BUCKLEY KOLAR LLP
LAWYERS FOR THE FINANCIAL SERVICES INDUSTRY

M E M O R A N D U M

To: Mary Jo Sullivan
Mortgage Bankers Association

From: Jeremiah S. Buckley, 202.349.8010
jbuckley@buckleykolar.com

Jonathan D. Jerison, 202.349.8015
jjerison@buckleykolar.com

Re: FACTA Summary

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Fair and Accurate Credit Transactions Act of 2003

The Fair and Accurate Transactions Act of 2003 ("FACTA"), signed into law on December 4, 2003, affects the mortgage industry in many ways. The following describes the major requirements under FACTA and reflects two final rules relating to issuing notices to consumers that negative information will be/has been reported about them to a credit reporting agency and new identity theft definitions.

Highlights of the major requirements are as follows:

A. Risk Based Pricing. FACTA requires a new "risk-based pricing" notice that must be provided at application or when a lender uses a consumer report in connection with an offer of credit on terms that are "materially less favorable" than those offered to other consumers. Existing adverse action requirements under both FCRA and the Equal Credit Opportunity Act ("ECOA") remain in effect.

B. Credit Score Disclosure. After pulling a consumer's credit score, brokers and lenders will have to provide that score, and the key factors underlying the score, to the consumer. Consumers may also access their score at the CRA.

C. Affiliate Marketing. FCRA currently requires a company (Company A) to give consumers the opportunity to "opt-out" before Company A *shares* "consumer report" information with its affiliate, Company B. Consumer report information includes information from credit reports or financial data from the consumer's application, but does not include information about Company A's experience with the consumer. FACTA imposes no further restriction on the sharing of information, but generally requires that, before Company B uses any shared consumer financial information for marketing, it offer the consumer an opportunity to opt-out of such marketing.

D. Medical Information. FACTA introduces new limits on the use and sharing of medical information that could make it difficult for lenders to evaluate whether an applicant has the mental capacity to enter into a loan agreement.

E. Identity Theft. FACTA creates new procedures aimed at curbing identity theft that allow consumers to place an "alert" in their credit file. Lenders must follow special identification procedures before extending credit if the credit report includes an alert.

F. Furnisher Obligation. FACTA creates a more stringent standard for the accuracy of information that lenders furnish to CRAs and allows federal regulators to define circumstances under which a consumer can dispute information being reported to CRAs directly with the lender.

Preemption: While imposing these new requirements, FACTA provides an important benefit for the mortgage industry – it permanently prevents the states from imposing their own more onerous regulations in many areas, including any state regulation related to sharing of information among affiliates. The preemption provisions in the previous version of FCRA had been scheduled to expire on December 31, 2003, meaning that the states could have begun to enact more extensive regulation of CRAs and lenders and other users of consumer reports.

Regulatory Action: FACTA requires that many of its new provisions and revisions to existing law be implemented through regulations issued by various federal agencies. Most significantly for the mortgage industry, the new risk-based pricing notice is to be implemented through a joint regulation issued by the Federal Reserve Board ("FRB") and Federal Trade Commission ("FTC"). MBA has organized an industry-wide coalition to seek a workable regulation. The FRB and FTC have not yet proposed regulations.

FACTA delegated to the FRB and FTC the power to set the effective dates for many of its provisions. Those agencies issued a final rule in February 2004 that sets December 1, 2004, as the effective date for most FACTA provisions. A few

provisions that do not require implementing regulations and that the FRB and FTC believe do not create operational difficulties for industry went into effect on March 31, 2004. The risk-based pricing provision is among those that are scheduled to go into effect on December 1, 2004. The agencies have informally indicated that that provision, as well as other provisions for which regulations have not been issued by the deadline, will not be enforced until final rules are issued, but industry, including MBA, is seeking a more formal pronouncement to that effect.

Summary of the FACTA Provisions

- The following summary reflects both the statutory requirements and the status of provisions to be implemented by regulation, with an emphasis on the provisions that particularly affect the mortgage industry.

A. Risk-Based Pricing Notice

FACTA requires a new "risk-based pricing" notice that must be provided at application or when a lender uses a consumer report in connection with an offer of credit on terms that are materially less favorable than those offered to other consumers. The FTC and the FRB are charged with writing regulations to implement this provision.

MBA is concerned about the difficulty of determining which customers receive materially less favorable terms, triggering the notice requirement. MBA is also concerned about the customer-relations problems that could result from telling the consumer at the time that credit is granted that he or she has received less favorable terms. MBA has organized an *ad hoc* coalition of national trade associations to promote a regulation that would allow lenders to provide a notice at the beginning of the transaction to all customers, explaining that credit reports may affect pricing and the other terms offered to the consumer. This would give consumers the opportunity to correct any errors in their report while at the same time allowing lenders to comply in an efficient manner.

Key features of the RBP provision in FACTA include:

1. This new notice is required in situations in which a consumer may be offered "sub-optimal" credit terms based on information in a consumer report. It applies to a person that – (1) uses a credit report, (2) in connection with an application for or grant or extension of credit, (3) on "material terms that are materially less favorable than the most favorable terms available" to a "substantial portion" of that creditor's other customers.

2. The notice must identify the consumer reporting agency ("CRA") that provided the information and explain that the information affected the terms of the offer. The RBP notice may be provided orally, electronically (without regard to federal ESIGN law or other consent provisions), or in

writing. If the lender provides a notice of adverse action, no RBP notice is required, but the RBP notice does not replace the adverse action notice.

3. The timing of the notice is very significant. The general rule of the statute is that the notice may be provided at application, communication of an offer of credit, or when the credit is granted. This should allow lenders to provide a generic notice to all applicants at the time of application. But some consumer advocates have urged the FTC and FRB to require a "triggered" notice, informing consumers at the time they are granted credit that they are receiving credit on terms that are materially less favorable than the terms offered to other consumers served by the lender.

4. Although the RBP requirement is scheduled to go into effect on December 1, 2004, as noted above, the regulators have yet to propose regulations. They have indicated that this provision will not be enforced until final rules are issued. However, the MBA is urging that the agencies issue formal written guidance making this point explicit.

B. <u>Credit Score Disclosure</u>

FACTA requires a person who uses a credit score to make or arrange credit secured by one to four units of residential real property – *i.e.,* a mortgage lender or mortgage broker – to give the consumer credit scoring information obtained from the CRA, an explanation of the role of credit scores in the lenders' decisions, and the name of the CRA. CRAs must disclose similar information at the consumer's request and may charge a reasonable fee for doing so. This provision is based on a very similar California requirement that has been in effect since 2001.

The credit score disclosure provided by either mortgage users or CRAs must include:

1. The four key factors that adversely affected the score, listed in order of importance. If the number of inquiries was a key factor (*i.e.,* it adversely affected the score), a consumer reporting agency must also provide a clear and conspicuous statement that the number of inquiries was a factor, even if it was not in the top four.

2. The date the score was created.

3. Name of the person that provided the credit score or credit file on which it was based.

4. Range of possible scores.

5. A lender or broker need not provide an explanation of the scores beyond the form disclosure provided in the statute.

- This provision distinguishes between “credit scores,” which are based solely on credit information, and “mortgage scores” produced by an automated underwriting system that considers factors in addition to credit information, such as loan-to-value ratio or the consumer’s financial assets. A mortgage score need not be disclosed to the consumer.

This provision does not require regulations. As discussed below, it becomes effective on December 1, 2004.

C. Affiliate Sharing

FACTA added new restrictions on the use of affiliate information that will have a significant impact on mortgage lenders. Under the new provision, consumers must be given an opportunity to opt out of the *use* for marketing by a company of any financial information obtained from an affiliate, including both consumer reports and direct transaction-and-experience information. Sharing of transaction-and-experience information, as opposed to use of that information by the recipient, is not restricted by this provision.

The existing affiliate-sharing provisions of FCRA allow companies to share identification and transaction-and-experience information with affiliates under all circumstances. They may share “consumer report” information only if the consumer is first given notice and the opportunity to “opt-out” of affiliate sharing. “Consumer report” information includes both information obtained from CRAs and other information bearing on creditworthiness, insurability, etc., such as information obtained from the application or directly from other lenders.

Under the statute, the new FACTA notice allowing the consumer to opt-out of the use of information from affiliates:

1. Must be clear and conspicuous.

2. Must allow the consumer to prohibit all marketing solicitations.

3. May also allow partial opt-outs from different types of solicitations.

In addition:

- Combination with other disclosure. The opt-out notice may be combined with other required disclosures, such as the privacy and opt-out notice under the Gramm-Leach-Bliley Act or the existing affiliate-sharing opt-out under FCRA.

- The opt-out is effective for five years. After five years, if the company wishes to resume affiliate solicitations, the consumer must receive another opt-out notice.

- <u>Preexisting Relationship.</u> The opt-out notice requirement does not apply to an affiliate that wishes to use the information if the affiliate has a "preexisting relationship" with the consumer. A preexisting relationship exists when:
    - The affiliate or the affiliate's licensed agent has an ongoing financial contract with the consumer;
    - Within the last 18 months, the consumer has purchased, rented, or leased goods or services, or a financial transaction (including holding an active account or policy) has occurred, within the 18 months before the consumer is sent a solicitation; or
    - Within the previous 3 months, the consumer has made an inquiry or application to the affiliate regarding the affiliate's products or services.

N.B. The periods defining a "preexisting relationship" are the same as those in the FTC's Telemarketing Sales Rule.

The notice and opt-out also do not apply if, among other things:

1. One company (Company B) uses the information to perform services on behalf of its affiliate (Company A), except that Company B may not solicit a consumer whom Company A could not have solicited because of an opt-out.

2. The consumer initiates a contact and the affiliate uses the information to respond.

3. The consumer authorizes or requests the solicitation.

Rulemaking. The federal banking agencies, the National Credit Union Administration ("NCUA"), the Securities and Exchange Commission, and the FTC must issue regulations implementing the affiliate-sharing provision. Final regulations implementing this provision were to have been issued by September 4, 2004, with an effective date no later than six months later (*i.e.,* March 4, 2005). The agencies issued proposals with a comment deadline in mid-August 2004. Because the agencies did not issue final rules by September 4, it appears that the mandatory compliance deadline will be later than March 4, 2005, although the agencies have not formally stated that the deadline will be extended.

Key provisions of the proposed regulations include:

1. <u>Responsible Party for Issuing the Opt-Out</u>**.** The "sharing" company (the company that provides the information) would be responsible for providing the opt-out notice, although FACTA does not assign responsibility for providing the notice. As drafted, the proposals do not address the common situation in the mortgage industry in which one entity (*e.g.,* a mortgage company) markets products (*e.g.,* HELOCs) on

behalf of an affiliate (*e.g.,* a bank). MBA is seeking a broader definition of a "preexisting business relationship" in which, in this example, the mortgage company would be deemed to have a business relationship with the customer with respect to the HELOC as well as with loans actually originated by the mortgage company.

2. Statement Stuffers. As required by FACTA, the proposed regulation would allow a company to include a "statement-stuffer" promoting an affiliate's products, in which the customers who receive the material are not selected using "eligibility information" that is covered by the rule. In other words, Bank A could include a statement-stuffer soliciting business for its affiliate, Mortgage Company B, so long as the material went to all of Bank A's customers or a subset selected using non-financial criteria such as the customer's place of residence.

- The agencies requested comment on whether a statement-stuffer promotion should be allowed where the material includes a code that reveals eligibility information to the affiliate when the customer responds to the offer, allowing what they refer to as "constructive sharing" of the information by the affiliate without the opportunity for the consumer to opt-out. MBA argued that the new FACTA provision should not apply to this situation because, once the consumer responds, the affiliate only uses the information in response to a customer inquiry, a situation that is excluded from the opt-out requirement by the statute and the proposed regulation. It argued that coding the material does not defeat the purposes of the provision, because the information is never "used" for marketing.

3. Electronic Disclosure. The proposed regulations are ambiguous on how the new affiliate-sharing notice could be given electronically. The proposed regulations would allow companies to comply with either Section 101 of the Electronic Signatures in Global and National Commerce Act ("ESIGN") or with special rules for electronic disclosures set out in the regulations, which include requirements that the consumer consent to and acknowledge the receipt of electronic disclosures. But because the provision does not require written disclosures, MBA noted that the ESIGN Act does not require consumer consent for electronic delivery of these disclosures.

D. Medical Information

FACTA imposes new limits on a credit bureau's ability to furnish, and a lender's ability to use, information related to a consumer's medical condition, in connection with extending credit:

1. Among other things, the law prohibits CRAs from reporting information about an individual's payment history with a medical provider if the report will reveal the nature of the medical condition to which the bill related.

2. Information about a consumer's payment record may be provided if it is coded so that the identity of the specific provider or the medical services, products, or devices cannot be determined.

** These new restrictions could create difficulties for mortgage lenders seeking to avoid accusations of "predatory lending." For example, they could prevent lenders who learn that an applicant receives mental disability income from evaluating the applicant's legal capacity to enter into a contract.

Sharing of Medical Information. The law also restricts the sharing of medical information among affiliates, despite the general exception from FCRA for such sharing.

Rulemaking. FACTA, however, also requires the banking agencies and the NCUA to create exceptions that they determine are "necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs":

1. The comment period on a proposal to create exceptions by the FRB, OCC, OTS, FDIC, and NCUA closed on May 28, 2004. The proposal only applies to institutions under the jurisdiction of those agencies.

2. The proposal would allow credit bureaus to furnish, and lenders to use, reports that reveal medical information if:

   - "[T]he information . . . relate[s] to debts, expenses, income, benefits, collateral, or the purpose of the loan, including the use of proceeds";

   - "[T]he creditor . . . use[s] the information in a manner and to an extent no less favorable than it would use comparable information that is not medical information in a credit transaction"; and

   - "[T]he creditor [does] not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any such determination of credit eligibility."

The same exceptions would apply to sharing of information with affiliates.

The FTC, which has jurisdiction over non-bank users of credit information, believes that it has more limited exception powers:

- The FTC also can create exceptions to the restrictions, but, in its view, only with regard to sharing of information among affiliated companies.

- The FTC filed a comment with the banking agencies asking them to recast their proposed exceptions as interpretations that the law simply does not apply to many situations, such as complying with state laws that require lenders to consider medical information to protect elderly and disabled consumers from abuse by creditors. The FTC hopes that this approach would protect companies under FTC jurisdiction that cannot be exempted from the law.

- The FTC has not yet issued a proposal for exemptions for affiliates.

E. Identity Theft Provisions

FACTA includes a number of provisions designed to help consumers who are, or believe themselves to be, victimized by identity theft. A CRA must note that a consumer alleges that he or she has been a victim of fraud (including identity theft) or is on active military duty. Users of credit reports must verify the identity of consumers who have "alerts" in their credit reports before making loans to them. **Failing to take these steps exposes the user of the report to liability for violating FCRA, in addition to the losses associated with an identity theft**.

Alerts in Consumer Credit Reports:

1. Two levels of alerts are provided for identity theft alerts – fraud alerts, which can be initiated with a telephone call and are valid for 90 days, and "extended" alerts, which can be valid for up to seven years. Active duty alerts are valid for one year.

2. In order to place any type of alert, the consumer must provide appropriate proof of identity. An extended alert also requires the filing of a police or similar report.

3. The level of identification required for a fraud or active duty alert is lower than for an extended alert:

- **Verification of Identity for Fraud Alerts and Active Duty Alerts:** For a fraud or active duty alert, the lender or other user must "utilize reasonable policies and procedures to form a reasonable belief that the user knows the identity of the person making the request" for credit. If a credit report that has an alert provides a telephone number for lenders to use to verify the identity of the applicant, the user must either call that number or take other reasonable steps to verify identity and confirm that the request for credit is not the result of identity theft.

- **Verification of Identity for Extended Alerts.** For extended alerts, the user must contact the consumer in person, by telephone, or through another reasonable contact method designated by the consumer. The "other reasonable steps" option is not available.

    - Users do not have to follow these special procedures for extensions of credit on an existing credit line, but they do have to follow them for requests to increase the credit limit.

- **Free Credit Reports.** Consumers who file alerts have additional rights to free credit reports. This creates the potential for abuse by consumers being advised by unscrupulous "credit repair" firms.

The identity theft provisions of FACTA also:

1. **Blocking of Information.** Require credit bureaus to block reports of items that were generated by an identity thief, and notify the entity that furnished the blocked information. (The furnisher's responsibilities not to "refurnish" information are discussed below.)

2. **Records.** Require the user of consumer reports, upon request of a victim of identity theft, to provide without charge application and transaction records related to the identity theft.

3. **Reconciling Addresses.** Require credit bureaus to alert lenders when a request for a consumer report includes an address that differs from the address in the consumer's file. The lender must then take reasonable steps to confirm the identity of the consumer and determine there is no identity theft. This provision is to be implemented through a banking agency/NCUA/FTC regulation, which has not yet been proposed.

4. **Red Flag Guidelines.** Require lenders to monitor and identify or flag patterns, practices or activities that would indicate identity theft. The banking regulators, NCUA and FTC will issue rules implementing this section. Failing to establish reasonable policies and procedures to implement the guidelines will be a violation of FCRA (although noncompliance with the guidelines will not, in itself, be a violation).

Rulemaking:

FACTA requires the FTC to issue regulations defining certain terms related to identity theft:

- The FTC issued rules in early November 2004 that define an "identity theft" as well as an "identity theft report" (a police report or similar report that triggers increased requirements for credit bureaus and users).

- In an attempt to prevent the use of the identity theft provisions in “credit repair” scams, the rule also addresses the amount of information that a credit bureau or lender may require before accepting an identity theft report as genuine.

- Some industry commenters believe the rules could be interpreted to convert any report of a stolen wallet into an identity theft report, triggering the alert provisions.

- Now that the FTC has issued rules, alerts will begin appearing in credit reports as of December 1, 2004, the effective date of the FACTA provision.

F. Furnisher Responsibilities

FACTA increases the responsibilities of lenders and others who furnish information to CRAs. As under previous law, there is no requirement in FCRA to provide information to a CRA, but once a lender decides to do so, it has some responsibilities for the accuracy of the information:

- The standard for the furnisher’s duty to furnish accurate information is changed from “knows or consciously avoids knowing that the information is inaccurate” to “knows or has reasonable cause to believe that the information is inaccurate.”

- The “reasonable cause to believe” standard is defined as “having specific knowledge, other than solely allegations by the consumer, that would cause a reasonable person to have substantial doubts about the accuracy of the information.”

Disputing Information on a Credit Report. The banking agencies, NCUA, and FTC are directed to issue regulations establishing the circumstances under which a consumer can dispute the accuracy of information that a furnisher is reporting directly with the furnisher. The procedure is similar to the “qualified written dispute” procedure under the Real Estate Settlement Procedures Act (“RESPA”) and requires that:

1. The consumer explain and document the dispute.

2. The notice of dispute must be sent to an address specified by the furnisher.

3. The furnisher will have to resolve the dispute and either correct its reporting or explain why it disagrees with the consumer within the same time that a CRA would have if the consumer had disputed the item directly with the CRA.

- MBA has been working with the FRB, which is conducting a FACTA-mandated study of furnisher issues to avoid duplicative or contradictory requirements under RESPA and the FACTA provisions.

- The banking agencies, NCUA, and FTC must also create guidelines for furnishers regarding “the accuracy and integrity of the information” they provide to CRAs, as well as rules requiring furnishers to establish reasonable policies and procedures to follow the guidelines:

    1. Failure to follow the guidelines will not, in itself, violate FCRA, but failure to establish reasonable policies and procedures will be a violation.

    2. The guidelines, as described in the statute, use the term “integrity,” rather than “completeness,” which was used in earlier versions of the legislation.

Under the identity-theft provisions, a mortgage banker furnishing information to CRAs:

1. Must establish reasonable procedures to avoid “refurnishing” information to a CRA if the CRA has informed the furnisher that the information has been “blocked” because of identity theft.

2. May not sell a loan or place it for collection if reporting of information about the loan has been “blocked.”

3. If it receives an “identity theft report” (such as a police report) directly from the consumer at an address established to receive such reports, must stop furnishing the information, unless the consumer informs the furnisher that the information is correct.

4. This provision would also appear to create opportunities for abuse, especially if the definition of an identity theft report adopted by the FTC rule is overly broad.

G. National Uniformity

Prior to the enactment of FACTA, FCRA preempted state law in a number of areas, but FCRA did not preempt any state law enacted after January 1, 2004, that (1) stated explicitly that it was intended to “supplement” the federal FCRA, and (2) provided more consumer protection than the federal law. FACTA eliminated the ability of states to “opt-out” of federal preemption beginning in 2004; in other words, the existing preemption provisions are now permanent.

The areas originally subject to federal preemption were:

- Exchange of information among affiliates;

- Adverse action;

- Pre-screened solicitations based on consumer reports;
- Prohibition against reporting obsolete information (generally 7 years for adverse trade and collection items and 10 years for bankruptcies);
- Responsibilities of furnishers of information to CRAs;
- CRA dispute-resolution procedures; and
- Form and content of the summary of rights that CRAs must provide to consumers who request file disclosures.

California and Preemption. In the first of these areas, exchange of information among affiliates, FCRA on its face preempts not only state laws concerning consumer reporting, but all state laws regulating sharing of any type of information among affiliates. A district court in California, however, held in June 2004 that provisions of California's privacy law, S.B. 1, regulating the exchange of information among affiliates, are not preempted by FCRA. *American Bankers Ass'n v. Lockyer,* No. Civ. S 04-0778 MCE KJ, 2004 WL 1490432 (E.D. Cal. June 30, 2004). That surprising decision is on appeal to the Court of Appeals for the Ninth Circuit, and the FTC and federal banking agencies, as well as industry trade associations, filed an *amicus* brief urging reversal. The Ninth Circuit, however, denied a motion to stay the district court judgment, meaning that S.B. 1 will be in effect until and unless the decision is reversed.

FACTA also preempts state laws governing the subject area of new provisions that it added to FCRA, including:

- Risk-based pricing notices;
- Credit score disclosure (existing laws grandfathered);
- Use of affiliate information for marketing;
- Fraud alerts;
- Blocking of information allegedly generated by identity theft;
- Prohibition on "refurnishing" fraudulent information;
- Prohibition on the sale or transfer of fraudulent debt;
- The requirement for lenders to provide information to victims of identity theft;
- Red-flag alerts;
- Disposal of credit report information;

- Truncation of credit- and debit-card account numbers;
- Truncation of social security numbers in credit reports;
- Notice by debt collectors of fraudulent information;
- Annual free credit reports;
- New summaries of rights; and
- Government coordination of identity theft complaint investigations.

As discussed in more detail below, FACTA directs the FRB and FTC to issue regulations establishing effective dates for many of the law's provisions. The agencies issued a regulation setting December 31, 2003, as the effective date for preemption. This ensured that there would not be a gap during which states could enact legislation covering areas previously preempted by FCRA. At the same time, the preamble to the final rule states that new requirements added by FACTA do not preempt state law until the accompanying substantive rule goes into effect. For example, state law requirements for merchants to truncate credit card numbers on receipts will continue in effect until the corresponding FACTA provisions become effective.

H. <u>Effective Dates</u>

As required by FACTA, the FRB and FTC in February issued a joint rule setting final effective dates for the provisions of the law that do not specify an effective date:

- As noted, the effective date for existing preemption provisions was December 1, 2003.
- The final rule also established March 31, 2004, as the effective date for provisions that are "self-executing" (*i.e.,* do not require rulemaking), and which the FRB and FTC believe do not require operational changes by industry. These provisions include:

    1. The extension of the statute of limitations to include a "discovery rule" that allows plaintiffs to bring an action within two years of discovering a violation or five years after the violation occurred, whichever is later. The rule does not address whether claims that were barred by the old version of the statute are now "revived" by the new, longer statute of limitations.
    2. The new definitions added by FACTA (other than those to be defined by regulation);

3. A savings clause that states that nothing in FACTA affects liability existing on the day before enactment; and

4. Clerical amendments.

- The final rule sets December 1, 2004, as the effective date for the remaining rules for which the statute itself does not specify an effective date. These provisions include, among others:

  1. The required credit score disclosure for mortgage bankers and brokers (as well as CRAs);
  2. The risk-based pricing ("RBP") notice provision;
  3. The provisions relating to identity theft, including the fraud and active-duty alert provisions, blocking of reporting, and "red-flag" identity theft procedures;
  4. Notice of reporting negative information to CRAs;
  5. The new furnisher provisions;
  6. Enhanced prescreen notices;
  7. Summaries of consumer rights; and
  8. Coordination of government identity theft complaint investigations;

- FACTA bases the effective dates for other provisions on when final rules are issued. For example:

  1. **Affiliate-sharing:** 6 months after issuance of final rules;
  2. **Records-disposal:** As provided in regulations (agencies proposed 3 months).

- A few others effective as specified in statute. E.g., new restrictions on medical information –

  1. Restrictions on sharing were generally effective June 1, 2004; but
  2. Restrictions on *use* not effective until 90 days after regulations issued, or other date specified in rules – still pending (agencies did not propose a different effective date).

I. <u>Other Provisions</u>

Other provisions of FACTA with some impact on the mortgage industry include:

1. **An annual free credit report, which allows consumers to request a free copy of their credit report once a year:**

   a. In June, the FTC adopted a final rule that will phase-in this requirement on a geographic basis, beginning with the West Coast on December 1, 2004, and achieving nationwide coverage by September 1, 2005.

   b. The increased volume of consumer file requests is likely to have an indirect impact on lenders by generating an increased number of disputed items that lenders will need to verify.

2. **Model notice that lender may report negative credit information:**

   a. Any “financial institution” (defined as in the Gramm-Leach-Bliley Act) must notify the consumer before reporting negative information about the consumer to a credit bureau.

   b. Use of the Gramm-Leach-Bliley definition of “financial institution” means that any mortgage lender is covered, regardless of whether it is affiliated with a bank.

   c. The notice may be provided with a notice of default, billing statement, or otherwise, but may not be provided with Truth in Lending Act disclosures.

   d. FACTA directs the FRB to provide model language for the notice. The final rule, issued in June 2004, provides alternative notices for two situations: where the lender has not yet reported negative information, and where the lender has reported such information.

   e. In response to industry comments noting that not all negative information that a lender reports is actually reflected in the consumer’s credit report, the notices state that the information “may be” reflected in the consumer’s credit report, and also allow the lender to state that information “may be” reported, allowing for the possibility that negative information would not even be reported.

3. **Disposal of consumer report information and records.**

   a. FACTA requires the FTC, the federal banking agencies, the Securities and Exchange Commission, and the National Credit Union Administration (“NCUA”) to issue “consistent and comparable” (but not joint) regulations requiring the proper disposal of information from consumer reports. The FTC did so, in a proposal published in April 2004; the banking agencies did so in June 2004. The proposals are very general and will, in many

instances, overlap with the existing requirements of the FTC Safeguards Rule and comparable banking agency guidance.

4. Enhanced disclosures of right to opt-out of prescreened credit solicitations.

a. Under FCRA, lenders that use credit-bureau prescreening must include a disclosure in their solicitations that informs consumers of their right to opt-out of future prescreened solicitations. FACTA requires the FTC to issue simplified, clearer language for this opt-out notice. On October 1, 2004, the FTC issued a proposed rule that would require a very prominent opt-out notice on the first page of a solicitation and specify more detailed language that could be included elsewhere.

b. MBA filed comments urging the FTC not to allow the opt-out notice to displace other important information, including information about the substance of the credit offer.

c. The final regulation has not yet been issued.

J. Other FACTA Provisions

1. **Truncation of Credit/Debit Card**. Prohibits businesses from printing more than the last five digits of a credit or debit card number on an electronically-generated point-of-sale receipt. This would appear to apply, for example, to a mortgage originator that accepts credit-card payments for appraisal and application fees. This provision will go into effect on January 1, 2005, for equipment that was in service as of December 4, 2004, and on December 4, 2006, for new equipment.

2. **Extends the FCRA statute of limitations.**

3. **Studies.** Requires various federal agencies to conduct studies of topics such as the impact of credit scoring on the availability and affordability of financial products (including the impact on minorities and certain geographical areas); the use of biometrics to prevent identity theft; whether restrictions on the use of prescreened information should be tightened.

4. **Financial Literacy and Education Commission.** Creates a Financial Literacy and Education Commission to develop a strategy to increase consumer financial understanding, composed of the Secretary of the Treasury, Chairs of the FRB, FTC, and SEC, heads of the other federal banking agencies, Secretaries of several other executive departments, and other high federal officials appointed at the President's discretion.