

# **Check Those Credit Card Receipts: A FACTA Primer**

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## Check Those Credit Card Receipts: A FACTA Primer

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A once fairly obscure law regarding credit card receipts has recently become a serious issue for numerous businesses. Consumers are becoming more aware of their data privacy rights, and attorneys have filed numerous lawsuits across the country based on alleged violations of Fair and Accurate Transaction Act of 2003 (“FACTA”). Attorneys representing any company that accepts credit cards should learn about FACTA, their clients’ potential exposure, and ways in which liability can be avoided. Businesses that handle a wide range of consumer information should also be advised regarding the effects of the FACTA Disposal Rule, another provision intended to lessen the possibility of identity theft.

### What is FACTA?

FACTA was a 2003 amendment to the Fair Credit Reporting Act primarily enacted in reaction to growing concerns about identity theft. Congress also intended to use the federal law to protect businesses from having to comply with various individual state laws that might affect certain transactions. In effect, FACTA preempts any efforts by states to enact stronger privacy restrictions than the act itself provides. Businesses were given three years – until December 4, 2006 – to comply with its provisions. FACTA is best known by consumers for giving them the right to obtain one free credit report from each of the three major credit bureaus every 12 months.

### FACTA Rules Governing Credit Card Receipts

Businesses, however, may be most affected by FACTA’s requirements with respect to credit card transactions and, in particular, credit card receipts. Specifically, section 605c(g) expressly requires that “no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.” 15 U.S.C. § 1681c(g)(1). A failure to comply with this provision can be very costly. A business that willfully violates FACTA is liable to consumers for either “actual damages”

or statutory damages between \$100 and \$1000 per incident:

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000 ...

15 U.S.C. § 1681n(a)(1)(A). A business may also be held liable for negligent failure to comply with FACTA’s requirements. In those circumstances, a consumer may recover actual damages and costs, including attorney’s fees. 15 U.S.C. § 1681o(a).

### FACTA Lawsuits

The provisions with respect to credit card receipts have become increasingly troublesome for businesses that have yet to comply. For example, a Pennsylvania woman brought a putative class action lawsuit against Lifetime Brands, Inc., manufacturer of sewing machines under the Pfaltzgraff brand. In *Ehrheart v. Lifetimebrands, Inc.* 2007 WL 2141979 (E.D.Pa. 2007), the plaintiff alleged that Pfaltzgraff violated FACTA when it gave her a receipt that included her full credit card number and printed the expiration date of the credit card. Pfaltzgraff moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1), claiming that the plaintiff lacked standing because she did not allege that she suffered any actual injury, such as a claim that she was the victim of identity theft. Pfaltzgraff also moved to dismiss for failure to state a claim under Rule 12(b)(6) on the grounds that its printing of the credit card receipt did not violate FACTA and it could not have acted willfully because the statute is subject to more than one interpretation.

The court held that FACTA does not require that a plaintiff suffer actual monetary damages in order to bring suit under the Act. According to the court, a plain reading of the statute demonstrated that the mere fact that a business

violated the Act by printing more than the last five digits of her credit card or debit card number and/or printing the expiration date of her card was sufficient to allege an injury under FACTA. Consequently, the court concluded that the plaintiff could be entitled to monetary damages.

The court also rejected Pfaltzgraff's attempts to avoid the clear language of the statute, which prohibits both the printing of more than the last 5 digits of a credit card number and the printing of an expiration date. The court concluded that either action constitutes a violation of FACTA. The court also found that the "willfulness" argument was premature because the complaint adequately alleged willfulness. In addition, the court rebuffed Pfaltzgraff's request to strike the plaintiff's class allegations, finding it to be premature.

A number of other cases with similar facts have been filed across the country. Given the large number of credit card transactions a business may have, the possible financial exposure for FACTA violations is huge. But whether such cases will be allowed to proceed as class actions is unclear. For instance, the United States District Court for the Central District of California refused to certify classes in three FACTA cases involving allegations of willful violations of FACTA. The court denied certification based, in part, on findings that (1) claims by individual plaintiffs could be pursued, (2) the defendants had inadvertently committed the FACTA violations, and (3) the defendants acted promptly and in good faith to bring themselves into compliance with FACTA once the violations were discovered. *See Narajian v. Charlotte Russe, Inc.*, No. 07-cv-00501, slip op. (C.D. Cal. June 12, 2007); *Narajian v. Avis Rent A Car System*, No. 07-cv-00588, slip op. (C.D. Cal. June 11, 2007); *Soulian v. International Coffee and Tea, LLC*, No. 07-cv-00502, slip op. (C.D. Cal. June 11, 2007). In *Spikings v. Cost Plus*, 06-08125, slip op. (May 25, 2007), the court concluded that the plaintiffs failed to satisfy the superiority requirement for class certification because the defendant's liability "would be enormous and completely out of proportion to any harm suffered by the plaintiff." The court concluded that even with an award based on the minimum statutory damages, a class action damage award would be "ruinous to Defendant" and disproportionate to the harm actually suffered by the class.

Whether other courts will follow the Central District of California's lead is uncertain. Plaintiffs

may also seek to avoid the "superiority" result in *Spikings* by focusing claims on selected stores or business outlets as a way of decreasing the overall amount of statutory damages. In any event, the *Spikings* court's reference to potentially "ruinous" damages exposure is a stark reminder for every business to promptly comply with FACTA's credit card receipt requirements.

### The FACTA Disposal Rule

In addition to the credit card receipt provisions, FACTA also imposes additional rules on businesses with respect to the use of consumer information. Businesses should pay particular attention to FACTA's requirement that businesses and individuals take suitable measures to dispose of an individual's personal sensitive information derived from consumer reports. As of June 1, 2005, businesses that use consumer reports for business purposes are subject to the FACTA Disposal Rule promulgated by the Federal Trade Commission, which calls for the proper disposal of information in consumer reports and records to protect against "unauthorized access to or use of the information." 16 C.F.R. Part 682.

16 C.F.R. § 682.3 establishes a standard for the "proper disposal of consumer information." Any person or business in possession of such information must properly dispose of it "by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal." The regulation sets forth several examples of "reasonable measures," such as policies requiring "the burning, pulverizing, or shredding" of papers containing consumer information, "the destruction or erasure of electronic media" containing such information, or using the services of a record-destruction business. In addition, the regulation requires that any business or individual subject to the Gramm-Leach-Bliley Act, 15 U.S.C. § 6081 *et seq.* and the FTC's Standards for Safeguarding Customer Information, 16 C.F.R. part 314 (known as the "Safeguards Rule"), must incorporate a proper consumer information disposal policy into the information security program required by the Safeguards Rule.

The Disposal Rule applies to almost any entity, including law firms, that may possess consumer reports and/or the information derived from consumer reports. According to the FTC, the Disposal Rule "applies to people and both large and small organizations that use consumer reports." Among those who must comply with

the Rule are:

- consumer reporting companies;
- lenders;
- insurers;
- employers;
- landlords;
- government agencies;
- mortgage brokers;
- automobile dealers;
- attorneys or private investigators;
- debt collectors;
- individuals who obtain a credit report on prospective nannies, contractors, or tenants;
- entities that maintain information in consumer reports as part of their role as service providers to other organizations covered by the Rule.

*FTC Consumer Alert: Disposing of Consumer Report Information? New Rule Tells How* (June 2005).

The scope of “consumer information” subject to the Disposal Rule is also very broad. It should be noted that the Disposal Rule encompasses both consumer reports and the information derived from consumer reports.

The FTC considers consumer reports to include “information obtained from a consumer reporting company that is used, or expected to be used, in establishing a consumer’s eligibility for credit, employment, or insurance, among other purposes.” 16 CFR § 682.1(b). The Disposal Rule not only applies to credit reports, but also includes reports businesses obtain regarding (1) employment background, (2) check writing history, (3) insurance claims, (4) residential or tenant history, and (5) medical history. *FTC Consumer Alert: Disposing of Consumer Report Information? New Rule Tells How* (June 2005). Businesses dealing any of these types of information should proactively implement disposal plans that comply with the Disposal Rule.

### **Conclusion**

Although FACTA has only been effective for a short time, its repercussions have already been widespread. Attorneys should counsel their clients to make certain that FACTA’s credit card restrictions are not violated to avoid potentially devastating liability. Companies should also be advised to review the Disposal Rule and take immediate steps to comply with its requirements.

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