



**YOUR BUSINESS MUST PROTECT PRIVATE FINANCIAL INFORMATION,
EVEN WHEN DISCARDED—NEW RULE TAKES EFFECT JUNE 1, 2005
BY SUSAN PHILLIPS, ESQ.**

On June 1, 2005, the Disposal Rule becomes effective. The Federal Trade Commission (“FTC”) has made it clear that regardless of a company’s size or industry, it will be subject to the Disposal Rule if the company maintains or possesses consumer information. In doing so, the FTC recognizes that numerous small entities across almost every industry could be subject to the Rule. Businesses most likely to be subject to the Rule include landlords, employers, lenders, insurers, lawyers, utility companies, telecommunications companies, mortgage brokers, automobile dealers and waste disposal companies.

The FTC reports that identity theft is the leading consumer crime in the country with one in twenty stolen identities being taken from discarded garbage. Although privacy and compliance issues are in the forefront of media and trade association attention, consumers continue to be stunned by the lack of caution many companies exercise in handling and disposing of personal information. Most consumers would agree that a federal regulation should not be necessary for companies to exercise caution in disposing of the most intimate of personal and financial details regarding their customers, prospective customers, and employees. Nonetheless, even the most reputable of companies continue to demonstrate sheer carelessness when disposing of sensitive financial information, literally placing documents filled with such data on the curb for public consumption.

With the effective date of the Disposal Rule weeks away, WSLN NewsChannel 10 in Roanoke, Virginia reported the results of an investigation that would shake the confidence of anyone who believes this regulation is perhaps another example of government regulation run amok. Representatives of the news station collected seven bags of trash from Blacksburg businesses without trespassing. The reported contents of the bags were stunning. A plethora of private information was there for the taking, including social security numbers, bank account numbers, credit card numbers, and the like. WSLN NewsChannel 10 interviewed one customer whose entire financial profile was discovered. Paperwork which was marked “confidential” included her name, address, phone number, social security number, amount of income, complete list of assets, and a list of credit card account numbers. A second bag of trash from a different business revealed the name, address, birthdate, and social security number of an employee, her husband, and her two children—four identities up for grabs. There is no question that the risk of identity theft is real. The Disposal Rule is aimed at limiting opportunity for would-be thieves.

If your company uses, maintains, or handles credit reports or information derived from credit reports for any purpose and you do not have in place policies regarding the disposal of that information, there is little time for delay in implementing appropriate policies. If you do have policies in place, it’s time to review them to ensure the policies comply with the new Federal Rule, which is not limited to paper disposal but also covers electronic media.¹

¹ Businesses covered by the Safeguard Rule having compliant written policies in place have little new to worry about. By including consumer information within the scope of policies implemented to meet the mandates of the Safeguard Rule, a company covered by the Gramm-Leach-Bliley Act should already be in compliance with the Disposal Rule. The Securities and Exchange Commission (“SEC”) has amended Regulation S-P, Rule 30 by enacting its Disposal Rule as subsection b. Other than requiring that the policies regarding disposal be written (as does the Safeguard Rule), the SEC’s enactment of the Disposal Rule is substantially similar to the FTC’s Rule.

The Disposal Rule was promulgated to comply with the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (the "FACT Act"). Specifically, Section 216 of the FACT Act requires that "any person that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived from consumer reports for a business purpose properly dispose of any such information or compilation." 15 U.S.C. § 1681w(a)(1). The FACT Act directs the FTC, the SEC, the National Credit Union Administration and all Federal banking agencies to coordinate in promulgating rules regarding disposal of consumer information. After the affected agencies conferred on the Section 216 requirements, the FTC issued its proposed Disposal Rule in April 2004, and after the comment period closed, issued its Final Rule with only slight modifications in November 2004.

Failure to comply with the Rule, either willfully or negligently, could result in civil liability and penalties. 15 U.S.C. §§ 1681(n)-(o), (s). When the Rule is violated, consumers may seek actual damages, which could be significant if the violation results in a stolen identity. Further, statutory damages of \$1,000 per consumer affected by the violation, and fees are available. The states as well as the Federal government may enforce the Rule. When Federal enforcement is pursued, \$2,500 per violation may be assessed.

Under the Rule, disposal includes discarding or abandoning consumer information, as well as the sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored. Title 16, Chapter I of the Code of Federal Regulations has been amended to include the Rule in Part 682.

As previously noted, the Rule becomes effective June 1, but don't panic. While the Rule is broad in scope in terms of the entities covered, its provisions are flexible and geared toward a standard of reasonable compliance. The Rule's flexibility balances the broadness of its reach into countless industries and recognizes that even the smallest of companies will be affected. The final Rule mandates that anyone over which the FTC has jurisdiction who maintains or possesses consumer information for a business purpose 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. The Rule embodies several examples of reasonable measures as guidance to covered entities. Full text of the Rule can be found at http://www.jackscamp.com/Publications/Disposal_Rule.pdf.

There is little room for "maneuvering" beyond the reach of the Rule if an entity has or uses consumer information. The "business purpose" qualifier will not help. The preamble to the Rule makes it clear that "business purpose" is to be read in its broadest sense and covers any person having consumer information other than the individual consumer who has obtained his own report.

While information that does not identify a particular individual such as aggregate information or blind data is not covered by the Rule, the Commission takes a broad view on the scope of "personal identifiers" that will be covered. A rigid definition of "personal identifiers" is not included in the Rule as the Commission believes that data elements that are not inherently identifying can, in combination, identify particular individuals. Nonetheless, the Commission expressly noted that personal identifiers go beyond a person's name and include social security numbers, driver's license numbers, phone numbers, physical addresses, and email addresses.

The FTC has repeatedly acknowledged that there are few foolproof methods of records destruction, and emphasizes that covered entities must consider their own unique circumstances when determining how to best comply with the Rule. It may be that a small entity could be in compliance through the mere expenditure of \$50 through the simple use of a \$25 shredder purchased at a local discount store, along with the purchase of a \$25 wiping utility used to overwrite or wipe computer media. In fact, given the guiding examples incorporated in the Rule, compliance is possible at virtually no cost using a match to burn paper files and a hammer to

smash computer media and hard drives. Of course, other entities will likely require the engagement of a disposal vendor contracted to meet the Rule's requirements. Entities covered by the Rule are expected to consider the sensitivity of the consumer information involved, the nature and size of the entity's operation, the costs and benefits of different disposal methods, and relevant technological changes when developing reasonable disposal measures.

Importantly, the Commission believes that "reasonable measures" are very likely to require that covered entities establish and implement policies and procedures governing disposal as well as appropriate employee training. Where the size of an entity warrants written protocols and/or employee training, there should be periodic follow-up and auditing. Policies should be reassessed periodically to ensure they remain consistent with governing authority, current technology and the entity's business goals. The fact that employees have reviewed and expressed an understanding of the policy should be documented. Further, as with all compliance measures, employees should receive "refresher" training and/or literature regarding compliance protocols, particularly when a policy or procedure is amended. Importantly, a company should audit compliance with its disposal policies to ensure that employees as well as vendors are disposing of consumer information consistent with the policies.

While companies in most industries are being increasingly burdened by a seemingly constant stream of regulations - - federal, state, and local - - aimed at compliance issues, the Disposal Rule is considered by many to implement sufficiently flexible controls to counter the ingenuity of those seeking to misuse consumer information.

Jackson & Campbell designs compliance programs tailored to client's needs and then helps them draft, implement, and audit appropriate compliance policies and protocols. Our experienced attorneys and staff can also help your business incorporate the mandates of the Disposal Rule into your existing compliance program. We can evaluate your current policies and/or draft new ones to ensure that your business complies with the many Federal, state, and local regulations governing your industry.

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