



FACTA and the Dodd-Frank Act: What You Must Know LIVE Webcast

Summary

Dodd-Frank has significantly impacted the way companies do business. This is especially true in FACTA related areas. Companies and consumers should have a complete understanding of what these latest regulations can offer as well as its potential impact on their business.

The Knowledge Congress has assembled a panel of experts in the field of banking and finance and key regulators from the government to speak in a two-hour webinar that will discuss the key provisions of FACTA and its impact of Dodd-Frank on FACTA regulation.



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Introduction

James Mann, a partner at Davis Wright Tremaine, focuses on consumer payment devices, payment systems, and loyalty programs. Mr. Mann represents parties to agreements for the issuance of many types of consumer payment devices, notably debit cards as well as general purpose, private label and agent bank credit cards. He also advises on the design of online commerce platforms and represents parties to agreements regarding payment processing; the outsourcing of issuing and processing functions and the procurement of the related technology; the sale of issuing or processing businesses and the associated receivables; and network branding, pricing and marketing. In recent years, many such agreements have involved mobile payments, utilizing a variety of networks and technologies. In addition, Mr. Mann provides advice on the applicable Federal laws and regulations, as well as the applicable payment-system rules. Examples include the CFPA, TILA, ECOA, EFTA, GLBA Privacy, the Federal FCRA, the FTCA, and the rules of NACHA, MasterCard, Discover, Star, Pulse, ACCEL/Exchange and other debit networks. Mr. Mann also assists clients in commenting on agency proposals, in other interactions with the agencies, and in the development of compliance programs. His practice's website is at www.paymentlawadvisor.com.



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Roadmap

- Users of consumer reports under FCRA:
 - Do you have a permissible purpose?
 - Once you pull a CR, what duties do you incur?
- Duties of furnishers of information in consumer reports
- Conclusion



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[Do I have a Permissible Purpose to Obtain a Consumer Report? Sec. 604\(a\)](#)

- Recap: For this issue to arise, you must have concluded that communication would be a “consumer report” shared by a “consumer reporting agency”
 - Risks of dealing with data brokers
- Consumer reporting agencies can share consumer reports only under an exclusive list of permissible purposes
- Plus valid pre-screen



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Do I have a Permissible Purposes to Obtain a Consumer Report? Sec. 604(a)

- Consumer's written consent
 - Must be clear and specific
 - Good: "I authorize you to procure a consumer report on me for purposes of evaluating my eligibility for X"
 - Bad: "I understand that, where appropriate, consumer reports may be obtained"
 - Separate signature line? Cf. GLBA, Section 15(a)(1)
- Reports "in connection with a credit transaction involving the consumer," and
 - Extension of credit
 - Status of guarantor/surety
 - Review – problems of "40 Years" report
 - Collection



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Do I have a Permissible Purpose to Obtain a Consumer Report? Section 604(a)

- Employment purposes
- Eligibility for government license or benefit
- Potential investor/servicer, or current insurer, to assess credit/prepayment risk of current obligation
- Underwriting insurance for consumer
- Court order or grand jury subpoena



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Do I have a Permissible Purpose to Obtain a Consumer Report? Sec. 604(a)

- Catch-all: other “legitimate business need”
 - In connection with a business transaction initiated by consumer, or
 - To review an account to determine whether the consumer still meets the account terms
- “Legitimate business need”: Transaction not covered by other permissible purposes
 - *E.g.*, applying for a cable TV subscription billed in advance
- “Business transaction”=consumer transaction primarily for personal, family, or household purposes
- “Review” involves non-credit accounts (*e.g.*, savings account)



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Do I have a Permissible Purpose to Obtain a Consumer Report? “Prescreening” Sec. 604(c)

- Must be a “firm offer” of credit or insurance
 - Pre-determined eligibility criteria
 - Honor offer if accepted (and postscreen shows continued qualification)
 - Not a sham offer
- Opt out offered
 - Two notices
 - Consumer has not opted out
- Consumer over 21 or consents



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Duties of Users: Fraud Alerts Etc.

- Adverse action notices & risk based pricing notices with credit score (covered by Maryann)
- Red Flag Rules (not covered today)
- Fraud alerts
 - Limit user ability to use CR to establish
 - new credit plan
 - additional card on existing credit account; or
 - increase in credit limit on existing credit account. Sec. 605A(h)(1)(A)
 - Two types: regular and extended
 - Both placed on consumer report at consumer's request to CRA (status of intermediary)
 - Unsupported versus supported by police report
 - 90 days versus 7 years



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Duties of Users: Fraud Alerts, continued

- User Obligations. If a person receives a request from a consumer for any of the items above, the person requests a consumer report, and that consumer report contains a fraud alert, then the user must:
 - Regular alert
 - Utilize reasonable policies & procedures to form a reasonable belief that the user knows the identity of the consumer making the request. Sec. 605A(h)(1)(B)
 - If the user does not have policies or procedures in place, or if the user can't form a reasonable belief, then the user may *not* take the action requested.
 - Extended alert: Contact the consumer in person or by a method the consumer provided in the alert to confirm that the request is not the result of identity theft. Sec. 605A(h)(2)(B)



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Duties of Users: Address Discrepancies, Sec. 605

- Address Discrepancies
 - A nationwide CRA (NCRA), must send a “notice of discrepancy,” if:
 - Prospective user requests a consumer report from NCRA,
 - The request includes an address for the consumer that “substantially differs” from the address in the NCRA’s file, and
 - The NCRA provides a consumer report in response, Sec. 605(h)(1)
- Upon Receipt of Notice of Discrepancy.
 - User must employ reasonable policies and procedures to enable user to form a “reasonable belief” that the consumer report relates to the correct consumer. Sec. 605(h)(2); 12 CFR 1022.82(c).
 - Reasonable policies would: compare the information in the consumer report with information the user: (a) has used to verify the consumer’s identity as required by Customer Identification Program rules; (b) maintains in its records; or (c) obtains from a third party



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Duties of Users: Address Discrepancies, Sec. 605

- Confirmation of accurate address
 - User must develop reasonable policies and procedures for *furnishing* to NCRA an address for the consumer that user has reasonably confirmed is accurate. 12 CFR 1022.82(d). Where user regularly reports to the NCRA, and has continuing relationship with the consumer, confirmation occurs when user can form a reasonable belief that the report relates to the consumer whose report was requested
 - Examples of confirmation methods. 12 CFR 1022.82(d)(2). User may reasonably confirm an address is accurate by:
 - Verifying the address with the consumer;
 - Reviewing its own records to verify the address of the consumer;
 - Verifying the address through third-party sources; or
 - Using other reasonable means.



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Duties of Users: FTC Data Disposal Rule, 16 CFR 682

- Entities under FTC jurisdiction, including users of credit reports, must adopt measures to protect against unauthorized access to or use of consumer information in connection with disposal
- In general, must implement program to ensure proper disposal, including
 - Shredding paper
 - Completely erasing electronic data
- Must conduct due diligence to ensure the program is followed



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Duties of Furnishers: Sec. 623

- Person may furnish information to CRAs
 - Without consumer permission
 - Over consumer objections
- But not if person "knows or has reasonable cause to believe that the information is inaccurate," Section 623(a)(1)(A), unless it "clearly and conspicuously" provides an address for consumers to send disputes. Sec. 623(a)(1)(C).



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Furnisher Duties: Reasonable Policies & Procedures to Report Accurately

- Must have reasonable written policies and procedures to report accurately. 12 CFR 1022.42.
- Applies to “accuracy” and “integrity” of furnished information
- “Accuracy” means: information the furnisher provides to a CRA about an account or other relationship with the consumer correctly:
 - Reflects the terms of and liability for the account or other relationship;
 - Reflects the consumer’s performance and other conduct with respect to the account or other relationship; and
 - Identifies the appropriate consumer. 12 CFR 1022.41(a).
- “Integrity” means the information:
 - Is *substantiated* by the furnisher’s records when furnished;
 - Is furnished *in a form and manner designed to minimize the likelihood that the information may be incorrectly reflected in a consumer report*;
 - Includes information the furnisher possesses about the account or other relationship, *without which the report would be materially misleading* in evaluating consumer’s characteristics; and
 - Includes the *credit limit*, if applicable and in the furnisher’s possession. 12 CFR 1022.41(1)(e).



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Furnisher Duties: Reasonable Policies & Procedures to Report Accurately

- Policies and procedures must be “appropriate to the nature, size, complexity, and scope of each furnisher’s activities.” *E.g.* policies should consider:
 - “the types of business activities in which the furnisher engages”;
 - the “nature” of the information and “frequency” with which it furnishes to CRAs; and,
 - the “technology” used to furnish information to the CRA. Interagency Guidelines Concerning the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies, Part I.(a)
- Must consider these Interagency Guidelines
 - Use standard data reporting formats and procedures for compiling and furnishing data, where feasible (note: brief discussion of such formats)
 - Maintain records for a reasonable period to substantiate accuracy of information furnished to CRAs subject to a direct disputes; and
 - Train staff
- Must review and update regularly



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Furnisher Duties: Accuracy of Furnished Information

- Duty to Report Accurately. Sec. 623(a)(2)
 - If a furnisher that regularly reports information to CRAs about experiences with a consumer determines that any information is not complete or accurate, the furnisher must promptly *notify* the CRA
 - Must provide *corrections or any additional information* to make the information complete and accurate.
 - Must *not continue* to furnish the information if it remains incomplete or inaccurate.



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Furnisher Duties: Accuracy of Furnished Information

- If consumer disputes completeness or accuracy of information, furnisher may not furnish disputed information to CRA without *notice* that the information is disputed. Sec. 623(a)(3).
 - Enforcement of this requirement
- Voluntary Account Closures. Sec. 623(a)(4)
 - Furnisher of information regarding a consumer who has a credit account must notify CRA of a consumer's voluntary account closure.
 - Notice must be furnished to CRA as part of the regularly furnished information for the period when the account is closed.
- Delinquent Accounts. Sec. 623(a)(5)
 - Furnisher of information on delinquent accounts placed for collection, charged off, or subjected to any similar action must notify the CRA of the month and year of the start of the delinquency that immediately preceded the action.
 - No later than 90 days after the report



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Furnisher Duties: Prerequisites to Investigate a Direct Notice of Dispute From Consumer

- Proper Notice. Must receive proper notice from consumer before investigating. Notice must contain: 12 CFR 1022.43(d)
 - Sufficient information to identify the account or other relationship in dispute;
 - Specific information that the consumer disputes and an explanation of the basis of the dispute, and
 - All supporting documentation or other information reasonably required by the furnisher to substantiate the dispute. Can be substantial.
- Dispute Address. Must investigate only if a consumer submits the dispute to:
 - Address provided by a furnisher and listed on a consumer report;
 - Address clearly and conspicuously specified by the furnisher provided to the consumer in writing or electronically; or
 - Any business address of the furnisher – if the furnisher has failed to provide a specific address for submitting direct disputes.



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Furnisher Duties: Prerequisites to Investigate a Direct Notice of Dispute From Consumer

- Subject of Dispute.
 - Dispute must relate to: 12 CFR 1022.43(a)
 - Consumer's liability for a credit account or other debt with the furnisher;
 - Terms of a credit account or other debt with the furnisher
 - Consumer's performance or other conduct concerning an account or other relationship; or
 - Any other information contained in a consumer report regarding an account or other relationship with the furnisher bearing on the consumer's characteristics.
 - May *not* relate to: 12 CFR 1022.43(b).
 - Consumer's identifying information;
 - Identity of past or present employers;
 - Inquiries or requests for a consumer report;
 - Information derived from public records;
 - Information related to fraud alerts or active duty alerts; or
 - Information provided to a CRA by another furnisher.



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Furnisher Duties: Prerequisites to Investigate a Direct Notice of Dispute From Consumer

- Nature of Dispute. Dispute must not be:
 - Submitted by or prepared by a credit repair organization
 - Frivolous or irrelevant. 12 CFR 1022.43(f). This means:
 - Consumer did not provide sufficient information to investigate; or
 - Dispute is substantially the same as a dispute previously submitted, and furnisher has already complied with the requirements. But it's a new dispute if it includes new information that should have been, but was not previously provided; or
 - Any of the other exceptions described above applies.



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Furnisher Duties: Direct Dispute from Consumer

- If prerequisites satisfied, must conduct investigation.
 - Timing
 - Must complete investigation in 30 days of notice of dispute, which may be extended by 15 days if the furnisher receives additional information
 - Must notify consumer of results within 5 days after completing investigation by mail or, if authorized by consumer, other means
 - If dispute frivolous or irrelevant, notice must explain why and identify information required to investigate the disputed information. No prescribed form.
 - Investigation: No specific procedures prescribed.



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Furnisher Duties: Dispute from CRA, Sec. 623(b)

- If furnisher receives notice of dispute from a CRA about accuracy or completeness of information provided, it must:
 - Conduct an investigation regarding the disputed information
 - Review all relevant information the CRA provided along with the notice
 - Report the results of the investigation to the CRA
 - If the investigation finds the information is incomplete or inaccurate, report those results to all NCRA's to which the furnisher previously reported
 - If the disputed information is incomplete, inaccurate, or not verifiable, the furnisher must:
 - Modify the item of information;
 - Delete the item of information; or
 - Permanently block reporting of that piece of information.
- Timing
 - Complete required investigations, reviews, and reports within 30 days.
 - May extend the time period for 15 days if a CRA receives additional relevant information from the consumer.

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