

FEDERAL TRADE COMMISSION

16 CFR Part 681

RIN 3084-AB50

Identity Theft Rules

AGENCY: Federal Trade Commission.

ACTION: Request for public comment.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) requests public comment on its Identity Theft Rules. The Commission is soliciting comment as part of the FTC’s systematic review of all current Commission regulations and guides.

DATES: Comments must be received on or before February 11, 2019.

ADDRESSES: Interested parties may file a comment online or on paper by following the Instructions for Submitting Comments part of the **SUPPLEMENTARY**

INFORMATION section below. Write “Identity Theft Rules, 16 CFR Part 681, Project No. 188402” on your comment and file your comment online at

<https://ftcpublic.commentworks.com/ftc/identitythefrulesreview> by following the

instructions on the web-based form. If you prefer to file your comment on paper, write

“Identity Theft Rules, 16 CFR Part 681, Project No. 188402” on your comment and on

the envelope and mail your comment to the following address: Federal Trade

Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610

(Annex B), Washington, D.C. 20580, or deliver your comment to the following address:

Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street

SW, 5th Floor, Suite 5610 (Annex B), Washington, D.C. 20024.

FOR FURTHER INFORMATION CONTACT:

Stacy Procter, Western Region – Los Angeles Office, Bureau of Consumer Protection, Federal Trade Commission, 10990 Wilshire Blvd., Suite 400, Los Angeles, CA 90024, (310) 824-4300, or Amanda Koulousias, Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, (202) 326-3334.

SUPPLEMENTARY INFORMATION:

I. Background

The Fair and Accurate Credit Transactions Act (“FACTA”) was enacted in December 2003.¹ Section 114 of FACTA amended section 615 of the Fair Credit Reporting Act (“FCRA”) and required the Commission and other federal agencies to establish and maintain guidelines for financial institutions and creditors to identify patterns, practices and activities that might indicate identity theft.² FACTA also required the Commission and other federal agencies to prescribe regulations requiring financial institutions and creditors to establish reasonable policies and procedures for implementing the established guidelines.³ In addition, FACTA required the Commission and other federal agencies to prescribe regulations requiring debit and credit card issuers to validate notifications of changes of address under certain situations.⁴

¹ Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended at 15 U.S.C. 1681-1681x).

² 15 U.S.C. 1681m(e)(1)(A), (e)(2). The other federal agencies include the Federal banking agencies, the National Credit Union Administration, the Commodity Futures Trading Commission (“CFTC”) and the Securities and Exchange Commission (“SEC”). The CFTC and SEC obtained regulatory authority in July 2010 pursuant to the Dodd Frank Wall Street Reform and Consumer Protection Act. Pub. L. 111-203, 124 Stat. 1376-2223.

³ 15 U.S.C. 1681m(e)(1)(B).

⁴ 15 U.S.C. 1681m(e)(1)(C).

In November 2007, the Commission and banking agencies published final rules and guidelines implementing the red flags provisions of section 615 of the FCRA.⁵ These rules include the duties regarding the detection, prevention, and mitigation of identity theft (“Red Flags Rule”)⁶ and the duties of card issuers regarding changes of address (“Card Issuers Rule”)⁷ (collectively, the “Identity Theft Rules” or “Rules”). In December 2010, the President signed the Red Flag Program Clarification Act (“Clarification Act”), which narrowed the scope of entities covered as a “creditor” under the Red Flags Rule.⁸ The Clarification Act also empowers the Commission and other federal agencies to determine through rulemaking whether any other type of creditor should be subject to the Red Flags Rule based on whether such creditor offers or maintains accounts with a reasonably foreseeable risk of identity theft.⁹

The Red Flags Rule requires each “financial institution” and “creditor” subject to the Commission’s enforcement authority to periodically determine whether it maintains “covered accounts,” and to develop and maintain a written Identity Theft Prevention Program (“Program”) to detect, prevent and mitigate identity theft in connection with the opening or existence of any “covered account.”¹⁰ Financial institutions or creditors that are required to implement a Program must administer the Program in accordance with the Red Flags Rule, consider the guidelines set forth in appendix A, and include in their

⁵ 72 FR 63718.

⁶ 16 CFR 681.1.

⁷ 16 CFR 681.2.

⁸ Pub. L. 111-319, 124 Stat. 3457 (codified at 15 U.S.C. 1681m(e)(4)). The Clarification Act retains the definition of “creditor” from section 702 of the Equal Credit Opportunity Act (“ECOA”), 15 U.S.C. 1691a, but generally limits application of the Red Flags Rule to ECOA creditors that engage in certain conduct regularly and in the ordinary course of business.

⁹ 15 U.S.C. 1681m(e)(4)(C).

¹⁰ 16 CFR 681.1(c)-(d).

Program those guidelines that are appropriate.¹¹ The Card Issuers Rule requires that debit or credit card issuers establish and implement reasonable policies and procedures to assess the validity of a change of address request if, within a short period of time after receiving the request, the card issuer receives a request for an additional or replacement card for the same account.¹² The Card Issuers Rule further prohibits a card issuer from issuing an additional or replacement card until it has (1) notified the cardholder of the request and provided a reasonable means for the cardholder to promptly report an incorrect address change, or (2) otherwise assessed the validity of the address change.¹³ Card issuers within the FTC's jurisdiction include, for example, state credit unions, general retail merchandise stores, colleges and universities, and telecoms.

II. Regulatory Review of the Identity Theft Rules

The Commission periodically reviews all of its rules and guides. These reviews seek information about the costs and benefits of the agency's rules and guides, and their regulatory and economic impact. The information obtained assists the Commission in identifying those rules and guides that warrant modification or rescission. Therefore, the Commission solicits comments on, among other things, the economic impact and benefits of the Identity Theft Rules; possible conflict between the Identity Theft Rules and state, local, or other federal laws or regulations; and the effect on the Identity Theft Rules of any technological, economic, or other industry changes.

III. Issues for Comment

The Commission requests written comment on any or all of the following questions. These questions are designed to assist the public and should not be construed

¹¹ 16 CFR 681.1(e)-(f).

¹² 16 CFR 681.2(c).

¹³ *Id.*

as a limitation on the issues about which public comments may be submitted. The Commission requests that responses to its questions be as specific as possible, including a reference to the question being answered, and refer to empirical data or other evidence upon which the comment is based whenever available and appropriate.

A. General Issues

1. Is there a continuing need for specific provisions of the Rules? Why or why not?
2. What benefits have the Rules provided to consumers? What evidence supports the asserted benefits?
3. What modifications, if any, should be made to the Rules to increase the benefits to consumers?
 - a. What evidence supports the proposed modifications?
 - b. How would these modifications affect the costs the Rules impose on businesses, including small businesses?
4. What significant costs, if any, have the Rules imposed on consumers? What evidence supports the asserted costs?
5. What modifications, if any, should be made to the Rules to reduce any costs imposed on consumers?
 - a. What evidence supports the proposed modifications?
 - b. How would these modifications affect the benefits provided by the Rules?
6. What benefits, if any, have the Rules provided to businesses, including small businesses? What evidence supports the asserted benefits?

7. What modifications, if any, should be made to the Rules to increase their benefits to businesses, including small businesses?
 - a. What evidence supports the proposed modifications?
 - b. How would these modifications affect the costs the Rules impose on businesses, including small businesses?
 - c. How would these modifications affect the benefits to consumers?
8. What significant costs, if any, including costs of compliance, have the Rules imposed on businesses, including small businesses? What evidence supports the asserted costs?
9. What modifications, if any, should be made to the Rules to reduce the costs imposed on businesses, including small businesses?
 - a. What evidence supports the proposed modifications?
 - b. How would these modifications affect the benefits provided by the Rules?
10. What evidence is available concerning the degree of industry compliance with the Rules?
11. What modifications, if any, should be made to the Rules to account for changes in relevant technology or economic conditions? What evidence supports the proposed modifications?
12. Do the Rules overlap or conflict with other federal, state, or local laws or regulations? If so, how?

- a. What evidence supports the asserted conflicts?
- b. With reference to the asserted conflicts, should the Rules be modified?
If so, why, and how? If not, why not?

B. Specific Issues

1. Do the guidelines in appendix A of the Red Flags Rule need updating? If so, what updates should be made?
 - a. What evidence supports the proposed modification?
 - b. [Reserved]
2. The Red Flags Rule covers creditors that regularly and in the ordinary course of business: (1) obtain or use consumer reports in connection with a credit transaction; (2) furnish information to consumer reporting agencies in connection with a credit transaction; or (3) advance funds to or on behalf of a person, based on an obligation of the person to repay the funds or repayable from specific property pledged by or on behalf of the person, unless the expenses for which the funds are advanced are incidental to a service the creditor provides to that person. Is there any other type of creditor that is not subject to the Red Flags Rule that offers or maintains accounts that are subject to a reasonably foreseeable risk of identity theft?
 - a. If so, what type of creditor and what evidence supports that conclusion?
 - b. [Reserved]

IV. Instructions for Submitting Comments

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before February 11, 2019. Write “Identity Theft Rules, 16 CFR Part 681, Project No. 188402” on the comment. Your comment, including your name and your state, will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission website, at <https://www.ftc.gov/policy/public-comments>. As a matter of discretion, the Commission tries to remove individuals’ home contact information from comments before placing them on the Commission website. Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, such as a Social Security number, date of birth, driver’s license number or other state identification number or foreign country equivalent, passport number, financial account number, or payment card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information.

In addition, do not include any “[t]rade secret or any commercial or financial information which is . . . privileged or confidential,” as discussed in Section 6(f) of the FTC Act, 15 U.S.C. sec. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you must follow

the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comments to be withheld from the public record. Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comment online. To make sure that the Commission considers your online comment, you must file it at <https://ftcpublic.commentworks.com/ftc/identitytheftrulesreview> by following the instructions on the web-based form. If this document appears at <https://www.regulations.gov>, you also may file a comment through that website.

If you file your comment on paper, write “Identity Theft Rules, 16 CFR Part 681, Project No. 188402” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, D.C. 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex B), Washington, D.C. 20024.

Visit the Commission website at <https://www.ftc.gov> to read this document and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive

public comments that it receives on or before February 11, 2019. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

By direction of the Commission.

Donald S. Clark,
Secretary