



January 5, 2005

Via Courier and Electronic Means
Federal Trade Commission
Office of the Secretary
Room H-159 (Annex O)
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: FACTA Credit Score Fee, Project No. R411004

I. INTRODUCTION AND OVERVIEW

Equifax Information Services LLC (“Equifax”) is a consumer reporting agency that furnishes consumer reports to its financial institution customers, other businesses that have a permissible purpose as defined in the Fair Credit Reporting Act (FCRA), and consumers. It is a subsidiary of Equifax Inc., which is not a consumer reporting agency.

We appreciate the opportunity to comment on the above referenced advanced notice of proposed rulemaking (ANPR) regarding the standard by which the Federal Trade Commission (“Commission”) will undertake its obligation to make the “fair and reasonable fee” determination required of the Commission by § 212(b) of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act).¹ We believe, as discussed further below, that the Commission should rely on a market-based approach in undertaking its responsibilities under § 212(b). We believe that the possible alternatives to a market-based approach identified by the Commission in the ANPR would operate to distort what is currently a healthy consumer market for credit scores.

II. BOTH THE FIXED-FEE AND PRICE CAP APPROACHES ARE FLAWED AND COULD OPERATE TO THE DETRIMENT OF CONSUMERS AND REGULATED CONSUMER REPORTING AGENCIES

As the Commission recognized in the ANPR, § 212(b) of the FACT Act only applies to a portion of the credit score marketplace, regulating consumer reporting agencies that provide credit scores in connection with mortgage lending and risk prediction scores to credit providers.² As such, a fixed-fee or price cap approach to implementing § 212(b) could distort the marketplace, depending on the posture adopted by the unregulated market actors.

¹ 69 Fed. Reg. 64698 (Nov. 8, 2004).

² 69 Fed. Reg. 64698.

We agree with the concerns expressed by the Commission about a fixed fee approach.³ Adoption of a fixed fee, for example, would disadvantage consumer reporting agencies if unregulated actors chose to undercut the fixed-fee price and disadvantage consumers if unregulated actors chose to match the fixed price. If unregulated actors chose to undercut the fixed price, the regulated consumer reporting agencies would not be able to price compete and would lose market share. This would also have the effect of undermining § 212(b) because consumers would be more likely to purchase the less expensive product from unregulated actors rather than purchase the “overpriced” regulated product and consumers might not receive the information that consumer reporting agencies are required to provide, such as the summary of their FCRA rights.

In the alternative, unregulated actors could choose to match the fixed fee (or only slightly undercut it) even if their cost structure would permit them to sell the score at a lower price and still make a profit. In effect, these unregulated actors would reap far higher prices than would be the case in the absence of the fixed fee or the price cap. The detriment under this scenario would be for consumers, who would end up paying more for their score than they would have under market conditions.

The price cap approach could potentially mitigate that risk to consumer reporting agencies outlined above, because this approach would permit the consumer reporting agency to lower prices to price compete with unregulated actors. As the Commission noted, however, it is possible that the price cap, as a functional matter, will operate as if it were a fixed fee (as the Commission suggested as has become the case with the price cap for credit file disclosure established by FCRA § 612(f)).⁴

Adoption of a fixed fee or a price cap also could disadvantage regulated consumer reporting agencies, irrespective of the actions of the unregulated actors, if the fixed fee or cap was set at an artificially low level which effectively required the regulated consumer reporting agencies to provide the mandated credit score disclosure at a financial loss. Such an outcome could also adversely impact unregulated market actors if their cost structure is higher than the Commission established fee or cap because they would face the choice of losing market share to the regulated consumer reporting agencies—which would be required to provide the credit score even at a loss—or selling their product at a loss in an effort to retain market share.

Finally, a fixed fee or price cap approach could operate to discourage innovation or limit the ability of regulated actors to provide the level of customer service they could provide if greater resources were available. In addition, if the fee is set unreasonably low, it could discourage others from entering the market to provide credit scores to consumers.

³ 69 Fed. Reg. 64699.

⁴ 69 Fed. Reg. 64700.

III. A MARKET-BASED APPROACH IS PREFERABLE TO A FIXED FEE OR A PRICE CAP

As discussed above, there are significant drawbacks to both the fixed fee and price cap approaches described in the ANPR--neither of which are necessary or appropriate in a vibrant marketplace. As the Commission noted in the ANPR, there is an “extensive and dynamic market for credit score products.”⁵ Actors in the current marketplace offer a wide array of credit score products, at a wide range of prices, and through a variety of distribution channels.

As such, the Commission should implement its “fair and reasonable fee” mandate under FACT Act § 212(b) in the least intrusive means possible in order to minimize the potential that it will inadvertently distort the healthy marketplace that currently exists for scores.⁶ We believe that the Commission should not unduly limit the flexibility of regulated consumer reporting agencies to set and adjust their pricing in response to market developments.

Therefore, we believe that the Commission should undertake its responsibilities under § 212(b) of the FACT Act to determine whether the fee for a regulated credit score is “fair and reasonable” on a case by case basis. If, as a result of Commission-conducted market surveys or in response to consumer complaints, the Commission believes that a consumer reporting agency is not selling regulated stand-alone scores at a “fair and reasonable” price, the Commission should investigate the matter and bring an enforcement action, if appropriate.

This approach preserves the maximum amount of market flexibility, while still providing the Commission with the ability to ensure that consumers are able to purchase the regulated stand-alone score product at a fair and reasonable price. This approach is also consistent with § 212(b)’s requirement that the Commission ultimately determine whether a fee is fair and reasonable.

This approach is preferable to a fixed-fee or a price cap because there is no “Commission-sanctioned” amount which could effectively set the nationwide price for both regulated and non-regulated products, as discussed above.

We suggest, however, that the Commission pre-establish factors that the Commission would consider in the event that it decided to question the fee charged by a consumer reporting agency for a stand-alone credit score disclosure. Such factors might, for example, include:

- Assessing the score product and the fee charged for that product in terms of the current marketplace, including assessing whether other regulated or unregulated entities are selling comparable credit scores at a comparable fee, and the market shares involved.
- The costs involved in providing the credit score disclosure to the consumer, including any royalty payments that may have to be made to a score developer.

⁵ 69 Fed. Reg. 64700.

⁶ The Commission expressed a desire to protect consumers from non-competitive prices in the event that that competition deteriorates. 69 Fed. Reg. 64701.

- How the cost of the credit score disclosure relates to the price cap for a credit file disclosure. (To our knowledge, in the current marketplace, a credit score-only fee does not exceed the statutory cap for full file disclosure).
- The type of credit score being disclosed (consumer educational or credit score used by lenders, such as mortgage lenders).
- Any special enhancements offered by the regulated entity (*e.g.*, express delivery of a mail request).

Advance publication of the factors that would be considered by the Commission would provide a regulated consumer reporting agency with a means of assessing whether that consumer reporting agency could justify its fee in light of the Commission's criteria.

IV. EFFECTIVE DATE AND ANSWERS TO SPECIFIC QUESTIONS POSED IN THE ANPR

The Commission proposed in the ANPR that the final rule take effect 30 days after its publication in the *Federal Register*. We believe that this is appropriate if the Commission adopts the market-based approach we have advocated above. If the Commission were to adopt a fixed-fee approach or a price cap, however, more time to comply may be necessary depending on whether the amount of the fee or cap requires changes to existing pricing practices or business arrangements.

In addition, the Commission posed a series of specific questions in the ANPR. We have addressed the issues raised by some of these questions in the preceding comments. In addition, it is our understanding that CDIA has separately submitted comments that address the specific questions posed in the ANPR. Equifax's views on these questions are generally consistent with those expressed by CDIA.

V. CONCLUSION

Equifax appreciates the opportunity to provide comments to the Commission on this important ANPR. We urge the Commission to adopt a market-based approach to carry out its obligation to determine "fair and reasonable" fees in accordance with § 212(b) of the FACT Act.

Sincerely yours,

KENT E. MAST
General Counsel
Equifax Information Services, LLC
Equifax Inc.