington, D.C. 20580

Dear Chairman Muris:

I am deeply concerned that the Interim Final Rule Prohibiting Circumvention, entitled "Prohibition against Circumventing Treatment as a Nationwide Consumer Reporting Agency" (the Circumvention Rule) is deficient in three ways. First, the Circumvention Rule fails to implement the plain language and the legislative intent of Congress in enacting the circumvention language in Section 211(b) of the Fair and Accurate Credit Transactions Act of 2003 (the FACT Act) (new Section 629 of the Fair Credit Reporting Act (FCRA)). The Circumvention Rule also fails to preserve constitutionally protected discretion for the nationwide credit reporting agencies to, in good faith, organize, manage and receive value for their property. Finally, the rule does not create an enforcement regime that is appropriate and proportionate.

Section 211(b) of the FACT Act requires the Federal Trade Commission to prescribe regulations to prevent a Section 603(p) nationwide consumer reporting agency from "circumventing or evading" their status as a Section 603(p) consumer reporting agency either (1) by means of a corporate reorganization such as a merger, dissolution or asset sale; or (2) by maintaining or merging public-record and credit-account information in such a manner to evade the statutory requirements imposed upon the Section 603(p) agencies.¹

¹ The FCRA defines a "consumer reporting agency that compiles and maintains files on a nationwide basis" to mean a consumer reporting agency that regularly engages 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, each of the following 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. 15 U.S.C. § 1681a(p). Under the FCRA, particularly as amended by the FACT Act, Section 603(p) agencies assume numerous and unique duties, including the obligation to provide consumers, upon request, once each year, a free copy of their credit report.

The Circumvention Rule² prohibits 603(p) agencies from circumventing or evading treatment as a 603(p) agency by any method, including the two methods set forth in the FACT Act, corporate reorganization and technological evasion. The Circumvention Rule includes four examples. In three of these examples, the Section 603(p) agency continues to operate effectively as a 603(p) agency but manipulates its structure or its technology in an attempt to evade 603(p) status. The Circumvention Rule (correctly I believe) finds this activity to be in violation. In the fourth example, the Section 603(p) agency sells its public record business to an unaffiliated third party in a *bona fide*, good faith transaction. Here, the FTC appropriately finds that this activity is not in violation of the Circumvention Rule.

The FTC Commentary to the Circumvention Rule notes (again, correctly I believe) that the FACT Act itself does not prohibit circumvention, but rather only requires the promulgation of a rule to prohibit circumvention. As the FTC sees it, “without the rule, there is no prohibition on circumvention.”³

Thus, the FACT Act gives the FTC wide and important, but not unlimited, discretion. I urge the FTC to use this discretion to make the following two changes to the Circumvention Rule, which will more fully and faithfully implement Congress’ intent in enacting Section 211(b):

1. Tying Circumvention to Intent

It is critical that the Circumvention Rule implement the FACT Act’s plain language, as well as the legislative intent behind the FACT Act, which prohibits only intentional acts to evade Section 603(p) status while still engaging in 603(p) activities. As good faith activities that involve corporate reorganization or technological change are part of the indicia of ownership, they are not only permitted by Section 211(b), they are protected by the Constitution.

The Circumvention Rule should state explicitly that circumvention occurs only when the following four criteria are met: (1) the consumer reporting agency is a 603(p) entity; (2) the consumer reporting agency engaged in an intentional act to evade its Section 603(p) status; (3) the 603(p) agency failed to adopt a good faith, legitimate business purpose in the activity in question; and (4) notwithstanding the Section 603(p) agency’s intent, the Section 603(p) agency continues to engage (directly or indirectly) in Section 603(p) activities; and,

² 69 Fed. Reg. at 8532 et. seq. (Feb. 24, 2004). Under the FACT Act, Congress required that the Circumvention Rule become effective not later than 90 days after enactment (thus, by Mar. 3, 2004). Because of this deadline, the FTC found that issuing the Circumvention Rule as a proposed rule with prior notice and comment was impracticable, unnecessary, and contrary to the public interest. Accordingly, the FTC issued a Final Interim Rule but invited comment by April 23, 2004 on the theory that the FTC could amend the rule after consideration of comments.

³ 69 Fed. Reg. at 8533.

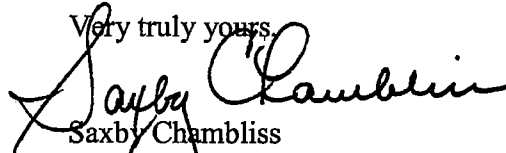
2. Enforcing the Circumvention Rule through FTC Regulation

The FCRA includes four enforcement regimes: (1) private rights of action (including class actions), under Sections 616 and 617 for willful or negligent noncompliance; (2) criminal penalties under certain circumstances, including false pretenses, under Sections 619 and 620; (3) FTC enforcement, under Section 621; and (4) state enforcement, also under Section 621.

The Circumvention Rule should state expressly that the FTC must make a finding of circumvention (*i.e.*, intentional evasion) before an action can be brought under Sections 616, 617, or 621. In the FACT Act, Congress included language stating that nothing in the FACT Act should be construed to affect any liability under Sections 616 or 617 (the private rights of action) that existed on the day before the enactment of the FACT Act (*see* Section 312(f) of the FACT Act). As circumvention was not a liability that existed on the day before enactment of the FACT Act, Congress clearly contemplated that any liability created under the circumvention provision could be limited with respect to private rights of action. Moreover, Sections 616 and 617 both create liability with respect to a failure to comply with “any requirement imposed under this Title”. Thus, a violation of the Circumvention Rule is a violation of an FTC rule, not a violation of “any requirement imposed under this Title” (*i.e.*, the FCRA as amended by the FACT Act). The Circumvention Rule should make this clear in order to implement the Congress’ intent and in order to shelter the three 603(p) nationwide credit reporting agencies from potentially catastrophic liability.

Should you have any questions regarding this issue, please do not hesitate to contact me or my staff.

Very truly yours,


Saxby Chambliss
United States Senate

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