

What You Need to Know About FACTA (the *Fair and Accurate Credit Transaction Act*)

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A new wave of consumer class action suits is pouring into the California courts and some restaurants are targets.

Recent suits against restaurants allege that businesses have printed prohibited credit and debit card information on receipt print-outs. These new lawsuits use the Fair and Accurate Credit Transactions Act, or “FACTA,” as their basis, with specific regard to what are called “truncation” requirements. This specific provision of FACTA requires that machine-generated debit or credit card receipts printed after December 4, 2006 do not contain more than the last five digits of the card, nor can they show the expiration date of the card. The class representatives allege that this prohibited information was printed on their receipts. Because there is almost strict liability for a violation of FACTA, and plaintiffs can recover statutory damages and attorneys’ fees for each violation, more class actions are sure to follow.

How does this affect the restaurant industry?

Under FACTA, all merchants who use electronic credit and debit card machines are responsible for complying with truncation requirements. Thus, the restaurant industry as a whole should comply.

FACTA background

FACTA (Pub. L. 108-159, 111 Stat. 1952) is a law designed to reduce the risk of consumer fraud and identity theft created by improper use or disposal of consumer credit information. FACTA amended the consumer protection provisions already present in the Fair Credit Reporting Act (15 U.S.C. §§ 1681-1681u) (“FCRA”). FACTA applies to every person and business in the United States. It requires the destruction of consumer information before it is discarded, and requires merchants who use credit and debit card machines, or an “electronic payment machine,” to ensure print-outs contain no more than the last five digits of the credit or debit card and to exclude the card’s expiration date. (California’s equivalent of these provisions is found in Civil Code section 1747.09). Part of FACTA enforces the proper destruction of consumer information, such as name, address, social security number and credit information. Also included in FACTA is the requirement to properly destroy data compiled from this information. Anyone in possession of any such information must take “reasonable measures” to protect against unauthorized access or use of the information in connection with its disposal. The Federal Trade Commission (FTC) defines “reasonable measures” in this context to mean “burning, pulverizing or shredding of papers containing consumer information” or entering into “a contract with another party engaged in the business of record destruction to dispose of material, specifically identified as consumer information, in a manner consistent with this rule.”

FACTA also prohibits any person who accepts credit or debit cards from printing the expiration date or more than the last five digits of the card on any terminal-generated receipt provided to the cardholder at the point of sale. Excluded from FACTA are transactions in which the sole means of recording the person's credit or debit card number is by handwriting or by an imprint or copy of the card. The legislative history for these provisions states that the truncation provision was designed to protect consumers by limiting "the number of opportunities for identity thieves 'to pick off' key card account information."

Although the law was signed by President George W. Bush on December 4, 2003, different sections have had different effective dates. With regard to truncation requirements, the relevant FACTA provisions came into effect three years after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is in use before January 1, 2005 (i.e., December 4, 2006); and one year after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is first put into use on or after January 1, 2005 (i.e., December 4, 2004). In fact, a common thread among the plaintiff's suits is the reference to the defendants having had three years to comply with truncation requirements.

Failure to comply

Failure to comply with the law, even if unintentional, can subject the violator to substantial penalties and civil exposure. In some cases, consumers may be entitled to their actual damages as a result of a violation of the Act, as well as statutory damages of not less than \$100 and not more than \$1,000 for each consumer affected by the violation of the Act. Additionally, class actions may be brought to enforce the provisions of the Act, in which the consumers seek massive statutory damages. Statutory provisions also allow for the imposition of punitive damages, and recovery of attorney fees and costs by successful plaintiffs.

What's next?

With the December 4, 2006 deadline having recently passed, counsel for plaintiffs have wasted no time in filing lawsuits alleging violations of the FACTA amendments. Greenberg Traurig is working with several retailers nationwide on the FACTA requirements, and where necessary is helping businesses defend against these suits. Although there are procedural and substantive defenses to all of the FACTA claims we have seen, the most important message for restaurants is to make sure that the receipts they generate do not contain more than the allowed credit card numbers or expiration dates.

At the state level, Senate Bill 1699 by former Senator Debra Bowen (D-Marine del Rey) adds to the truncation requirements of FACTA by prohibiting the printing of more than the last five digits of a credit card number on any credit card receipt *kept* by merchants.

Senate Bill 1699 becomes effective January 1, 2009 and is seen as an additional step in protecting consumers from credit card fraud.

The California Restaurant Association worked with the author of the bill to ensure this law does not include batch summary reports or other internal documents that may be used for internal administrative purposes. Therefore, restaurateurs may still have the full credit card number printed out on documents, other than receipts, such as those needed for tax purposes or in order to comply with CISP requirements.

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