

Commentary

Dealers Subject To New FTC Rule – The ‘Disposal Rule’

By Teresa Rohwedder

First it was "privacy policies," then came the "Safeguards Rule" and now, the latest in the line of Federal Trade Commission compliance requirements – the "Disposal Rule." Last year the Federal Trade Commission Safeguards Rule went into effect, with mandatory compliance required by May 23, 2003. The Gramm Leach Bliley Act requires all financial institutions (a term of art defined to include many entities in addition to traditional financial institutions, including car dealers) to ensure the security and confidentiality of their customers' personal information. The FTC's Safeguards Rule implemented the GLBA requirements and applies to, among others, car dealers. If you aren't familiar with this rule, get your head out of the sand; wake up and smell the coffee! Subscribers can find numerous articles on the FTC Safeguards Rule in back issues of Spot Delivery, all available online at www.spotdelivery.com.

This year we have a new FTC rule that applies to car dealers. This latest rule, known as the "Disposal Rule," was issued in its final form on November 24. The FTC extended the effective date to June 1, 2005.

Ever heard of the Fair and Accurate Credit Transactions Act of 2003, or FACT Act or FACTA? It was signed into law last year, December 4, 2003. The FACT Act amended the Fair Credit Reporting Act, imposing new requirements targeted at the ever-escalating battle against identity theft. One of those new requirements deals with the proper disposal of consumer information. The purpose of the FTC's new Disposal Rule, which implements Section 216 of the FACT Act, is "to reduce the risk of consumer fraud and related harms, including identity theft, created by improper disposal of consumer information."

Proper Disposal

Let's cut right to the chase and take a look at what this new rule requires. Here is the rule, verbatim:

Any person who maintains or otherwise possesses *consumer information* for a business purpose must *properly dispose* of such information by taking *reasonable measures* to protect against unauthorized access to or use of the information in connection with its *disposal*.

Simple enough, right? Well, not necessarily. Let's take a look at some of the terminology emphasized above. The definitions of these terms delineate the scope of the rule, which is very important, as you will see.

"Consumer information" means any record about an individual, whether in paper, electronic, or other form, that is a consumer report or is derived from a consumer report. Consumer information also means a compilation of such records. Consumer information does not include information that does not identify individuals, such as aggregate information or blind data."

Consumer information is defined as any record *"that is a consumer report or is derived from a consumer report."* This distinction is important. The Safeguards Rule applies to a much broader body of customer information, but there is no private cause of action associated with that rule (i.e. the rule is enforced by federal regulators, not via private lawsuits). The Disposal Rule applies to a much narrower body of consumer information — information that *is a consumer report or is derived from a consumer report*. Remember, the Disposal Rule implements an amendment to the FCRA. More importantly, the Disposal Rule has a private cause of action associated with it (i.e. it allows for private lawsuits).

"Dispose" or "disposal," as defined in the rule, means: "(1) The discarding or abandonment of consumer information, or (2) The sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored."

Reasonable Measures

What are "reasonable measures"? This is the key phrase in the new rule – it is the *standard* that will be used to judge whether an entity or individual has complied with the rule or not.

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Is this term defined in the new rule? Well, no – we have to keep the lawyers busy, remember? Seriously though – if an attempt were made to define this term, the resulting rule would probably be too rigid. The FTC intentionally doesn't define the standard in order to build flexibility into the rule, which applies to a very broad range of business entities – everything from mammoth corporations to mom and pop small businesses. Although the term is not defined, the FTC provides several examples of what constitutes "reasonable measures."

The FTC states the following caveat with respect to its examples: "These examples are illustrative only and are not exclusive or exhaustive methods of complying with the rule in this part." One of the FTC's five examples talks about the Safeguards Rule. Those of you who are really up on your compliance requirements and are currently compliant with the Safeguards Rule may have asked yourselves why this Disposal Rule is needed if you already have a written plan in place for safeguarding customer information that includes safeguards relating to the disposal of customer information. It's an excellent question, and one that many commenters on the proposed rule asked the FTC.

The FTC's fifth example of "reasonable measures" would include "incorporating the proper disposal of consumer information as required by this rule into the information security program required by the Safeguards Rule." In response to those concerned with the compliance burden associated with the two rules, the FTC expressed the opinion that "companies should easily be able to develop approaches that satisfy the requirements of both rules without undue burdens or costs."

There is definite overlap between the Safeguards Rule and the Disposal Rule. Keep in mind the *scope* of each rule as determined by the type of "consumer information" subject to each rule. If you have a compliance program in place for the Safeguards Rule, you probably need to augment it for purposes of the Disposal Rule by focusing on your company's *disposal* of consumer reports and information derived from those reports.

Service Providers

Let's talk a minute about "who" this new rule applies to. The Disposal Rule states: "This rule applies to any person over which the Federal Trade Commission has jurisdiction, that, for a business purpose, maintains or otherwise possesses consumer information." That would include car dealers, of course. But the "otherwise possesses" portion of the sentence brings in service providers in the disposal business and raises some interesting issues. Your local garbage man probably falls within the scope of this rule.

Consider the following scenario: you hire a third-party service provider to take care of disposing of certain materials that fall under this rule, and while in the service provider's possession, the consumer information is disclosed to persons likely to use it for criminal gain. Who is responsible? The service provider or the owner of the consumer records? Well, it could be the record owner if it didn't take "reasonable measures."

This is the subject of another one of the FTC's examples. First of all, the service provider is covered by the Disposal Rule as well. However, your responsibility under the Disposal Rule amounts to more than just handing over the consumer information and assuming the service provider will do its job properly. "Reasonable measures" in this regard, the FTC says, would require the record owner to (1) select a service provider capable of properly disposing of the consumer information; (2) notify the service provider that such information is consumer information; and (3) enter into a contract with the service provider that requires the service provider to dispose of the information in accordance with the Disposal Rule.

So, the latest pronouncement by your favorite regulator, the Federal Trade Commission, is the Disposal Rule. The Disposal Rule *does not* impose recordkeeping or disclosure or reporting requirements or even require that your "reasonable measures" for disposing of consumer information be reduced to written form, though it might be wise to incorporate your ideas into your written information security plan (Safeguards Rule). The good news is, the compliance burden is not that great, especially if you already comply with the Safeguards Rule. The other good news is that you have until June 1, 2005.

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