

A MATTER OF FACTA

In this month's article, I thought I would take the opportunity to briefly discuss the Fair and Accurate Credit Transactions Act ("FACTA") and its significance to our industry. While FACTA has been around a while and you are likely all familiar with the main provisions of the Act, there has been some recent legislation enacted that is of significant to all of us. I'll give you a brief overview of FACTA and then discuss the new Act that has just been signed into law and what it means for our business.

So what is FACTA again?

On December 4, 2003, President Bush signed into law the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"). The stated purpose of FACTA is to provide consumers, companies, consumer reporting agencies and regulators with important new tools to expand access to credit and other financial services and to enhance the accuracy of the consumers' financial information while helping to fight identify theft. The main provisions of the Act center on combating identity fraud and protecting consumer privacy. Some of the protections include:

1. Giving a consumer the right to a free credit report every year;
2. Requiring that merchants leave off all but the last five digits of credit card numbers and leave off the card expiration date from credit/debit receipts;
3. Creating a national system of fraud detection allowing consumers to make only one call to set off a nationwide fraud alert and establishing a nationwide system of fraud alerts for consumers to place on their credit files; and
4. Requiring regulators to devise a list of red flag indicators of identify theft to use in their compliance examinations and requiring lenders and credit agencies to create similar guidelines to identify patterns common to identify theft in an effort to stop theft before it can cause major damage.

All in all seems like a good piece of legislation for a change, so what's been the problem with FACTA for our industry?

FACTA and the Credit Card Industry

As there always is with new legislation, implementation has been somewhat problematic. One of the issues for our industry has been compliance with the requirement that merchants truncate the credit card number and leave off the expiration date from credit card receipts. The effective date for compliance with this requirement was December 4, 2006. However, it seems that not all merchants got the message.

Beginning in December 2006, plaintiffs' attorneys across the country began filing lawsuits against merchants alleging willful violations of FACTA based largely on the fact

that while in most instances the credit card number was truncated, the expiration date on the printed credit card receipt was still showing. Statutory penalties of between \$100 and \$1,000 per consumer for each willful violation made these lawsuits very attractive to plaintiffs' attorneys and created potential liability in the hundreds of millions or even billions of dollars for those unlucky merchants that were sued.

H.R. 4008

In response to the absurd prospect of merchants facing potentially bankrupting liability from these statutory damages for non-compliance with a provision of FACTA that everyone acknowledged posed no real risk to consumers, the legislature stepped in to help. On June 3, 2008, President Bush signed into law H.R. 4008, the Credit and Debit Card Receipt Clarification Act. This is a narrowly tailored remedy that will only benefit those merchants that properly truncated the credit card numbers on receipts but failed to redact the expiration dates.

What this legislation basically says is that the inclusion of an expiration date on an otherwise FACTA-compliant receipt cannot be deemed a willful violation of FACTA (which had been the basis of many of the class actions that had been filed). Furthermore, the law was retroactive and applied to all receipts issued between December 4, 2004 and June 3, 2008. This new law should lead to the dismissal of many of the class actions that were filed.

So what Now?

After June 3, 2008 any merchant that continues to print non-FACTA compliant receipts and that means truncating the credit card number and leaving off the expiration date, could be subject to enormous statutory damages for willful violation of FACTA. The danger of such a violation being willful is now heightened as a result of the publicity surrounding FACTA lawsuits and the passage of this new law. It will be difficult for a merchant to take the position now that it did not know about this requirement.

Merchants should conduct an immediate review of their point-of-sale systems and the receipts issued to consumers to ensure that they comply with both the account truncation and the redaction of the expiration date requirements of FACTA to ensure they are not a party in the next wave of these FACTA lawsuits.

The only express exception to the FACTA receipt rules are where the sole means of recording a credit/debit card number is by handwriting or by an imprint or copy of the card. Some courts have determined that receipts from on-line sales must also comply with FACTA. As such, companies must ensure that the receipts generated from their online sales as well as ordinary paper receipts comply with the truncation and redaction requirements.

The passage of this new law should serve to eliminate the vast majority of the outstanding cases and could be the end of the FACTA lawsuit deluge. However, I have faith that plaintiffs' attorneys will find something else to take their place.

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