

Matter of FACTA

Credit Information Measure Will Impact Businesses and Individuals

By GEORGE O'BRIEN

Bacon & Wilson litigator, Robert S. Murphy, weighs in.

It's called FACTA, or the FACT Act — both shorter names for the Fair and Accurate Credit Transaction Act of 2003.

It was passed, at the behest of the Federal Trade Commission, to address the proper and accurate reporting of consumer credit information and, in so doing, take the fight against identity theft to a higher level. Most of the bill's provisions — including everything from free credit reports for consumers to the so-called truncating of credit card numbers so merchants or restaurant workers can't access them — have already been put in place.

But one added amendment to the measure will take effect June 1, and it could have implications for several business sectors, while also providing fresh opportunities for the emerging document-destruction industry, and especially the growing number of shredding companies in the area.

That provision, Sec. 682.3, refers to the "proper disposal of consumer information," and both of those phrases have fairly specific yet still subjective definitions, said Robert Murphy, a partner with the Springfield law firm Bacon & Wilson. He told *BusinessWest* that 'proposal disposal' means implementing and following set policies on shredding, pulverizing, or incinerating documents and materials, while 'consumer information' means, for the most part, credit-application data.

There is a certain amount of ambiguity to the terminology, said Murphy, noting quickly that companies, agencies, and individuals involved with taking credit applications — automobile dealers, mortgage brokers, landlords, government agencies, and the sellers of big-ticket retail items, among



Barry Sanborn, co-owner of Pro-Shred, says FACTA will create new urgency and accountability when it comes to document destruction.

others — would be subject to the FACTA provision, as well as the potential for increased liability and cost of doing business that come with it.

"At issue is a new level of obligation that businesses and individuals who come into the possession of consumer information

Sanborn and his partner, Joe Kelly, operate Wilbraham-based Pro-Shred, a company that specializes in on-site shredding, which means its trucks come to your door to dispose of everything from paper to CDs.

Sanborn said that while he hasn't received many inquiries —

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have when it comes to the disposal of that information in a secure manner so that it doesn't fall into the hands of people who shouldn't have it," said Murphy, noting that many business owners — and their legal representatives — are still trying to figure out what the new law means.

For Barry Sanborn, FACTA will likely mean more business.

or additional accounts — due directly to FACTA, he suspects that he will once the provision takes effect and awareness of its dictates and penalties grows.

"As I look at this legislation, I believe it applies to just about every type of business," he said. "And with the addition of penalties for those who don't comply, I think you'll see business owners

take the necessary steps to protect themselves."

BusinessWest looks this month at FACTA, and specifically its provision regarding disposal of consumer information, and what it all means for area businesses and individuals.

Shred of Evidence

When he first starting looking into the final provision of FACTA, Murphy said he saw a number of reports and press accounts that served to exaggerate its reach.

"I saw one indicating that if you had a nanny and you put her Social Security number in the trash, you could be liable under this measure," he said, adding that while every businesses should be careful with any and all information about employees and customers, FACTA isn't as far-reaching as some make it sound.

But it is a matter to be taken seriously, he said, because it does impact many business groups and it does add new measures of accountability and liability to the equation when it comes to the disposal of consumer information.

The final provision is another in a series of steps designed to curb the dangerous growth of identity theft. Other provisions within FACTA include:

- A measure, which took effect last December, that requires each of the three major credit reporting agencies to provide consumers with a free copy of their own credit report every 12 months;
- The 'National Fraud Alert System.' This provision, which also took effect last December, enables consumers who reasonably suspect that they have been or may be victimized by identity theft, or who are military per-

sonnel on active duty away from home, to place an alert on their credit files. Such an alert will put potential creditors on notice that they must proceed with caution when granting credit;

- Another measure that requires that account numbers on credit card receipts be shortened or 'truncated' (not more than the last five digits) so that merchants, employees, and others who may have access to such receipts do *not* have access to consumers' names and full credit card numbers.

Such steps were deemed necessary by alarming statistics on identity theft, said Murphy, adding that the Federal Trade Commission noted that there 10 million victims of the crime in 2002 alone.

The provision regarding proper disposal of consumer information was conceived to combat what is known as 'Dumpster diving,' he explained, noting that this practice involves rooting through trash receptacles in search of financial information such as Social Security numbers and bank account numbers.

Nearly all companies that handle financial information take some steps to control the spread of such data, said Murphy, but FACTA now requires such action, and the measure has some teeth.

Companies, government agencies, and individuals such as landlords could be subject to lawsuits and fines if they don't properly dispose of consumer information and someone's identity is stolen as

a result. And the fines, ranging between \$100 and \$1,000, will likely be the least of a company's worries, said Murphy.

The greater danger, although it would seem remote, is from a victim of identity theft successfully tracing their problem to a specific company or individual and then filing suit to recover their full monetary losses and accompanying legal expenses.

"Finding out the business that gave up your information is going to be difficult, but not outside the realm of possibility," Murphy explained. "And if that company was cavalier in how it got rid of its information or perhaps it had other people complaining to it that they had lost their information in the same manner ... if you could establish that in a civil case, that would open that company up to punitive damages.

"This can include multiple damages," he continued, "basically taking the number by which you've been harmed through loss of your identity and multiplying it by some factor."

What that multiple might be would depend on the case and the extent of financial and emotional damage, he said, noting that, with identity theft, the latter can be considerable.

"In dealing with victims of this crime, I know that it throws one's life into financial and emotional turmoil," he said. "You've got creditors coming out of the woodwork at you, you have to deal with government bureaucracy in order to try and clear all this up; it's both expensive and time-consuming for the person. And if

someone were to be able to figure out how and where their identity was stolen, that would be a significant case."

With this very real threat of fines and civil lawsuits, Murphy expects businesses to take FACTA and its specific provisions seriously. Implications could run the gamut, from an anticipated run on personal and small-office shredders at business supply stores, to a possible halt on donations of computers to non-profit groups out of fear that information on hard drives may get into the wrong hands.

"I hope that doesn't happen," said Murphy, of a possible freeze on computer donations. "But some people say that once information is on a hard drive, it's on there for good, and that might have a chilling effect on companies."

Sanborn said the latest provision of FACTA should provide another boost for shredding companies, and especially those who do their work on-site and provide written guarantees that the materials intended for destruction have indeed been destroyed.

Shredding outfits have already seen a boost from the Health Insurance Portability and Accountability Act (HIPAA), which targets the health industry and requires destruction of sensitive medical information, said Sanborn, and also from the Sarbanes-Oxley and Gramm-Leach-Bliley bills, which carry similar regulations for the financial services industry. FACTA should put more small businesses into a shredding mode, he said.

"There will now be a lot more awareness of the need to take proper steps to take care of confidential information," he said. "Companies will know that they can't just throw these things away or leave them lying around where they might fall into the wrong hands.

"This is a different age we're living in ... people can't even put up the flag on their mailbox out of fear that information might be stolen," he said. "This is part of living in that age."

Like Sanborn, Murphy said he has not received many inquiries from clients about FACTA, but he expects that will change after June 1. In the meantime, he and his firm are being proactive about the measure.

"We're trying to get information out to clients so they can assess their current practices and determine what they need to do to be in compliance," he said. "We want them to be able to hit the ground running."

The Paper Chase

While there appears to be some gray areas with regard to FACTA and its provisions, some things are clear.

The law will bring a new measure of accountability to document handling and destruction for many business sectors. This is a fact of — or FACTA — life in the new, troubling age of identity theft. ❖

For more information on FACTA, visit <http://www.ftc.gov/os/2004/11/041118disposalfrn.pdf>