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Establishing Appropriate Liability Under the Fair and Accurate Credit Transactions Act

I. INTRODUCTION

Michelle Brown was the typical girl next door. She attended a respected university, never had any trouble with the law, and, upon graduation, became a successful international banker.¹ However, after her rental application was stolen from her landlord's leasing office, everything Michelle had worked so hard to achieve was stolen from her in an instant.² In January 1999, Michelle received a call from a Bank of America representative inquiring about a late payment for a truck she had recently purchased.³

Knowing she had not bought a car recently, Michelle took appropriate steps to remedy the problem by canceling her credit cards and having fraud alerts placed on her credit report.⁴ This should have been the end of Michelle's nightmare, but the damage had already been done. Not only had the identity thief stolen Michelle's good credit to allegedly purchase a \$32,000 pick-up truck and \$5,000 worth of liposuction, the thief had also used Michelle's identity to engage in drug trafficking, ultimately presenting herself as Michelle Brown in front of a federal judge when charged with smuggling three thousand pounds of marijuana across the border.⁵

Michelle refers to the ordeal of battling this "true name fraud"⁶ and criminal identity theft⁷ as "by far the darkest, most

1. *Identity Theft: How to Protect and Restore Your Good Name: Hearing Before the Subcomm. on Tech. Terrorism, & Gov't Info. of the H. Comm. on the Judiciary*, 106th Cong. 23, 25 (2000), available at <http://www.gpo.gov/fdsys/pkg/CHRG-106shrg69466/pdf/CHRG-106shrg69466.pdf> [hereinafter *Identity Theft*] (statement of Michelle Brown, Identity Theft Victim).

2. *Id.* at 24.

3. *Id.* at 23.

4. *Id.*

5. *Id.* at 24.

6. Heather M. Howard, Note, *The Negligent Enablement of Imposter Fraud: A*

challenging and terrifying chapter of my life.”⁸ Michelle is just one example of the approximately 100 million persons whose identities are put at risk each year as a result of this violative act.⁹

The Fair and Accurate Credit Transaction Act of 2003 (FACTA)¹⁰ provides mechanisms through which consumers can combat true name fraud.¹¹ True name fraud is defined as when a “thief us[es] the victim’s identifying information to open new accounts in the victim’s name.”¹² FACTA’s Red Flags Rule¹³ (The Rule) imparts preventative measures to reduce the occurrence of the fraud. The Rule requires qualifying businesses and institutions¹⁴ to implement preventative programs to alert these institutions to the “red flags”¹⁵ that might indicate that an identity thief is attempting to use a customer’s information.¹⁶ Provided that

Common-Sense Common Law Claim, 54 DUKE L.J. 1263, 1266 (2005) (“true name fraud...occurs when a thief use[s] the victim’s identifying information to open a new account in the victim’s name.”) (original quotation marks omitted) (quoting Holly K. Towle, *Identity Theft: Myths, Methods, and New Law*, 30 RUTGERS COMPUTER & TECH. L.J. 237, 242 (2004)).

7. Thomas P. Vartanian & Travis P. Nelson, *Identity Theft and Financial Institutions*, COMM. ON BANKING L. NEWSL. (ABA/BUS. L. SEC., COMM. ON BANKING L., CHICAGO, I.L.), SEPT. 2006, at 2, available at <http://www.abanet.org/buslaw/newsletter/0057/materials/pp7.pdf> (defining criminal identity theft as providing another individual’s personal information to a law enforcement official during the course of an investigation or upon being arrested).

8. *Identity Theft*, *supra* note 1, at 23, 25 (statement of Michelle Brown, Identity Theft Victim).

9. *Identity Theft Victim Statistics*, IDENTITYTHEFT.INFO, <http://www.identitytheft.info/victims.aspx>.

10. Fair and Accurate Credit Transaction Act of 2003, 15 U.S.C. § 1681 (2006).

11. See Fair and Accurate Credit Transaction Act, sec. 112(a), § 605A (codified as amended at 15 U.S.C. § 1681) (fraud alerts and active duty alerts), sec. 113, § 605 (codified as amended at 15 U.S.C. § 1681c(g)) (truncation of credit and debit card account numbers), sec. 114, § 615 (codified as amended at 15 U.S.C. § 1681m(e)) (establishment of procedures for the identification of possible instances of identity theft), sec. 115, § 609(a)(1) (codified as amended at 15 U.S.C. § 1681g(a)(1)) (authority to truncate social security numbers).

12. Howard, *supra* note 6, at 1266 (original quotation marks omitted) (quoting Holly K. Towle, *Identity Theft: Myths, Methods, and New Law*, 30 RUTGERS COMPUTER & TECH. L.J. 237, 242 (2004)).

13. Fair and Accurate Credit Transaction Act, sec. 114, § 615 (codified as amended at 15 U.S.C. § 1681m(e)).

14. Duties Regarding the Detection, Prevention, and Mitigation of Identity Theft, 16 C.F.R. § 681.1(a) (2009) (explaining that financial institutions and creditors are covered by The Rule).

15. *Id.* § 681.1(b)(9) (“Red Flag means a pattern, practice, or specific activity that indicates the possible existence of identity theft.”).

16. *Id.* § 681.1; *The Red Flags Rule: Frequently Asked Questions*, FED. TRADE

the amendments discussed below are made to FACTA's damages and preemption provisions, the statute will provide an appropriate and sufficient cause of action for victims of identity theft, leaving no reason to expand, or even utilize, tort law as a means of recourse for true name fraud resulting from an institution failing to detect and prevent red flag activity.¹⁷

At its simplest, identity theft is the misappropriation of another's personal information, including his or her name, address, and Social Security number.¹⁸ Identity theft is a rapidly increasing fraudulent act.¹⁹ Rising rates of electronic communication and difficult economic times only serve to exacerbate the problem,²⁰ making identity theft easier to execute and identities with favorable credit more valuable to thieves.²¹ Because of the nature

COMM'N, <http://www.ftc.gov/bcp/edu/microsites/redflagrule/faqs.shtm>.

17. See *The Red Flags Rule: Frequently Asked Questions*, *supra* note 16 (explaining that currently there is no private cause of action available under FACTA).

18. Howard, *supra* note 6, at 1264-65 (quoting Martha A. Sabol, *The Identity Theft and Assumption Deterrence Act of 1998: Do Individual Victims Finally Get Their Day in Court?*, 11 LOY. CONSUMER L. REV. 165, 166 (1999)); Brandon McKelvey, *Financial Institutions' Duty of Confidentiality to Keep Customer's Personal Information Secure from the Threat of Identity Theft*, 34 U.C. DAVIS L. REV. 1077, 1082 (2001) ("Identity theft occurs when someone uses another individual's personal information for fraudulent purposes.").

19. See Press Release, Texans Credit Union, Texans Credit Union Provides Identity Protection for Checking Accounts (Oct. 1, 2006), www.identityfraud.com/PDF/Texans%20IF1%20PressRelease.pdf ("The number of personal records being lost or stolen is alarming by any standards. Recent surveys . . . indicate that there were 8.9 million victims of identity theft last year."); Brendan Delany, Comment, *Identity Theft: The Fair Credit Reporting Act and Negligent Enablement of Imposter Fraud*, 54 CATH. U. L. REV. 553, 554 (2005) (stating that identity theft is a rapidly accelerating white collar crime).

20. Stephen L. Wood & Bradley I. Schecter, *Identity Theft: Developments in Third Party Liability*, SEC. OF LITIG. CONSUMER & PERS. RTS. NEWSL. (ABA/Sec. of Litig., Consumer & Pers. Rts. Comm., Chicago I.L.), Summer 2002, available at http://www.jenner.com/files/tbl_s20Publications/RelatedDocumentsPDFs1252/380/Identity_Theft.pdf ("Identity theft has become more and more common . . . as the Internet has opened new avenues for access to personal data . . ."); *Recession Breeds Identity Theft- Are You Ready?*, IDENTITYTHEFTLABS (Sept. 24, 2009), <http://www.identitytheftlabs.com/identity-theft/recession-breeds-identity-theft-are-you-ready/> ("[T]he recession can breed identity theft. It's a sad but true fact that as more people are out of work more tend to turn to crime in order to make ends meet.").

21. Timothy L. O'Brien, *Officials Worried over a Sharp Rise in Identity Theft*, N.Y. TIMES, Apr. 3, 2000, at A1, available at <http://www.nytimes.com/2000/04/03/world/officials-worried-over-a-sharp-rise-in-identity-theft.html> ("The Social Security Administration attributes the rise to the

of the crime, the Federal Trade Commission (FTC)²² is unable to definitively measure the full extent of the crime's occurrence;²³ however, unofficial estimates suggest that fifteen million United States citizens are victims of identity theft each year with aggregate damages exceeding \$50 billion annually.²⁴ The pervasiveness of the crime results in deleterious outcomes for individuals and financial institutions alike.²⁵

Part II²⁶ of this Note will briefly examine and define the nature of identity theft and the prevalent threat posed by the crime for the nation's financial institutions²⁷ and, most importantly, consumer victims.²⁸ Part III²⁹ will analyze the impact of FACTA

ease with which Social Security data can be collected on the Internet.”); Andrew Stutzman, *Stutzman on a Bank's Duty to a Non-Customer: Know Your Customer (and Non-Customers) – You May have a Duty to Them Both Where Someone's Identity is Stolen*, LEXISNEXIS EMERGING ISSUES, Oct. 20, 2008 (explaining the increasing value of identities that have good standing with their creditors); Rob Leiber, *Don't Tell Facebook Friends that You are Going Away*, N.Y. TIMES (Sept. 15, 2010, 12:55 PM), <http://bucks.blogs.nytimes.com/2010/09/15/dont-tell-facebook-friends-that-youre-going-away/> (stating that Facebook's increasing popularity exposes its users to identity theft by allowing strangers to view the birthdays of the site's users).

22. Federal Trade Commission Act, 15 U.S.C. § 43 (2006) (stating that the FTC has a broad range of authority, including the power to police anticompetitive practices and enforce consumer protection laws).

23. See Jennifer Lee, *Identity Theft Victimizes Millions, Costs Billions*, N.Y. TIMES, Sept. 4, 2003, at A20, available at <http://www.nytimes.com/2003/09/04/us/identity-theft-victimizes-millions-costs-billions.html>.

24. *Identity Theft Victim Statistics*, *supra* note 9 (“On a case-by-case basis, . . . approximately 7% of all adults have their identities misused with each instance resulting in approximately \$3,500 in losses.”); see also Expert Report and Affidavit at 7, *Root v. Scholastic Book Fairs, Inc.*, No. 07-61632-Civ-Ungaro/Simonton (S.D. Fla. dismissed June 6, 2008), available at 2008 WL 2849190 (“The growth of identity fraud has become such as [sic] serious social and economic problem that the Federal Trade Commission . . . established a clearinghouse to assist victims of identity theft and document their cases in a data base beginning in 1999.”).

25. See McKelvey, *supra* note 18, at 1085-86 (explaining that financial institutions and insurance companies are liable for any losses perpetuated by the fraud; however, individuals are responsible for restoring any reputational or credit damage incurred).

26. See *infra* Part II.

27. See Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681a(t) (2006) (internal quotation marks omitted) (“[A] financial institution [is] a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds a transaction account . . . belonging to a consumer.”).

28. Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation, 16 C.F.R. § 681 app. a (Supp. A 2009) (stating that while identity theft is most frequently targeted against individual consumers, that commercial customers of financial institutions and creditors are also covered by the Rule).

and how it has changed the mechanisms utilized to fight true name fraud by implementing stricter preventative measures.³⁰ Specifically, in relation to these mechanisms, this section will examine the efficacy of The Rule³¹ and argues that it is necessary and useful in protecting against identity theft facilitated by a financial institution's misconduct in relation to The Rule. Part IV³² will discuss the inadequacy of tort claims as a means of compensating and providing justice for consumer victims of identity theft. Courts have been reluctant to recognize specialized tort law claims such as negligent enablement of imposter fraud due to a financial institution's lack of duty to a consumer victim and the unforeseeability of his or her harm.³³ Finally, in the interest of uniformity and consistency, Part V³⁴ of this Note will propose several amendments to FACTA to further supplement the already commensurate statute to provide for stricter federal preemption and larger, more consistent damages awards.

II. CURRENT LOOK AT IDENTITY THEFT

There are two predominant types of identity fraud: criminal identity theft³⁵ and true name fraud.³⁶ While criminal identity theft is a serious crime and of concern to consumers, it is not the focus of the discussion here because its prevention is best established through stricter "investigative and prosecutorial strategies" currently being coordinated by the Secret Service and the

29. See *infra* Part III.

30. See Fair and Accurate Credit Transaction Act of 2003, 15 U.S.C. § 1681 (2006).

31. *Id.* § 1681m(e).

32. See *infra* Part IV.

33. See, e.g., *Eisenburg v. Wachovia Bank, N.A.*, 301 F.3d 220, 224-25 (4th Cir. 2002) (claiming no duty was owed to the third party victim); *Smith v. AmSouth Bank, Inc.*, 892 So.2d 905, 908-10 (Ala. 2004) (stating that in order to prevail on a negligence claim, plaintiff must prove the existence of a duty); *Huggins v. Citibank, N.A.*, 585 S.E.2d 275 (S.C. 2003) (holding that the relationship between creditor and victim is too attenuated to support an affirmative duty).

34. See *infra* Part V.

35. Vartanian & Nelson, *supra* note 7, at 2.

36. Howard, *supra* note 6, at 1266 (original quotation marks omitted) (quoting Holly K. Towle, *Identity Theft: Myths, Methods, and New Law*, 30 RUTGERS COMPUTER & TECH. L.J. 237, 242 (2004)).

Department of Justice to educate local and federal law enforcement officials.³⁷ Instead, the focus here is on the true name fraud form of identity theft and the statutory changes necessary to ensure victims remuneration for their losses as a result of the fraud.³⁸

There are three potential ways to combat both types of identity theft. The first means is through criminal law in an action brought by federal or local government against the identity thief.³⁹ These actions are defined by the applicable criminal laws which generally require fraudulent misuse of an individual's identity before the theft is legally considered a crime.⁴⁰ The second way is through action by a federal administrative agency designated to enforce a specific federal statute.⁴¹ Such a mechanism is prescribed by FACTA as the means of recourse for consumer victims of a financial institution's noncompliance with The Rule.⁴² Finally, as a means of counteracting identity theft, a consumer can bring an action pursuant to state common law against a negligent financial institution, presumably because the thief is either unidentified or judgment proof.⁴³ These common law actions may be grounded either in tort law or contract law, depending upon how the specific

37. *Identity Theft Penalty Enhancement Act, and the Identity Theft Investigation and Prosecution Act of 2003: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 16 (2004), available at <http://www.gpo.gov/fdsys/pkg/CHRG-108hhrg92671/pdf/CHRG-108hhrg92671.pdf> [hereinafter *Identity Theft Penalty Enhancement Act Hearing*] (statement of Larry D. Johnson, Special Agent in Charge, Criminal Investigative Division, U.S. Secret Service).

38. See *infra* Parts IV-V.

39. See Kristen S. Provenza, Note, *Identity Theft: Prevention and Liability*, 3 N.C. BANKING INST. 319, 319-322 (1999) (delineating the various criminal statutes utilized for the prosecution of identity theft).

40. *Id.* (describing some of the criminal statutes applicable to identity theft).

41. See Kurt M. Saunders & Bruce Zucker, *Counteracting Identity Fraud in the Information Age: The Identity Theft and Assumption Deterrence Act*, 8 CORNELL J.L. & PUB. POL'Y 661, 661 (1999) (explaining that the Federal Trade Commission has been appointed to enforce the Identity Theft Assumption and Deterrence Act of 1998 which makes identity theft a federal crime punishable with up to twenty-five years in prison and maximum penalties of \$250,000).

42. Fair and Accurate Credit Transaction Act of 2003, sec. 312, § 623 (codified as amended at 15 U.S.C. § 1681s (2006)).

43. Provenza, *supra* note 39, at 330.

state statute is drafted.⁴⁴ This Note primarily focuses upon this course of action, specifically claims pursuant to tort law.⁴⁵

When identity theft occurs, there are two parties harmed by the act: the financial institution that must absorb the financial loss and the individual whose identity was stolen.⁴⁶ The Rule is formulated to protect both parties.⁴⁷ However, in the context of this Note and its discussion of inadequate tort claims, the consumer seeking compensation under tort law is the applicable victim. Complex issues arise as to how adequate protection can be provided for both parties. In order to gain a full understanding of The Rule and its procedures and protections, both parties' harm will be discussed herein; however, particularized attention is paid to the harm incurred by consumer victims.⁴⁸

In regard to financial institutions, there are two primary ways these institutions are disadvantaged as a result of the identity theft of a consumer.⁴⁹ The first detriment is the negative reputational effect suffered as a result of the financial institution's inadequate precautions against identity theft.⁵⁰ This problem is more acute in the current turbulent economy, since financial institutions need good standing in the community in order to remain competitive.⁵¹ Second, financial institutions are accountable for any losses that result from identity theft and thus potentially face insurmountable debts ensuing from the crime.⁵²

44. *Id.*

45. *See infra* Parts IV-V.

46. *See* Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation, 16 C.F.R. § 681 app. a (Supp. A 2009) (discussing that The Rule requires the establishment of procedures designed to protect customers and the safety and soundness of the financial institution or creditor).

47. *See id.*

48. *See* Fair and Accurate Credit Transaction Act of 2003, sec. 114, § 615 (codified as amended at 15 U.S.C. § 1681m(e) (2006)) (focusing upon the harm incurred by consumers as opposed to the costs to financial institutions).

49. *See* Vartanian & Nelson, *supra* note 7, at 1.

50. *See id.*

51. *Identity Theft Penalty Enhancement Act Hearing, supra* note 37 (statement of Larry D. Johnson, Special Agent in Charge, Criminal Investigative Division, U.S. Secret Service).

52. McKelvey, *supra* note 18, at 1086-87; Provenza, *supra* note 39, at 322 (stating that because the financial institution must absorb the costs of the thief's expenses, the customer victim is often legally not viewed as a victim of identity theft).

As discussed above,⁵³ identity theft consumer victims also face grave financial, emotional and temporal consequences at the hands of the thief.⁵⁴ Thus, while financial institutions absorb the actual monetary damages arising from the fraud, the long-term personal effects on the consumer victim are usually more crippling and costly.⁵⁵ Frequently, the costs incurred by the consumer victim far outweigh those of the financial institution once the economic benefits afforded the financial institution and the emotional toll upon the consumer are taken into consideration.⁵⁶

FACTA is equipped to eradicate true name fraud in ways that common law tort claims fall short.⁵⁷ FACTA attacks true name fraud primarily through the *ex ante* mechanism of Identity Theft Prevention Programs (ITPP) created by The Rule, which should lead to a reduction of true name fraud.⁵⁸ Consumers

53. See *supra* Part I.

54. See McKelvey, *supra* note 18, at 1087 (“For some victims, the exhausting process of rehabilitating their credit can result in lost wages, increased stress and even health problems.”).

55. See *Identity Theft*, *supra* note 1 (statement of Michelle Brown, Identity Theft Victim); Patrick v. Union State Bank, 681 So. 2d 1364, 1366 (Ala. 1996) (describing how Bridgette Patrick spent approximately ten days behind bars for crimes another committed with her stolen identity); *Identity Theft Penalty Enhancement Act Hearing*, *supra* note 37, at 2 (statement of Rep. Howard Coble, Member, H. Comm. on the Judiciary) (explaining that often stolen identities are used to commit serious crimes including the trafficking of narcotics and mail and wire fraud which can have debilitating effects upon one’s credit and general well being).

56. ORRIN G. HATCH, IDENTITY THEFT ASSUMPTION AND DETERRENCE ACT REPORT TOGETHER WITH ADDITIONAL VIEWS, S. DOC. 105-274, at 6 (2nd Sess. 1998) (“The Federal Trade Commission testified that the identity theft victims suffer real harm, with the effect of the theft being ‘significant and long-lasting.’”) (original quotation marks omitted); see also Chris Jay Hoofnagle, *Internalizing Identity Theft*, 13 UCLA J.L. & TECH. 2, 35 (2009) (discussing that it is more financially favorable for a financial institution to issue accounts to all individuals who apply, despite warning signs to the contrary, because the external economies allow them to make money while the victims absorb much of the cost of reinstating their credit); Howard, *supra* note 6, at 1266 (“In a competitive market, these institutions fear that a more rigorous screening process might scare consumers away to competitors who do not take such measures.”).

57. See *Identity Theft Penalty Enhancement Act Hearing*, *supra* note 37, at 23-24 (testimony provided by Robert Ryan, Senior Director of Government Regulations, TransUnion, LLC).

58. Duties Regarding the Detection, Prevention, and Mitigation of Identity Theft, 16 C.F.R. § 681.1(d)(1) (2009) (“Each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Identity Theft Prevention Program . . . that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account.”).

victimized by true name fraud will receive greater vindication with less time and anxiety, if the amendments proposed to FACTA in this Note are adopted.

III. THE EVOLUTION OF IDENTITY THEFT

A. Initial Federal Legislative Initiatives

The government utilizes legislation to combat the growing concern of identity theft and promote consumer privacy.⁵⁹ These efforts began some forty years ago with the Fair Credit Reporting Act of 1970 (FCRA),⁶⁰ which was passed in an effort to ensure “accuracy and confidentiality”⁶¹ in connection with credit reports.

The Right to Financial Privacy Act (RFPA)⁶² was enacted eight years later in 1978, and denied the federal government access to citizens’ personal financial records without their express consent.⁶³ This statute did little to protect against identity theft, however, since the majority of true name fraud is committed by private citizens who manage to steal the relevant information from a financial institution or a creditor’s online database.⁶⁴

In 1998, the Identity Theft and Assumption Deterrence Act⁶⁵ made it “a felony to possess, transfer or produce personal identification information with unlawful intent.”⁶⁶ This altered the crime from one against a financial institution whose establishment was compromised by the theft to one against the consumer victim whose identity was stolen.⁶⁷ However, even though, as a result of

59. See *Identity Theft Penalty Enhancement Act Hearing*, *supra* note 37, at 1 (statement of Rep. Howard Coble, Chairman, H. Comm. on the Judiciary) (discussing the threat posed by identity theft and the need for congressional action to combat the risk).

60. Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681 (2006).

61. *Stafford v. Cross Country Bank*, 262 F.Supp. 2d 776, 781 (W.D. Ky. 2003).

62. Right to Financial Privacy Act, 12 U.S.C. § 3402 (2006).

63. *Id.*

64. See *Identity Theft*, *supra* note 1 (statement of Michelle Brown, Identity Theft Victim) (claiming that the system in place in 1998 clearly failed her).

65. Identity Theft Assumption and Deterrence Act, 18 U.S.C. § 1028 (2006).

66. McKelvey, *supra* note 18, at 1092. See, e.g., Howard, *supra* note 6, at 1280 (explaining that while the Act might aid identity theft victims in collecting from identity thieves, it does not assist victims in their efforts to collect damages from financial institutions).

67. See HATCH, *supra* note 56, at 4 (stating that two of the purposes of the Act

the statute, identity theft was properly focused as a harmful act against an individual victim, the penalties are directly proportional to the severity of the particular instance of identity theft, thus does little to deter all occurrences of the crime.⁶⁸ Additionally, because the statute does not provide for recovery by the consumer victim from the financial institution facilitating the true name fraud, it does little to prevent the crime from happening or remunerating the losses suffered.⁶⁹ Recovery from the financial institution is critical because recovery from the actual identity thief is virtually impossible due to the difficulty in determining the thief's real identity.⁷⁰

Other federal statutes concerned with protecting against identity theft include the Identity Theft Penalty Enforcement Act⁷¹ and the Fair Credit Billing Act.⁷² However, because of the reactionary nature of these statutes⁷³ and their inability to deter identity thieves, none of these statutes were successful in eliminating, or even substantially deterring true name fraud.⁷⁴ Through the enactment of FACTA and similar *ex ante* mechanisms, Congress displayed its philosophy of prevention in regard to identity theft as opposed to punishment after the crime

were to recognize the individual victims of identity theft crimes and establish their right to restitution); Vartanian & Nelson, *supra* note 7, at 5.

68. See Saunders & Zucker, *supra* note 41, at 672 (explaining that the Sentencing Commission is delegated broad authority in determining a punishment for perpetrators of identity theft and thus those instances that involve large amounts of money stolen, a great deal of planning, and a great deal of harm to the plaintiff receive lighter penalties).

69. See Howard, *supra* note 6, at 1280.

70. *Suing for Identity Theft Lawyers*, LEGALMATCH, <http://www.legalmatch.com/law-library/article/suing-for-identity-theft.html>.

71. Identity Theft Penalty Prevention Act of 2004, 18 U.S.C. § 1028(A) (2006) (making it a federal offense to use another's personal identifying information in the furtherance of a felony).

72. See, e.g., Fair Credit Billing Act, 15 U.S.C. § 1666 (Supp. IV 2010) (creating procedures to rectify billing errors on credit card accounts).

73. See *infra*, Part III.A.

74. 15 U.S.C. § 1666.

has been committed.⁷⁵ This led to the enactment of the Fair and Accurate Credit Transaction Act in 2003.⁷⁶

B. The Fair and Accurate Transaction Act of 2003

The laws comprising FACTA are a series of amendments to the FCRA.⁷⁷ It contributes to the FCRA by implementing new procedures and mechanisms for utilization in the battle against identity theft.⁷⁸ In addition to supplementing the previous legislation, the FACTA rules were born out of a growing concern that the influx of information sharing over the internet required stronger regulations in order to better protect consumers.⁷⁹ The rules apply to financial institutions⁸⁰ and creditors.⁸¹

75. See Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation, 16 C.F.R. § 681 app. a (Supp. A 2009) (stating that financial institutions and creditors should adopt procedures designed to prevent and mitigate identity theft that are proportionate with the degree of risk posed for the customer account).

76. See Delany, *supra* note 19, at 576-77 (discussing how the FCRA did not live up to Congress' expectation of reducing incidences of identity theft).

77. See Duties Regarding the Detection, Prevention, and Mitigation of Identity Theft, 16 C.F.R. § 681.1(a) (2009).

78. Ann Graham, *Graham on Our Credit Reporting System & Identity Theft—New Regulations for 2008*, LEXISNEXIS EMERGING ISSUES, Feb. 29, 2008.

79. PATRICK LEAHY, PERSONAL DATA PRIVACY AND SECURITY ACT OF 2009 REPORT, S. DOC. 111-110, at 2 (1st Sess. 2009) (“Advanced technologies, combined with the realities of the post-9/11 digital era, have created strong incentives and opportunities for collecting and selling personal information about ordinary Americans.”); see also Vartanian & Nelson, *supra* note 7, at 6 (“[A] response to the growing reality that the increase in information sharing and growth in technology was in part a catalyst for identity theft.”).

80. Fair and Accurate Credit Transaction Act of 2003, sec. 111, § 603 (codified as amended at 15 U.S.C. § 1681a(t) (2006)); see also Kevin D. Lyles, *Red Flag Rules Require Companies to Take Identity Theft Seriously*, JONES DAY (NOV. 2008), <http://www.jonesday.com/red-flag-rules-require-companies-to-take-identity-theft-seriously-11-12-2008/> (stating that financial institutions, for purposes of The Rule, include banks, savings and loan associations, mutual savings banks, credit unions, or any other entities offering a transaction account).

81. Fair and Accurate Credit Transaction Act, 15 U.S.C. § 1681(r)(5) (“The terms ‘credit’ and ‘creditor’ have the same meanings as in § 1691a of this title”) (original quotation marks omitted); Equal Credit Opportunity Act, 15 U.S.C. § 1691a(e) (2006) (“[A creditor includes] any person who regularly extends, renews, or continues credits; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.”).

One of the most influential and confusing rules included in FACTA is the Red Flags Rule,⁸² which requires financial institutions and creditors offering “covered accounts”⁸³ to establish written ITPPs customized to each institution’s specific needs for protection of its customers.⁸⁴ Covered accounts are offered for personal use such as checking or savings accounts or mortgage loans.⁸⁵ Covered accounts also include those accounts “for which there is a reasonably foreseeable risk to customers . . . from identity theft”⁸⁶ Thus, the accounts affected by The Rule are the ones most frequently targeted by those committing true name fraud and thus those bearing a foreseeable risk of compromise.⁸⁷ FACTA operates by setting forth preventative measures necessary for financial institutions and creditors rather than reactionary measures taken by the consumer victims whose identities were stolen.⁸⁸

The Rule instructs six agencies⁸⁹ to formulate guidelines to aid financial institutions and creditors in “identify[ing] patterns,

82. See Press Release, Federal Trade Commission, FTC Extends Enforcement Deadline for Identity Theft Red Flags Rule (May 28, 2010), available at <http://www.ftc.gov/opa/2010/05/redflags.shtm> (explaining that several Enforcement Policy delays have been issued so that Congress has time to amend and more clearly define the “creditors” covered by The Rule).

83. Graham, *supra* note 78 (“Covered accounts are accounts used primarily for personal, family, or household purposes that involve or permit multiple payments or transactions, in addition to any other account for which there is a reasonably foreseeable risk to customers or the safety and soundness of the financial institution or creditor from identity theft.”).

84. *Id.*

85. *Id.*

86. Lyles, *supra* note 80.

87. See Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation, 16 C.F.R. § 681 app. a (Supp. A 2009) (discussing the purpose of the rules and regulations contained within FACTA’s Red Flags Rule).

88. Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. 63,718, 63,728 (Nov. 9, 2007) (to be codified at 16 C.F.R. § 681) (listing several of the suggested measures financial institutions and creditors could take, including (1) “monitoring an account for evidence of identity theft,” (2) “changing any passwords, security codes, or other security devices that permit access to a customer’s account,” and (3) “reopening an account with a new account number”).

89. Fair and Accurate Credit Transaction Act of 2003, sec. 111, § 603 (codified as amended at 15 U.S.C. § 1681a(e) (2006)), sec. 114, § 615 (codified as amended at §§ 1681m(e)(1)(A) & (2)(A) (2006)); see also Lyles, *supra* note 80 (“The agencies are (1) the Office of the Comptroller of the Currency, Treasury; (2) the Board of Governors of the Federal Reserve System; (3) the Federal Deposit Insurance

practices, and specific forms of activity that indicate . . . identity theft.”⁹⁰ The agencies issued their final proposals on November 9, 2007,⁹¹ and these guidelines went into effect on January 1, 2008.⁹² However, the compliance deadline was extended for those creditors subject to enforcement from the Federal Trade Commission, presumably those creditors covered by The Rule who had never before been subject to this type of financial oversight and regulation.⁹³ The deadline was extended to December 31, 2010.⁹⁴ Compliance by financial institutions has been effective since January 1, 2008 and enforcement has been conducted by the institution’s regulators since that date.⁹⁵

The Rule consists of four basic elements for the prevention of identity theft; however, the contents of a particular institution’s written program is flexible and should reflect the red flags threatening that specific institution.⁹⁶ First, financial institutions and covered creditors must list specific indicators that might signify actual or attempted theft of their customers’ identity.⁹⁷ Examples of these indicators that financial institutions and creditors might want to include in their ITPP are alerts or notifications from consumer reporting agencies, the use of suspicious documents in the opening of an account, and suspicious activity relating to an existing covered account.⁹⁸

Second, once the signals relevant for a specific institution have been identified, a system must be established for detecting

Corporation; (4) the Office of Thrift Supervision, Treasury; (5) the National Credit Union Administration; and (6) the Federal Trade Commission.”).

90. Lyles, *supra* note 80.

91. Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. at 63,718-63,775.

92. *Id.* at 63,739.

93. Lyles, *supra* note 80.

94. Press Release, FTC Extends Enforcement Deadline for Identity Theft Red Flags Rule, *supra* note 82.

95. Lyles, *supra* note 80.

96. *See* Graham, *supra* note 78.

97. Duties Regarding the Detection, Prevention, and Mitigation of Identity Theft, 16 C.F.R. § 681.1 (2009).

98. Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. 63,718, 63,755 (Nov. 9, 2007) (to be codified at 16 C.F.R. § 681).

these red flags.⁹⁹ The development of this system should take into account specific risk factors such as the methods the institution uses to open accounts and the ways in which it provides access to its covered accounts.¹⁰⁰ Financial institutions and creditors should also consider adopting procedures for authenticating the identity of an individual attempting to open an account so as to ascertain the presence of red flags.¹⁰¹

The third step is to appropriately respond to any and all detected red flags in order to effectively mitigate the occurrence of true name fraud.¹⁰² Any response should be proportionate to the risk posed by the red flag so as not to be unduly burdensome for the financial institution or creditor.¹⁰³ This measure serves as a means of shifting the burden of counteracting true name fraud from response and correction by the consumer victim to efficient prevention by the financial institution or creditor whose records are in jeopardy.¹⁰⁴

Finally, the fourth step requires covered entities to update their ITPP as required by the passing of time and evolving societal and technological standards.¹⁰⁵ These changes should most

99. Lyles, *supra* note 80; *The Red Flags Rule: Frequently Asked Questions*, *supra* note 16 (“The Rule doesn’t require any specific practice or procedures. It gives you the flexibility to tailor your Program to the nature of your business and the risks it faces.”).

100. Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. at 63,755.

101. Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation, 16 C.F.R. § 681 app. a (Supp. A 2009).

102. The response procedure is described as follows:

In determining an appropriate response, a financial institution or creditor should consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer’s account records . . . or notice that a customer has provided information related to a covered account . . . to someone fraudulently claiming to represent the financial institution or creditor or to a fraudulent website.

Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. at 63,755.

103. 16 C.F.R. § 681 app. a.

104. *See id.*

105. Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. at 63,720 (“[T]he Program [must be] updated periodically, to reflect changes in risks to customers or to the

importantly reflect changes in the risk posed to customers as well as risks to the “safety and soundness of a financial institution or creditor.”¹⁰⁶ In light of The Rule’s four parts, private action brought pursuant to a financial institution or creditor’s noncompliance is both logical and appropriate, assuming certain safeguards are adopted.¹⁰⁷ Private action by consumer victims for noncompliance is appropriate because of the industry-wide coverage, the level of detail contained within The Rule, and the flexibility afforded for appropriate response to varying degrees of risks.¹⁰⁸

The Rule helps to prevent identity theft where the FCRA previously fell short.¹⁰⁹ The purpose of the FCRA is “to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer”¹¹⁰ This does little, if anything, to mitigate the occurrence of true name fraud because a consumer reporting agency is not the party responsible for the breach of security that enables identity theft.¹¹¹ Instead, consumer reporting agencies accumulate an individual’s consumer credit information and use this information to determine that individual’s creditworthiness.¹¹² The FCRA, as originally enacted, established rules to ensure that credit reporting is fair and accurate, but did not implement mechanisms for preventing the identity theft that led to inaccuracy.¹¹³ The FCRA failed to establish any necessary procedures that financial institutions must abide by so that consumer information is protected.¹¹⁴ FACTA’s Red Flags Rule

safety and soundness of the financial institution or creditor from identity theft.”).

106. 16 C.F.R. § 681 app. a(V).

107. See Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. at 63,766-67 (explaining the methods and risk factors that should be utilized and weighed when structuring an ITPP).

108. See *id.*

109. See Delany, *supra* note 19, at 575 (discussing the shortcomings of the FCRA).

110. Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681(b) (2006).

111. See McKelvey, *supra* note 18, at 1090 (discussing how the FCRA targets the use of credit history by specific institutions).

112. See 15 U.S.C. § 1681(a)(3).

113. See 15 U.S.C. § 1681(b).

114. Wood & Schecter, *supra* note 20, at 8.

directly combats this shortcoming.¹¹⁵ In Michelle's case,¹¹⁶ the preventative mechanisms that Bank of America would have enacted in accordance with The Rule could have alerted it to the suspicious activity and allowed it to prevent the theft entirely or mitigate the harm Michelle suffered. In contrast, the FCRA only allowed Michelle to place a fraud alert on her file *after* she suspected or identified that she had been victimized by identity theft.¹¹⁷

IV. ESTABLISHING APPROPRIATE LIABILITY FOR FINANCIAL INSTITUTIONS UNDER FACTA

A. Common Law Claims and True Name Fraud

When victimized by identity theft, individuals usually turn to the courts to seek reimbursement and vindication for the damages they have incurred.¹¹⁸ Often, these suits are filed under tort law,¹¹⁹ frequently pursuant to the common law claim of negligent enablement of imposter fraud.¹²⁰ Other common law claims utilized by identity theft victims include fraudulent misrepresentation, breach of fiduciary duty, defamation, and breach of contract.¹²¹ For purposes of the discussion here, tort law is the central focus and will be examined for its inadequacies in regard to compensating customer victims of identity theft.¹²² Tort

115. See *supra*, pp. 111-115.

116. See *supra*, pp. 101-102.

117. See 15 U.S.C. § 1681c-1(a)(1)(A).

118. See, e.g., *Eisenburg v. Wachovia Bank, N.A.*, 301 F.3d 220 (4th Cir. 2002) (bringing negligence action against bank); *Patrick v. Union State Bank*, 681 So. 2d 1364 (Ala. 1996) (filing negligence action against bank); *Brunson v. Affinity Fed. Credit Union*, 972 A.2d 1112 (N.J. 2009) (bringing claims of negligent investigation and malicious prosecution against credit union); *Polzer v. TRW, Inc.*, 256 A.D.2d 248 (N.Y. App. Div. 1998) (asserting intentional or negligent enablement of imposter fraud); *Huggins v. Citibank, N.A.*, 585 S.E.2d 275 (S.C. 2003) (representing cases in which victims of identity theft resorted to the common law for recourse).

119. *Western Union Tel. Co. v. Taylor*, 11 S.E. 396, 398 (Ga. 1889) (“[A] tort is a breach of duty which the law in distinction from a mere contract has imposed . . .”).

120. See, e.g., *Brunson*, 972 A.2d 1112; *Polzer*, 256 A.D.2d 248; *Huggins*, 585 S.E.2d 275. But see *Patrick*, 681 So. 2d 1364; Howard, *supra* note 6, at 1272-75 (recognizing numerous cases in which negligent enablement of imposter fraud has been utilized as a cause of action).

121. *Suing for Identity Theft Lawyers*, *supra* note 70.

122. See *infra* Parts IV-V.

law claims are pursued by plaintiffs because of the larger awards provided by the claim; however, none of the claims are consistently recognized by the courts in cases of identity theft, suggesting that a federal standard of care is necessary in order to provide full redressability for consumer victims.¹²³

Discussed below are several reasons why negligent enablement of imposter fraud, along with other tort law claims often associated with identity theft, are inappropriate and ill fit to provide redress for consumer victims of identity theft.

1. No Duty Exists to Give Rise to Tort Liability

A successful negligence claim requires affirmative proof of four elements: (1) duty, (2) breach, (3) causation, and (4) damages.¹²⁴ Courts have declined to recognize negligence claims arising from true name fraud because the claims fail to establish the first crucial element of duty.¹²⁵ In fact, since the introduction of negligent enablement of imposter fraud as a claim against true name fraud, only the Alabama Supreme Court has recognized it as valid, in the case of *Patrick v. Union State Bank*.¹²⁶ Furthermore, no published decision and only a single unpublished decision have ever directly followed the holding reached in *Patrick*.¹²⁷

123. See Hoofnagle, *supra* note 56, at 30 (“In the new account identity theft context, duty has proven to be the highest hurdle for litigants pursuing negligence theories.”); David A. Szwak, *Update on Identity Theft and Negligent Enablement*, 58 CONSUMER FIN. L.Q. REP. 66, 71 (2004) (“These cases illustrate that a plaintiff seeking to recover against a bank or credit issuer following an identity theft must carefully plead and prove facts to support a negligent enablement or similar claim. . . . [M]ost courts do not recognize a general fiduciary duty to the public on the part of banks or other business enterprises.”).

124. *Richardson v. Corvallis Pub. Sch. Dist. No. 1*, 950 P.2d 748, 751 (Mont. 1997).

125. See *Patrick*, 681 So. 2d at 1367 (Ala. 1996) (“It is axiomatic that to maintain a negligence claim, one must point to the existence of a duty on the part of the defendant.”); *George v. Federal Land Bank of Jackson*, 501 So. 2d 432, 435 (Ala. 1986) (“There can be no fraud without a breach of a legal duty owed by the defendant to the plaintiff.”); *Haney v. Fire Ins. Exch.*, 277 S.W.3d 789, 792-93 (Mo. Ct. App. 2009) (discussing the importance of establishing the existence of a duty owed by the defendant).

126. *Patrick*, 681 So. 2d 1364 (Ala. 1996); see also *Brunson v. Affinity Fed. Credit Union*, 972 A.2d 1112, 1123 (N.J. 2009) (stating that the broad holding in *Patrick* has been met with widespread disapproval, primarily for lack of foreseeability of harm or existence of a duty).

127. See *Brunson*, 972 A.2d 1112; *Torres v. Valencia*, 2006 U.S. Dist. LEXIS 94602

In *Patrick*, an identity theft victim brought suit against a bank claiming that it negligently opened an account to an imposter using her name.¹²⁸ The plaintiff was not a customer of the bank at the time it opened an account for the imposter.¹²⁹ The court found a duty owed between the bank and the plaintiff because it was “foreseeable, in terms of the question of duty, that the person in whose name and Social Security number and upon whose identification a checking account is opened may be injured or harmed by fraud”¹³⁰ Courts have interpreted this holding as broadly expanding the duty of financial institutions to the public at large.¹³¹

In cases where the true name fraud victim has prevailed under a theory of negligence, there are separate issues that warranted a finding of negligent conduct by the defendant institution beyond those solely associated with negligent enablement of imposter fraud.¹³² Often these additional factors that permitted recovery resulted from the financial institution’s failure to follow its own protocol,¹³³ thus breaching the standard of care it established to benefit its customers.¹³⁴

2. No Foreseeability of Harm Exists to Give Rise to Tort Liability

The existence of foreseeable harm to the consumer victim is just as critical to a successful negligence claim as the existence of

at 13 (W.D.Tex. Sept. 27, 2006) (“It is . . . reasonable to conclude that the bank believed it had a relationship with plaintiff when it opened the account based upon the presentation of his passport.”).

128. *Patrick*, 681 So. 2d 1364.

129. *Id.* at 1369.

130. *Id.*

131. See, e.g., *Guerra v. Regions Bank*, 188 S.W.3d 744, 747 (Tex. App. 2006) (stating that since the plaintiff was not a customer of the facilitating bank, there is no duty owed to the victim of the identity theft); *Schleicher v. W. State Bank of Devils Lake*, 314 N.W.2d 293, 297 (N.D. 1982) (refusing to extend a bank’s duty of care to noncustomers).

132. See *Murray v. Bank of America, N.A.*, 580 S.E.2d 194 (S.C. App. 2003) (holding that the bank owed a duty to plaintiff because it negligently failed to follow its own procedures).

133. *Id.* at 344.

134. See *BALLENTINE’S LAW DICTIONARY* (3d ed. 1969) (defining “breach” as “the violation of an obligation, engagement or duty”).

a legal duty between the parties.¹³⁵ In *Brunson v. Affinity Fed. Credit Union*,¹³⁶ the Superior Court of New Jersey stated, “the ability to foresee injury to a potential plaintiff does not in itself establish the existence of a duty, but it is a crucial element in determining whether imposition of a duty on an alleged tortfeasor is appropriate.”¹³⁷ This explanation highlights the interaction between the duty owed and the foreseeability of the harm suffered.¹³⁸ While neither element is dispositive of liability, both are important factors to its creation.¹³⁹ This is due to the fact that courts require the presence of the element of foreseeability in any negligence claim.¹⁴⁰ Claims filed pursuant to negligent enablement of imposter fraud lack foreseeability, exposing a fatal flaw to the successful creation of liability.¹⁴¹ If a particular bank is unaware

135. See *Key v. Compass Bank, Inc.*, 826 So. 2d 159, 170 (Ala. Civ. App. 2001) (“The key factor [in a negligence claim] is whether the injury was foreseeable by the defendant.”) (quoting *Smitherman v. McCafferty*, 622 So. 2d 322, 324 (Ala. 1993)).

136. *Brunson v. Affinity Fed. Credit Union*, 954 A.2d 550 (N.J. Super. Ct. App. Div. 2008).

137. *Id.* at 560 (quoting *Carter Lincoln-Mercury, Inc. v. EMAR Group, Inc.*, 638 A.2d 1288, 1294 (N.J. 1994)).

138. See *id.* (“The foreseeability of the harm is a significant consideration in the determination of a duty to exercise reasonable care.”) (quoting *Carvalho v. Toll Bros. Developers*, 675 A.2d 209, 212 (N.J. 1996)) (internal quotation marks omitted); *Key*, 826 at 170 (Ala. Civ. App. 2001) (“Foreseeability is the key factor in determining whether a duty exists.”).

139. The court outlines its analysis for determining the existence of duty as follows:

In deciding that question, three factors govern our analysis: (1) the relationship between the parties, (2) reasonable foreseeability of harm to the person who is injured, and (3) public policy considerations. We use these factors under a balancing approach and not as three distinct and necessary elements. In the end, whether a duty exists is a policy decision based upon all relevant considerations that guide us to conclude a particular person is entitled to be protected from a particular type of harm.

J.A.H. ex rel. R.M.H. v. Wadle & Assocs, P.C., 589 N.W.2d 256, 258 (Iowa 1999) (internal citations omitted).

140. See *Leonard v. Iowa*, 491 N.W.2d 508, 510-12 (Iowa 1992) (claiming that the scope of a duty owed is measured by the degree of foreseeability of the harm to the victim); *Knight v. Michigan*, 297 N.W.2d 889, 894 (Mich. App. 1980) (stating that foreseeability is interrelated to the establishment of duty to a third party).

141. See, e.g., *DiBiasi v. Joe Wheeler Elec. Membership. Corp.*, 988 So. 2d 454, 461 (Ala. 2008); *Pritchett v. ICN Med. Alliance, Inc.*, 938 So. 2d 933, 937 (Ala. 2006); *Key*, 826 So. 2d at 170; *Rutledge v. Arrow Aluminum Indus., Inc.*, 733 So. 2d 412, 416 (Ala. Civ. App. 1998).

that the new customer desiring to open an account with it is an identity thief, despite its vigilant efforts to ascertain the identity thief's invalidity, then the bank is unable to foresee that checks written against the account might cause harm to a third party victim.¹⁴² Simply because banks think they are opening an account with a particular person does not actually establish a relationship with that presumed individual.¹⁴³ The only connection is a name.

Fraudulently attempting to open an account in another's name has been made much more difficult by the passage of the USA PATRIOT Act.¹⁴⁴ That Act is targeted at "facilitating the prevention, detection, and prosecution of international money laundering and the financing of terrorism."¹⁴⁵ Some of the standards utilized for implementation of the USA PATRIOT Act might prove useful for financial institutions in applying The Rule to their covered accounts;¹⁴⁶ however, it does not address the issue of duty owed.¹⁴⁷ No matter which federal statutes are breached by

142. *Patrick v. Union State Bank*, 681 So. 2d 1364, 1372 (Ala. 1995) (Houston, J., dissenting) ("There is no evidence that Union State Bank foresaw the criminal activity of the person who opened the account in Ms. Patrick's name. Whether a legal duty exists is a question of law for the courts."). *But see, e.g., Wolfe v. MBNA Am. Bank*, 485 F. Supp. 2d 874, 882 (W.D. Tenn. 2007) (finding that a bank is liable under state negligence law when it fails to complete a reasonable check as to an applicant's information).

143. *See City Check Cashing, Inc. v. Mfrs. Hanover Trust Co.*, 764 A.2d 411, 417 (N.J. 2001) ("Absent a special relationship, courts will typically bar claims of non-customers against banks."); *Patrick*, 681 So. 2d at 1372 (Houston, J., dissenting) (claiming that a special relationship giving rise to a duty of care only exists when the financial institution has actual or constructive notice that the actions of the third party will injure the plaintiff); *Saccuzzo v. Krystal Co.*, 646 So. 2d 595 (Ala. 1994) (asserting that absent a special relationship, individuals have no duty to protect others from criminal acts of third parties).

144. *See USA PATRIOT Act*, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended at 18 U.S.C. § 2712 (2006)).

145. *Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003*, 72 Fed. Reg. 63,718, 63,728 (Nov. 9, 2007) (to be codified at 16 C.F.R. § 681).

146. *Id.* (discussing how the CIP rules, the Federal Financial Institution's Examination Council's guidance on authentication, that were written to enforce the USA PATRIOT Act might be a useful tool in aiding financial institutions to detect red flags.) Before its passage, several commentators said that The Rule was redundant because of its resemblance to the USA PATRIOT Act regulations. However, because certain accounts and institutions are treated specially under the USA PATRIOT Act because of the low risk they pose on money laundering, it is necessary to have The Rule enacted under FACTA to fully protect against identity theft. *Id.* at 63,719.

147. *See Kolodziej v. Durham Agric. Fair Ass'n, Inc.*, 901 A.2d 1242, 1244 (Conn.

financial institutions in allowing the creation of a fraudulent account, there is still no duty owed between the financial institution and the consumer victim in whose name the account is opened without overextending the orbit of duty.¹⁴⁸

As evidenced through the cases declining to expand the scope of duty owed by banks to noncustomers, the argument for foreseeability is attenuated at best.¹⁴⁹ For this reason, courts will possibly disagree on the appropriate outcome of negligence claims.¹⁵⁰ This is fundamentally unfair to victims, such as Michelle, who are denied the ability to recover damages from the financial institution that facilitated the fraud.

In the interest of simplicity and uniformity, noncompliance with FACTA should replace common law negligence claims hinging upon the existence of foreseeability and duty.¹⁵¹ As the statute currently stands, there is no private cause of action for noncompliance with The Rule.¹⁵² Courts have interpreted FACTA's amendment to 15 U.S.C. section 1681m to preclude all private causes of action for failure to comply with the rules established in the section.¹⁵³ Thus, the first step to providing adequate redressibility for consumer victims of true name fraud is to provide a private cause of action for noncompliance with The

App. 2006) (explaining that an actor has no affirmative duty to act for the protection of another absent a special relationship).

148. See RESTATEMENT (SECOND) OF TORTS, § 314A cmt.f (2010) ("The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered.").

149. See *Patrick v. Union State Bank*, 681 So. 2d 1364, 1372 (Ala. 1995) (Houston, J., dissenting) (asserting that the harm to the consumer victim is not reasonably foreseeable under negligence); *Huggins v. Citibank, N.A.*, 585 S.E.2d 275, 277 (S.C. 2003) (refusing to recognize negligent enablement of imposter fraud as a viable cause of action because the relationship between the parties was "too attenuated").

150. See *Patrick*, 681 So. 2d at 1372 (recognizing a duty owed to a victim of identity theft); cf. *Huggins*, 585 S.E.2d 275 (declining to establish a duty owed by financial institution to third party victim).

151. Lyles, *supra* note 80 (explaining that FACTA establishes a higher, more specific standard of care which makes common law negligence claims obsolete).

152. *The Red Flags Rule: Frequently Asked Questions*, *supra* note 16.

153. See, e.g., *Perry v. First Nat'l Bank*, 459 F.3d 816, 823 (7th Cir. 2006) ("The unambiguous language of § 1681m(h)(8) demonstrates that Congress intended to preempt private causes of action to enforce § 1681m."); *Rollins v. Peoples Gas Light & Coke Co.*, 379 F.Supp.2d 964, 967 (N.D. Ill. 2005) ("It is undisputed that there is no private right of action under § 1681s-2(a).").

Rule.¹⁵⁴ Such an amendment would solve the problems of lack of duty and foreseeability created by negligence claims because, as a result of The Rule, a duty is owed by the financial institution to comply with The Rule and failure to comport leads to foreseeable harm.¹⁵⁵

The inclusion of a private cause of action for noncompliance should also provide for express preemption of state tort law claims. This would leave noncompliance, as established in the statute, as victims' sole recourse for recovery from identity theft for any negligent or willful conduct by a financial institution or creditor that results in the institution's inability to detect and prevent red flags. By replacing the common law negligence claims, the query would become whether or not there has been a willful or negligent violation of FACTA's Red Flags Rule.¹⁵⁶ Such a determination of noncompliance lacks the uncertainty created by the varying state tort claims, providing for a more reliable and predictable remedy.¹⁵⁷

The determination of noncompliance should be made by the Bureau of Consumer Financial Protection (Bureau), an independent agency established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).¹⁵⁸ The Bureau is authorized through Title X of Dodd-Frank¹⁵⁹ to enforce and administer existing federal consumer financial

154. See Fair and Accurate Credit Transaction Act of 2003, sec. 114, § 615 (codified as amended at 15 U.S.C. § 1681m(h)(8)(A) (2006)) (foreclosing civil actions brought for noncompliance with The Rule and restricting redress to administrative enforcement).

155. See *id.* § 1681m(e).

156. See *id.* §§ 1681n-o.

157. See Hoofnagle, *supra* note 56 ([Negligence claims fail] from both economic and moral perspectives. Economically, a negligence regime could create inefficiency, because uncertainty would surround the optimal level of care to prevent leaks of personal information.") (citing Danielle Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S. CAL. L. REV. 241, 263-64 (2007)).

158. See Gill Rudawsky, *New Consumer Financial Bureau Keeps Main Street Safe from Wall Street*, DAILY FIN., July 23, 2010, 6:00 AM, <http://www.dailyfinance.com/story/credit/new-consumer-bureau-keeps-main-street-safe-from-wall-street/19565123/>.

159. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1955-2113 (2010) (to be codified in scattered sections of U.S.C.).

protection laws.¹⁶⁰ This would make the Bureau the primary rulemaking agency for FACTA and its Red Flags Rule.¹⁶¹ Therefore, while the regulations expounding The Rule were originally created by the FTC in conjunction with the other primary federal banking agencies, authority over The Rule and its rulemaking will be transferred to the Bureau in the future.¹⁶² The amendments called for here would thus be administered by the Bureau.¹⁶³

The enforcement regime established to redress noncompliance with The Rule currently provides for administrative enforcement by the FTC or the appropriate federal bank regulator.¹⁶⁴ With the passage of Dodd-Frank, enforcement of The Rule will be shared by the Bureau and the other federal banking agencies, primarily the FTC, depending upon the size and function of the covered institution.¹⁶⁵ Thus, as the statute currently exists, private civil action is provided for under other sections of the FCRA but is precluded for purposes of The Rule.¹⁶⁶ Administrative enforcement as a means of redressibility for identity theft is inadequate because it fails to provide compensation for the consumer victim of the identity theft.¹⁶⁷

160. *Consumer Financial Protection Bureau- Overview of Key Provisions*, CENTER FOR RESPONSIBLE LENDING (Sept. 1, 2010), <http://www.responsiblelending.org/mortgage-lending/policy-legislation/regulators/consumer-financial-protection.html>.

161. *See id.*

162. *See id.* (explaining that the date for transfer of authority to the Bureau is tentatively scheduled to occur within 6 to 12 months of Dodd-Frank's passage, with a possible 6 month extension).

163. *See id.*

164. Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. 63,718, 63,772 (Nov. 9, 2007) (to be codified at 16 C.F.R. § 681) (subjecting entities not in compliance to administrative enforcement of the FCRA by the Federal Trade Commission pursuant to 15 U.S.C. § 1681s(a)(1)).

165. *Consumer Financial Protection Bureau- Overview of Key Provisions*, *supra* note 160 (stating that the Bureau has primary enforcement authority over "large depository institutions" with assets over \$10 billion and exclusive enforcement authority over non-banks that are "either payday lenders, providers of mortgage-related services, larger market participators, [or] bad apples in the market." Other covered non-bank institutions will be subject to the FTC's enforcement.).

166. Fair Credit Reporting Act of 1970, 15 U.S.C. §§ 1681n-o (2006) (providing for civil liability for financial institutions and credits to consumers for willful or negligent noncompliance with the statute).

167. *See* § 1681s (providing for administrative review and enforcement for

Instead, the FTC collects a civil penalty for the violation or implements injunctive orders against the offending institution.¹⁶⁸ This in no way inures to the benefit to the victim. Thus, individuals like Michelle, are currently unable to collect from the facilitating financial institution under the theory of negligence because of the lack of duty and foreseeability and unable to collect under a theory of noncompliance with The Rule because the statute explicitly precludes such action.¹⁶⁹

3. Identity Theft Matters are Better Left to the Legislature

The Rule in FACTA prescribes mandatory and industry specific standards for financial institutions and creditors that will both reduce the instance of true name fraud as well as establish a national standard of care to be adopted by financial institutions and businesses controlling consumers' personal information.¹⁷⁰ This should help alleviate the problems presented by adjudicating the claims under negligence, namely the lack of duty and foreseeable harm.¹⁷¹ A financial institution may currently implement anti-fraud mechanisms at its discretion, abide by those mechanisms, and thus not be legally negligent because it operated in accordance with due care by following the procedures it had in place.¹⁷² The Red Flags Rule fixes this problem by explicitly establishing the necessary standards all institutions must adopt.¹⁷³ Private action for noncompliance with The Rule would thus

noncompliance).

168. See 12 U.S.C. § 1818(b)-(g) (2006) (describing the various remedies a federal banking agency may impose upon a bank or related institution that violates FACTA's Red Flags Rule).

169. See *supra* Part IV.A.1-2.

170. See *Pegram v. Herdrich*, 530 U.S. 211, 221 (2000) (“[S]uch complicated factfinding and such a debatable social judgment are not wisely required of courts unless for some reason resort cannot be had to the legislative process, with its preferable forum for comprehensive investigations and judgments of social value.”); *Vartanian & Nelson*, *supra* note 7, at 8; *Lyles*, *supra* note 80.

171. See *infra* pp. 116-122.

172. See *Hoofnagle*, *supra* note 56.

173. *Duties Regarding the Detection, Prevention, and Mitigation of Identity Theft*, 16 C.F.R. § 681.1 (2009) (establishing the necessary components of the Red Flags Rule).

provide redressibility where negligence claims fall short.¹⁷⁴ Although FACTA should reduce the number of cases resulting from true name fraud, Congress, with its members' diverse views, unique agencies, and constitutionally derived legislative capabilities,¹⁷⁵ is better situated to address and implement the large-scale reform necessary to eradicate identity theft than courts applying poorly defined and inconsistent common law principles.¹⁷⁶ The judiciary is ill-equipped and lacks sufficient resources to adjudicate every instance of identity theft.¹⁷⁷

In declining to recognize negligent enablement of imposter fraud as a valid cause of action for victims of identity theft, the South Carolina Supreme Court stated, "we conclude that the legislative arena is better equipped to assess and address the impact of credit card fraud on victims and financial institutions alike."¹⁷⁸

V. AMENDING FACTA TO INCLUDE PROVISIONS FOR TRUE LOSS OF DAMAGES TO VICTIMS

A private cause of action for noncompliance with FACTA's Red Flags Rule is a better avenue through which to compensate victims of true name fraud than seeking remedies

174. See Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S. CAL. L. REV. 241, 261-68 (2007).

175. U.S. CONST. art. I, § 8 ("The Congress shall have power . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.").

176. The respective roles of the independent branches of government were described by the Court as follows:

But such complicated factfinding and such a debatable social judgment are not wisely required of courts unless for some reason resort cannot be had to the legislative process, with its preferable forum for comprehensive investigations and judgments of social value.

Pegram v. Herdrich, 530 U.S. 211, 221 (2000).

177. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 513 (1982) ("The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable.").

178. *Huggins v. Citibank, N.A.*, 585 S.E.2d 275, 277 (S.C. 2003).

under common law claims.¹⁷⁹ FACTA should be amended to make the system more just for consumer victims of identity theft and to promote uniformity and consistency in its application¹⁸⁰ by permitting a private cause of action for noncompliance with The Rule. This allows victims to recover for their losses under a clearly defined federal regime.

*A. Provide for Private Causes of Action and More Explicit
Compensatory Damages*

While the current FCRA regime¹⁸¹ provides for remedies through claims brought for noncompliance with particular sections of the statute, the section pertaining to The Rule precludes private civil action.¹⁸² Therefore, the only available remedies provided under the current statute are through administrative enforcement in the form of injunctive relief or monetary penalties levied against the institution.¹⁸³ According to the plain language of the statute, the consumer victim of the identity theft has no means to recover for his or her losses resulting from noncompliance with The Rule.¹⁸⁴ However, courts have varied in their application of FACTA's enforcement, with some jurisdictions claiming that no private cause of actions are permitted and others insisting that the statute's language does not preclude a victim's private claim against the facilitating financial institution.¹⁸⁵ Such divergent

179. See *Haney v. Fire Ins. Exch.*, 277 S.W.3d 789, 793 (Mo. Ct. App. 2009) (declining to recognize negligence claim for lack of duty); *Pritchett v. ICN Med. Alliance, Inc.*, 938 So. 2d 933, 937 (Ala. 2006) (holding that due to lack of foreseeability, no liability arises); *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 36-37 (N.Y. 1985) (explaining that liability should be limited so as to avoid imposing crushing liability upon a party).

180. U.S. Const. art. 14, § 1; see *Rabino v. Pennsylvania*, 450 A.2d 773, 776 (Pa. Commw. Ct. 1982) (stating that law should be applied "with the twin goals of uniformity and fairness").

181. See Fair Credit Reporting Act of 1970, 15 U.S.C. §1681s (2006).

182. Fair and Accurate Credit Transaction Act of 2003, sec. 114, § 615 (codified as amended at 15 U.S.C. § 1681m(h)(8)(A) (2006)).

183. *Id.*

184. *Id.*

185. *Barnette v. Brook Rd., Inc.*, 429 F. Supp. 2d 741, 746-49 (E.D. Va. 2006) (finding that § 1681m(h)(8) does not eliminate private causes of action for the entire section which includes the Rule, but instead only eliminates private actions related to subsection 1681m(h)). *But see Stavroff v. Gurley Leep Dodge, Inc.*, 413 F. Supp. 2d

interpretations indicate ambiguity in the statute and possible willingness to make alterations to the law's enforcement. The statute should be amended to explicitly provide for private causes of action, allowing individual victims to recover for their harm where such recovery currently is, according to a majority of jurisdictions, unavailable under The Rule and common law tort claims.¹⁸⁶

There are four primary reasons supporting amendments to FACTA to expressly provide for additional compensation for true name fraud victims. First, one of the reasons so many victims seek remedies under common law tort claims is the large awards they will be able to collect once their pain and suffering¹⁸⁷ have been taken into account as well as any punitive damages that might be deemed appropriate. While these common law tort claims lack consistency and create confusion for the courts,¹⁸⁸ there is validity in the desire for additional damages, given the extensive emotional and economic suffering of the victim.¹⁸⁹ For this reason, FACTA's noncompliance damages provision, once included, should explicitly include awards for these general damages¹⁹⁰ and state the appropriate ceiling that should be applied.¹⁹¹ This removes any

962, 966 (N.D. Ind. 2006) (holding that the language of the statute eliminates all private actions related to § 1681m).

186. See 15 U.S.C. §§ 1681m, 1681s; Lyles, *supra* note 80 (“[I]t is likely that, over time, the Red Flags Rule will become a de facto standard of care applied to determine whether a company has negligently [sic] allowed a customer’s identity to be stolen.”).

187. See *Identity Theft*, *supra* note 1 (statement of Michelle Brown, Identity Theft Victim).

188. See Wood & Schecter, *supra* note 20, at 8 (“Courts have struggled to advance a consistent theory for imposing duties on financial institutions with respect to the disclosure of consumer information.”).

189. See Howard, *supra* note 6, at 1272-75 (explaining the ordeal Bridgette Patrick went through as a victim of identity theft).

190. See *Meerscheidt v. Wyoming*, 931 P.2d 220, 224 (Wyo. 1997) (“Damages for pain, suffering, and mental anguish are general damages.”); *Mariner v. Marsden*, 610 P.2d 6, 11 (Wyo.1980) (“[General damages are] those which may not be fixed with any degree of pecuniary exactitude but which, instead, involve mental or physical pain or suffering, inconvenience, the loss of gratification of intellectual or physical enjoyment, or other losses of life or life-style which cannot really be measured definitively in terms of money.”) (emphasis omitted) (quoting *Anderson v. Welding Testing Laboratory, Inc.*, 304 So. 2d 351, 352 (La. 1974)).

191. See 15 U.S.C. §§ 1681n-o (implementing specific ceilings on the recoverable damages for noncompliance with certain sections of the Act).

ambiguity as to the size of recoverable damages. The administrative enforcement process should be kept as a regulatory mechanism to incentivize compliance as well as ensure safe and sound practices.¹⁹² Any damages awarded by way of private suits should be assessed above any civil penalty imposed by the bank regulator. In drafting the amendment to The Rule for inclusion of private civil action for noncompliance, Congress should use sections 1681n and 1681o of the Act which address negligent and willful noncompliance as applied to other provisions of the Act as a drafting tool.¹⁹³ These standards will provide consistency for application of The Rule and set a limit on damages recoverable.¹⁹⁴ These recoverable damages should be measured upon a sliding scale that takes into consideration such factors as the level of noncompliance, the presence of red flags that should have alerted the institution of fraud, and the adequacy of the ITTP in place.¹⁹⁵

Second, the amendments would diminish the need to bring common law emotional distress tort claims since the remedies for these general damages would be provided for in the statute.¹⁹⁶ The courts have been reluctant to recognize these claims because of their failure to establish a duty owed between the parties.¹⁹⁷

Third, the proposed amendments would incentivize compliance with the Red Flags rule.¹⁹⁸ If larger payouts under the statute are awarded with consistency for noncompliance, then banks have more at stake and will take compliance more seriously and understand what needs to be done to be in full conformity

192. *See id.* §§ 1681m(e) & 1681s (establishing the administrative enforcement regime).

193. *See id.* §§ 1681n-o.

194. *See id.*

195. *See* Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation, 16 C.F.R. § 681 app. a (Supp. A 2009) (discussing the guidelines established to aid institutions in enacting an ITTP and what factors are pertinent to adopting a successful prevention program).

196. *See* *Polzer v. TRW, Inc.*, 256 A.D.2d 248, 248 (N.Y. App. Div. 1998) (refusing to recognize plaintiff's claims of negligent enablement of imposter fraud and intentional or negligent infliction of emotional distress due to lack of relationship between the parties and absence of a duty owed).

197. *See* *Howard v. Sears, Roebuck and Co.*, 2004 WL 503515, at *1 (N.Y. App. Div. 2004). (stating that because emotional distress claims "sound in negligence," the same elements must be established).

198. *See* *Wood & Schecter*, *supra* note 20, at 8.

with The Rule.¹⁹⁹ In essence, it would be adopting a “stick” approach to compliance.²⁰⁰ However, in the long run, it will be less expensive for financial institutions and creditors to implement an ITPP and pay the statute’s noncompliance damages for any breaches than it would for them to finance and struggle over litigation initiated by consumer victims for damages pursuant to a tort law claim, especially considering the inconsistency with which courts in the past have applied common law claims to instances of true name fraud.²⁰¹

Finally, providing for a private cause of action for noncompliance so as to effectively eliminate the need for common law tort claims conserves judicial resources.²⁰² Because of the limited time, resources, and capacity of the judiciary, it is vital that only those suits necessarily requiring adjudication go before the courts.²⁰³ Furthermore, suits lacking consistency and uniform rules of law expend more of the judiciary’s limited resources than do other claims.²⁰⁴ By limiting the claims available to victims of true name fraud and establishing explicit statutory rules directing these suits, fewer resources are expended and the limited judicial capacity is conserved.²⁰⁵

In enacting the amendments proposed herein, Congress should take heed and learn from the legislation stemming from violations of the debit and credit card truncation provision of

199. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 111, 102 S. Ct. 869, 875, 71 L. Ed. 2d 1 (1982) (discussing the value of a statute that has penalties designed to serve the dual goals of consistent application and fairness to the violator); *United States v. Phelps Dodge Indus., Inc.*, 589 F. Supp. 1340, 1365 (S.D.N.Y. 1984) (“To accomplish the statutory purpose of deterring violations, a penalty must ensure that disobedience does not pay. As a general rule, an offender should be deprived of any benefit derived from [the violation.]”)

200. See *Rivas-Mira v. Holder*, 556 F.3d 1, 3 (1st Cir. 2009) (providing a definition of a “stick” approach as a method of ensuring compliance through threatening behavior or punishment).

201. See *Delany*, *supra* note 19, at 559-63.

202. See *Commonwealth v. Hinterleitner*, 464 N.E.2d 46, 50 (Mass. 1983) (“Counsel should always be sensitive to the need to conserve judicial resources and the importance of avoiding inconvenience.”); *Hooker v. Simon*, 2010 WL 3516662 (E.D. Cal. Sept. 7, 2010) (noting the importance of conserving the judiciary’s limited resources).

203. See, e.g., *Foster v. RSC Equip. Rental, Inc.*, 2009 WL 4840649 (N.D. Ga. Dec 1, 2009) (speaking to the importance of conserving judicial resources).

204. See *Hooker*, 2010 WL 3516662.

205. See e.g., *Foster*, 2009 WL 4840649.

FACTA²⁰⁶ that became fully effective in December 2006.²⁰⁷ The provision applies to electronically printed receipts and states that “no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction.”²⁰⁸ This section of FACTA is subject to the noncompliance provisions established in section 1681n and section 1681o which provide for private causes of actions brought by consumer victims.²⁰⁹ For instances of negligent noncompliance, the victim of the noncompliance with the truncation provision must show loss resulting from the noncompliance, and is then only able to recover for actual losses and attorney’s fees.²¹⁰ For willful noncompliance, however, the consumer victim does not have to show harm and is able to recover statutory damages up to \$1,000 for each violation.²¹¹ The differences in the two provisions place great importance upon intent; however the harm to the consumer is the same whether the facilitating institution is negligent or willful.²¹² With the resulting harm the same, the burden of proof and damages differences seem excessive.²¹³ Thus, in drafting the private cause of action provision for The Rule, Congress should be careful to distinguish between technical violations that cause no additional harm to consumers and violations of The Rule that cause a consumer’s identity to be stolen, leading to grave consequences for the victim.²¹⁴ Only in the latter of these cases should compensatory damages be permitted so

206. See Fair and Accurate Credit Transaction Act of 2003, sec. 113, § 605 (codified as amended at 15 U.S.C. §1681c(g) (2006)).

207. Client Alert, Womble, Carlyle, Sandridge & Rice, PLLC, Truncation Now Required of Credit Card Data under FACTA: Plaintiff’s Attorneys File Numerous Class Action Lawsuits, (Feb. 19, 2007), <http://www.wcsr.com/articles/truncation-now-required-of-credit-card-data-under-facta-plaintiffs-attorneys-file-numerous-class-action-lawsuits>.

208. See 15 U.S.C. § 1681c(g)(1).

209. See *id.*; 15 U.S.C. §§ 1681n-o.

210. Womble, Carlyle, Sandridge & Rice, PLLC, *supra* note 207.

211. *Id.*

212. See Michael E. Chaplin, *What’s So Fair About the Fair and Accurate Credit Transaction Act?*, 92 MARQ. L. REV 307, 319 (2008) (raising concerns of due process violations posed by the remedies provisions).

213. See *id.*

214. See *id.* at 315-19.

as to preserve the effectiveness of the system and preclude violations of the judicial system and its resources while at the same time respecting due process.²¹⁵ However, in contrast to the award established in section 1681n for negligent noncompliance, the recoverable damages should constitute more than simply actual damages in order to compensate the consumer victim for the emotional and temporal harm he or she suffered.²¹⁶

B. Impose More Inclusive Preemption Provisions

More inclusive preemption provisions will serve to further eliminate state common law claims as well as prevent “states from imposing stronger duties on [financial institutions].”²¹⁷ Under Dodd-Frank, states are permitted to provide stricter consumer protection laws than those established by the Bureau, thus applying an anti-preemption notion to consumer protection.²¹⁸ However, because of the national character of the battle against identity theft,²¹⁹ it is imperative that uniformity of law and consistency of judicial opinion exist across all jurisdictions, an importance that should outweigh an anti-preemption notion.²²⁰ Preemption of state law claims will provide this essential uniformity.²²¹ The idea of uniformity has been recognized as important in confronting the issue of international fraud and can

215. See *id.* at 317 (“A long recognized judicial principle provides that ‘where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable’ the penalty violates due process and is, therefore, without effect.”) (quoting *St. Louis I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919)).

216. See *supra* Part V.A.

217. *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Hous., & Urban Affairs*, 108th Cong. 69 (2003); see also Delany, *supra* note 19, at 559-63.

218. See *Consumer Financial Protection Bureau- Overview of Key Provisions*, *supra* note 160.

219. See Delany, *supra* note 19, at 560.

220. See 108 CONG. REC. H8122 (daily ed. Sept. 10, 2003) (statement of Rep. Michael Castle) (“This is uniformity, not a state-by-state issue; and as Congress we must protect the consumers.”).

221. See *id.* (statement of Rep. Michael Castle) ([By not adopting uniform FACTA provisions] “we would . . . create more difficulties for our already-struggling economy. For example, according to a recent report commissioned by the Financial Services Roundtable, the loss of national uniform credit reporting standards would produce a 2 percent drop in the gross domestic product of this Nation.”).

be equally vital to the prevention of the nation's epidemic levels of interstate true name fraud.²²²

Providing increased remedies for victims of true name fraud will eliminate the need and application of state common law claims,²²³ by providing more pervasive and explicit preemptive measures within the language of FACTA.²²⁴ Additionally, a more defined and identifiable standard of care will emerge which will allow financial institutions to conform their behavior accordingly and eliminate the need for various common law and state statutory claims.²²⁵ Consumer protection is traditionally an area in which Congress prefers to allow states to adopt stricter protections for its citizens, free from conflict preemption.²²⁶ However, by including explicit federal legislative preemption within the amended version

222. The importance of uniformity is described by one commentator as follows:

One step towards uniformity and prevention of cross-border fraud issues is to create a binding international instrument in the form of a treaty. In order for such a treaty to be successful, it must recognize the concerns with cross-border fraud activities. It must define both online-identity theft and Internet fraud as global offenses. In addition to providing both criminal and civil sanctions for violators, it must also provide adequate remedies for victims to seek redress and damages.

Brian C. Pidcock, *Chester James Taylor 2008 Award Winner: Cross-Border Fraud: Bridging Global Protection Disparity Through International Cooperative Efforts*, 17 CURRENTS INT'L TRADE L.J. 78, 88 (2008); *Identity Theft Investigation and Penalties: Hearing Before the H.Subcomm. On Crime, Terrorism, and Homeland Sec.*, *supra* note 57, at 17-19 (noting how technology provides personal information to flow across state borders, highlighting the necessity of a national standard); HATCH, *supra* note 56, at 6 ("Mari Frank, a California attorney and victim, has helped hundreds of identity theft victims. She testified that because identity crimes occur across State lines, a Federal law making identity theft a crime is essential.").

223. See Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681s (2006) (amending this provision for larger recoverable damages will decrease, and ultimately eliminate the need for common law tort claims).

224. See *Montgomery v. Bank of America, Corp.*, 515 F. Supp. 2d 1106, 1109 (C.D. Cal. 2007) (stating that Congress may preempt state law by explicitly declaring the law preempted within the language of the statute).

225. See 108 CONG. REC. H8122 (statement of Rep. Michael Oxley) ("Creating a set of uniform national standards will benefit people across the economic spectrum and is the perfect vehicle to fight the crime of identity theft.").

226. See *Farm Raised Salmon Cases*, 175 P.3d 1170, 1088 (Cal. 2008) ("[C]onsumer protection laws such as the [UCL], false advertising law, and CLRA, are within the states' historic police powers and therefore are subject to the presumption against preemption.").

of The Rule that requires preemption of state tort law claim relating to counteracting identity theft, the problem of conflict preemption is avoided.²²⁷ This would allow the enforcement provisions to be upheld even within the anti-preemption area of consumer protection law. Additionally, if written sternly and stringently, there would be no need for additional, stricter state laws.

C. Benefits of the Proposed Amendments to the Financial System

The proposed amended version of FACTA is more beneficial to the financial system than the current method that permits tort law claims. First, as previously discussed,²²⁸ broader preemption of state laws will provide uniformity.²²⁹ Because of the national importance and pervasiveness of identity theft, it is vital that regulations be uniform so as to provide clear legal standards for financial institutions and to maintain enhanced regulation of the financial system.²³⁰ If financial institutions and creditors are able to reference a uniform law regarding their role in preventing identity theft, they will be better able to comport their practices and understand the liabilities imposed should such conformity not be achieved.²³¹

227. *See id.* (“In all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”).

228. *See supra* Part V.B.

229. *See* *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392, 401 (3d Cir. 2010) (holding that when Congress deems a matter to be of federal concern, state law should be preempted to ensure uniformity); *Chae v. SLM Corp.*, 593 F.3d 936, 942-43 (9th Cir. 2010) (stating that state laws should be preempted when they impede Congress’s uniform administration of the law); *Chapman v. Dunn*, 414 F.2d 153, 157 (6th Cir. 1969) (discussing Congress’s desire for interstate uniformity in matters of national importance).

230. *See* 108 CONG. REC. H8126 (“Any time Congress debates the issue of pre-empting State law, we have to question whether or not the Federal Government knows better than the States how to pass a law that affects our citizens.”).

231. *See* *Bailey v. Heald*, 17 Tex. 102, 103 (1856) (“We regarded it important that uniformity of decision on a question of so much importance to commerce should be observed.”); ANGIE L. WELBORN AND LORETTA NOTT, CONG. RESEARCH SERV., RL32121, FAIR CREDIT REPORTING ACT: A SIDE-BY-SIDE COMPARISON OF HOUSE, SENATE AND CONFERENCE VERSIONS 3 (2003) (revealing that both the House and the

Second, the amendments will provide an incentive for financial institutions to comply with The Rule in order to avoid litigation and large awards.²³² Currently, litigation is not available for noncompliance with The Rule and is only utilized through common law claims seeking remuneration for identity theft.²³³ And even though litigation and individual awards will be components of noncompliance suits, presumably there will be less complication, disagreement, and fact finding making the suits far less expensive and lengthy than suits brought pursuant to common law tort claims. This is because noncompliance will be explicitly delineated and defined by the amended statute. The more financial institutions observe The Rule and its requirements, the more smoothly the system will run and the more successful the nation as a whole will be in preventing the growth and occurrence of identity theft.²³⁴

Third, the amended statute will promote fairness by giving institutions a chance to reasonably conform their behavior to the new standards.²³⁵ Moreover, any actions based on noncompliance will result in fair and adequate judgments granted throughout all jurisdictions.²³⁶

Finally, it is important that contained within the statutory language there is a ceiling placed on recoverable damages for actual harm suffered.²³⁷ This ceiling should reflect adequate compensation for identity theft victims by taking into

Senate desired strong federal preemption standards in relation to identity theft).

232. See Wood & Schecter, *supra* note 20, at 8.

233. See Fair and Accurate Credit Transaction Act of 2003, sec. 114, § 615 (codified as amended at 15 U.S.C. §1681m(e) (2006)).

234. See Lyles, *supra* note 80.

235. See Williams v. United States, 503 U.S. 193, 219 (1992) (claiming that the purpose of sentencing reform was to improve that scheme's fairness and rationality of application. The same objectives should motivate federal preemption and statutorily proposed ceilings on damages in order to promote efficiency and equality.).

236. See *Identity Theft Penalty Enhancement Act Hearing*, *supra* note 37, at 17-19 (testimony provided by Robert Ryan, Senior Director of Government Regulations, TransUnion, LLC) (stating that because more holders of personal information are large, national corporations, it is important that a national standard be implemented).

237. See Chaplin, *supra* note 212, at 311 (discussing the pitfalls of a system lacking in a limit to recoverable damages).

consideration the risk factors of the red flags as well as the degree of noncompliance.²³⁸

VI. CONCLUSION

The fight against identity theft should be waged in the legislative arena with a focus upon preventative, as opposed to *ex post*, solutions to the ever increasing problem of true name fraud. Specifically, FACTA's Red Flags Provision provides broad and flexible preventative measures that financial institutions and creditors must adopt in order to impede the occurrence of true name fraud.²³⁹ There should be amendments to the statute's damages provision as well as stricter preemption provisions to ensure efficiency, consistency and adequate compensation to consumer victims of identity theft. If amendments are made to the damages provided under FACTA and to its preemptive scope, the statute would provide an appropriate and sufficient cause of action for consumer victims of identity theft, leaving no reason to expand, or even recognize, tort liability as a means of recourse for true name fraud.

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238. See *supra* Part V.

239. See Lyles, *supra* note 80.

