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Donald S. Clark, Secretary
Federal Trade Commission
Office of the Secretary
Room H-159 (Annex J)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20850

Re: FACTA Identity Theft Rule, Matter No. R411011

Dear Mr. Clark:

Nissan Motor Acceptance Corporation ("NMAC") submits its comments on the Proposed Rule defining the terms "identity theft" and "identity theft report" in Fair Credit Reporting Act ("FCRA") § 603(q).¹

NMAC is an automobile finance company that acquires thousands of motor vehicle retail installment sales contracts and motor vehicle leases from automobile dealers each year. Through the acquisition of these contracts, NMAC permits automobile dealers to offer greater numbers of vehicles to consumers than would be possible if dealers retained, funded and serviced these contracts and leases.

In determining whether to acquire the contracts resulting from automobile sales and leases to consumers, NMAC relies upon the accuracy and completeness of the consumer report information provided by consumer reporting agencies ("CRAs"). As a consequence, NMAC is vitally interested in the Commission's rulemaking process to implement the Fair and Accurate Credit Transactions Act ("FACTA") amendments to the Fair Credit Reporting Act ("FCRA").

Although NMAC writes separately as a "user" of consumer reports and a "furnisher" of transaction and experience information to CRAs, NMAC fully supports the comments of the American Financial Services Association ("AFSA"), a national trade association of which NMAC is a member.

INTRODUCTORY COMMENTS

As an indirect financing source for thousands of consumers each year, NMAC is acutely aware of the danger of identity theft and constantly seeks to guard against the unauthorized use of a consumers' personal financial information.

¹ See 15 U.S.C. § 1681a(q)(3)-(4). These definitions were added by section 111 of the Fair and Accurate Credit Transactions Act, 2003 ("FACTA"), Pub. L. No. 108-159, 117 Stat. 1952 (Dec. 4, 2003).

NMAC believes that appropriate definitions of the terms “identity theft” and “identity theft report” are critical to the effectiveness of the FACTA amendments that are intended to address the risk of consumer identity theft and to mitigate its effects, once it occurs. NMAC also believes, as does the Commission, that identity theft reports “could provide a powerful tool for misuse, allowing persons to engage in illegal activities in an effort to remove or block accurate, but negative, information from their consumer reports.”²

NMAC is concerned that the Proposed Rule does not fully address the risk of misuse that the Commission identified. NMAC believes that, as written, the Rule may allow the unscrupulous to turn a system intended to protect consumers into a system that could be easily used to deceive and defraud creditors and furnishers of information to CRAs. As discussed below, this is particularly true with regard to the Proposed Rule’s limitations on a furnisher’s ability to request additional information from a consumer for the purpose of determining the validity of an identity theft report. NMAC believes that these limitations are inconsistent with FACTA § 151, which added subsection “(e)” to FCRA § 609 and which provides the information furnisher with greater discretion in connection with a claim of identity theft to confirm the identity of the consumer and to determine the validity of the alleged identity theft.

Comments Concerning the Definitions of “IDENTITY THEFT” AND “IDENTITY THEFT REPORT”

1. Proposed Rule § 603.3(a): “Identity Theft Report.”

The Proposed Rule defines “identity theft report” as a report: (1) that alleges identity theft with as much specificity as the consumer can provide; (2) is a copy of an official, valid report filed by the consumer with a Federal, State, or local law enforcement agency, the filing of which subjects the person filing the report to criminal penalties relating to the filing of false information if, in fact, the information is false; and (3) may include additional information or documentation that an information furnisher or CRA reasonably requests for the purpose of determining the validity of the alleged identity theft.³

NMAC is concerned that the proposed definition of “identity theft report,” and the examples provided by the Commission do not adequately address the risk of misuse by unscrupulous consumers.

A. Proposed Rule §§ 603.3(a)(1), 603.3(b): specificity requirement.

The Proposed Rule generally requires that a consumer allege an identity theft “with as much specificity as the consumer can provide.”⁴ NMAC agrees, but believes that the Commission’s examples suggest that a consumer may not have to meet the statutory prerequisites for an identity theft report. The Proposed Rule § 603.3(a)(1) should be revised to make clear that a valid “identity theft report” must specifically allege and support each of the following elements of the crime of identity theft: (i) the commission, or attempted commission, of a fraud; (ii) using identifying information of another; (iii) without lawful authority.⁵ This revision should be carried forward in the examples provided by the Commission.

² 69 Fed. Reg. 23371.

³ Proposed Rule § 603.3(a).

⁴ Proposed Rule § 603.3(a)(1).

⁵ Proposed Rule § 603.2(a).

FCRA section 605A(a) requires the consumer's "good faith suspicion" that the "consumer has been or is about to become a victim of fraud or related crime, including identity theft." Because the "*loss* of personal information" is not, by itself, the offense of identity theft, "loss" should not be included in section 603.3(b)(1) as an example of "specificity."

B. Proposed Rule § 603.3(a)(2): the need for a valid, official report.

The Proposed Rules requires that an "identity theft report" be "an official, valid report."⁶ NMAC supports this element of the definition as essential to minimizing those instances when the fraud alert and identity theft protections may be misused by consumers to remove accurate, but negative, credit information from their CRA files. However, NMAC believes that the Commission has inadvertently opened the door for consumer misuse of the process by suggesting that "a consumer could opt to use a copy of a complaint filed with the Commission's Clearinghouse as an "identity theft report" because such a copy would technically meet the statutory definition."⁷ NMAC disagrees.

The Commission concedes that its complaint system "is not designed to vouch for the truth of each individual complaint."⁸ The Clearinghouse is designed to provide a central collection point for identity theft data. The Commission has no procedures to authenticate the information submitted through a Clearinghouse complaint. The consumer alone chooses how much or how little information to provide.

The suggestion that a complaint filed with the Clearinghouse would technically meet the statutory definition of an "identity theft report" is also contrary to the instructions the Commission provides to consumers. The Commission recommends that consumers file *both* a police report *and* a complaint with the Clearinghouse. Finally, nothing on the Commission's website informs the consumer that the consumer would be subject to criminal penalties for providing false information in a filed complaint, something that is required in the Proposed Rule to qualify as an "identity theft report."

NMAC believes that the Commission should address these concerns by: (i) permitting data furnishers to require a fraud affidavit similar to that found on the Commission's website; (ii) making clear that a complaint filed with the Clearinghouse is not an "identity theft report;" and (iii) providing examples of what constitutes "an official, valid report" filed with "a Federal, State or local law enforcement agency.

C. Proposed Rule § 603.3(a)(3): verification of the identity theft report.

The Proposed Rule's verification provisions offer the Commission the most effective means of preventing the misuse of identity theft reports. As a user of consumer reports and a furnisher of consumer report information, NMAC is, therefore, most concerned with these provisions.

Because identity theft reports can result in the blocking or non-reporting of otherwise accurate, negative information, it is critical that furnishers be permitted reasonable discretion to seek additional information relating to the alleged identity theft.

⁶ Proposed Rule § 603.3(a)(2).

⁷ See, 69 Fed. Reg. 23372, n. 9.

⁸ 69 Fed. Reg. 23372, n. 9.

Proposed Rule § 603.3(a)(3) permits a furnisher to request additional information in order to determine “the validity of the alleged identity theft.” NMAC supports this element of the definition of identity theft report. Some of the Commission’s examples suggest a limited ability on the part of furnishers to complete this investigation. Although NMAC appreciates the Commission’s need to consider the consumer’s convenience when formulating appropriate verification procedures, NMAC is concerned that the examples provided by the Commission could be read to mean that requests for additional information are unreasonable even when specific circumstances indicate that particular identity theft reports may be unreliable. NMAC believes that such a limitation is inconsistent with FCRA § 609(e)⁹ which permits furnishers to obtain more certain information from those consumers who submit a request for information relating to the alleged unauthorized use of a means of identification.

Under FCRA § 609, a business entity is required to provide a consumer with “a copy of application and business transaction records” relating to an alleged unauthorized use of a means of identification *only if* the entity is able to verify: (i) the identity of the requesting victim; and (ii) the claim of identity theft.¹⁰ To complete this verification, the entity is given the discretion (i.e., “at the election of the business entity”)¹¹ to request specific information from the victim. To verify the requesting victim’s *identity*, the entity is given the discretion to request the following from the victim:

- (i) a government-issued identification card;
- (ii) personally identifying information of the same type as was provided to the business entity by the unauthorized person; or
- (iii) personally identifying information that the business entity typically requests from new applicants, including any documentation described in (i) and (ii) above.¹²

To verify the *claim* of identity theft, the entity is given the discretion to request the following from the victim:

- (i) a copy of a police report evidencing the claim; and
- (ii) a properly completed—
 - (I) copy of a standardized affidavit of identity theft developed and made available by the Commission; or
 - (II) an affidavit of fact that is acceptable to the business entity for that purpose.¹³

NMAC believes that the Commission’s decision, in the Proposed Rule, to deem requests for additional information “unreasonable” in the context of fraud alerts and information blocking represents an unjustified inconsistency, because the FCRA itself permits furnishers to use their discretion to request such information in similar circumstances.

⁹ 15 U.S.C. § 1681g(e).

¹⁰ FCRA § 609(e)(1); 15 U.S.C. § 1681g(e)(1).

¹¹ FCRA § 609(e)(2)(A)&(B); 15 U.S.C. § 1681g(e)(2)(A)&(B).

¹² FCRA § 609(e)(2)(A); 15 U.S.C. § 1681g(e)(2)(A)

¹³ FCRA § 609(e)(2)(B); 15 U.S.C. § 1681g(e)(2)(B).

NMAC now proceeds to the examples themselves.

i. Proposed Rule 603.3(c)(1): example number 1.

The first example precludes a furnisher from requesting additional information if the identity theft report takes the form of a law enforcement report that includes details about the identity of the officer taking the report, unless there is “an indication that the report was obtained fraudulently” or another identifiable concern.¹⁴

NMAC is concerned that the example deprives furnishers of the ability to respond to suspicious reports. To remedy this, NMAC believes the example should be revised to state that it is reasonable for a furnisher to seek additional information from the consumer when the furnisher reasonably believes that the report was fraudulently obtained, created, or altered. NMAC also believes that any valid identity theft report must connect the alleged identity theft with the information the consumer seeks to block if the report is valid.

ii. Proposed Rule 603.3(c)(2)-(3): examples numbered 2-3.

NMAC agrees with examples two and three affecting information furnishers provided in Proposed Rule § 603.3(c)(2)-(3).

iii. Proposed Rule 603.3(c)(4): example number 4.

This example indicates that a consumer may obtain an *extended* fraud alert by merely providing a “law enforcement report generated by an automated system with a simple allegation that an identity theft occurred.”¹⁵ According to the Commission, in such a case it would not be reasonable for a CRA to require additional documentation or information such as a notarized affidavit.¹⁶

NMAC questions whether a simple allegation submitted on the Commission’s Clearinghouse complaint form constitutes a “law enforcement report generated by an automated system with a simple allegation that an identity theft occurred.” NMAC believes this outcome is not supported by FACTA because the Commission’s complaint form would not always qualify as an “identity theft report.”¹⁷ That is; the Commission’s complaint form will not always have sufficient indicia of authenticity that it will qualify it as an “official, valid report” that subjects the consumer to criminal penalties for filing false information.¹⁸ The example should be revised to state that, unless an identity theft report meets the requirements of section 603.3(a), a furnisher may request additional information to determine its validity.

¹⁴ Proposed Rule § 603.3(c)(1).

¹⁵ Proposed Rule § 603.3(c)(4).

¹⁶ *Id.*

¹⁷ FCRA § 605A(b)(1); 15 U.S.C. § 1681c-1(b)(1).

¹⁸ Proposed Rule § 603.3(a)(2).

iv. Proposed Rule 603.3(c)(5): example number 5.

Example five provides that furnishers are not permitted to obtain additional information from consumers relating to the alleged identity theft if the law enforcement report provided by the consumer contains the information sought by the furnisher.¹⁹

This prohibition fails to consider those instances where a document purporting to be a law enforcement report may have been obtained by the from non-law enforcement authorities; perhaps over the Internet or from forms providers or credit repair organizations. Using such reports, a consumer could provide a furnisher with a report that purports to subject the consumer to criminal penalties for false information but the report may never have actually been filed with a law enforcement agency. NMAC is also concerned that some reports from some jurisdictions may not contain any statement relating to the consumer's criminal liability for the filing of a false report.

Simply stated, NMAC believes there may be many reasons why an information furnisher would want to require a notarized form or other means of authenticating the consumer's representations. Example five should be clarified to permit a furnisher to seek additional information in the form of an affidavit, such as the Commission's form of affidavit or similar form²⁰ when the furnisher reasonably needs the additional information so that the document submitted by the consumer will qualify as an "identity theft report" within the meaning of Proposed Rule 603.3(a).

v. Proposed Rule § 603.3(a)(3): the timing of verification requests.

With respect to all verification requests by an information furnisher, the Proposed Rule requires that the request be made within 5 business days of receipt of an identity theft report.²¹

NMAC believes that this time period should be extended to 10 business days to give furnishers time to review an identity theft report and determine whether additional verification is necessary. NMAC believes that a time period shorter than 10 business days will be counterproductive because furnishers are likely to send out more requests for verification to ensure that they have not overlooked an issue on an identity theft report.

2. Proposed Rule § 603.2(a)-(b): Identity Theft and Identifying Information.

NMAC supports the Proposed Rule's definition of "identity theft" as "a fraud committed or attempted using the identifying information of another person without lawful authority."²² NMAC also supports the definition of "identifying information" found in Proposed Rule § 603.2(b).

¹⁹ Proposed Rule § 603.3(c)(5).

²⁰ See, <http://www.ftc.gov/bcp/online/pubs/credit/affidavit.pdf>.

²¹ Proposed Rule § 603.3(a)(3).

²² Proposed Rule § 603.2(a).

Conclusion

Because “identity theft” and “identity theft report” are critical terms to the implementation of the fraud alerts and the blocking of consumer information under FCRA sections 605A and 605B, NMAC hopes that due consideration will be given to its comments as an automobile finance company that relies upon the accuracy and completeness of consumer report information to acquire thousands of motor vehicle retail installment sales contracts each year.

Most particularly, NMAC hopes that the Commission will recognize NMAC’s need, and that of similar information furnishers, to have the discretion to request a fraud affidavit from a consumer to determine the authenticity of a proffered identity theft report.

Sincerely,

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Legal Department

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*On behalf of Nissan Motor Acceptance Corporation
its division, Infiniti Financial Services
and Nissan-Infiniti LT*

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