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State Utility Commissions Have Role in Identity Theft Prevention by Public Utilities Even in Light of Federal FACTA Statute

In August 2013, Minnesota's energy utilities filed their federal "Red Flags" Plans with the Minnesota public utilities commission ("PUC") pursuant to an order of the PUC.[1] Xcel Energy objected to the PUC's review of the Company's Red Flags Plan, asserting that "the FCRA contains an explicit preemption clause that prohibits states from imposing any requirements or prohibitions with respect to the conduct required by the Red Flags provisions of the FCRA. Accordingly, Commission regulation of the same conduct as required by the Rule would likely be preempted."[2]

The discussion below examines the argument that state utility commissions are not authorized to review the Red Flags Plans of public utilities. Xcel Energy's assertion that state regulatory oversight of identity theft prevention by public utilities is pre-empted by the FCRA is not well-founded. Regulatory commissions can assert jurisdiction under the traditional "just and reasonable" test for reviewing the provision of utility service.

[1] Notice of Compliance Filing and Comment Period on the Federal Trade Commission's Red Flags Rules for Gas and Electric Utilities, Docket E, G-999-/CI-12-1344 (July 19, 2013).

[2] Xcel Energy Reply Comments (September 24, 2013), at 9 – 10, footnote 21, citing, 15 U.S.C. §1681t(b)(5)(F) and §1681m(e), Minnesota PUC Docket E, G-999-/CI-12-1344, Privacy Policies of

Xcel Energy relies on language in 15 U.S.C. Section 1681t(b)(5)(F) to assert that states have no right to assert jurisdiction over identity theft prevention by public utilities. That statute provides that "no requirement or prohibition may be imposed under the laws of any State. . .(5) with respect to the conduct required by the specific provisions of [the U.S. Code section regarding Red Flags]."[3]

Inconsistency with Federal Law

Even given Xcel's citation to statutory authority, Xcel Energy gave no weight to the "general provisions" of Section 1681t(a), which states: "Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency."[4]

To the extent that a utility commission, under a state "just and reasonable" statutory standard applicable to utility service, seeks to regulate "the collection, distribution, or use of any information on consumers, or. . .the prevention or mitigation of identity theft," the commission may do so unless that regulation is "inconsistent with" the Red Flags statute ("and then only to the extent of the inconsistency").

The provisions of the Red Flags statute (15 U.S.C. sec. 1681m) do not refer specifically to the regulation of utility service nor to application of a "just and reasonable" standard to utility actions that prevent or mitigate identity theft for utility customers or relate to "the collection, distribution or use of any information on consumers. . ." As has been thus observed, "in fact, so long as state law claims are consistent with the requirements of the FCRA, §1681a specifically preserves their viability."[5]

Not only is using compliance with the Red Flags Rule not "inconsistent with" the federal statute, the use of Red Flags compliance as a standard of reasonable care is ***expected*** under the statute. The Red Flags Plans promulgated pursuant to federal law is evidence to help "determin[e] what relatively unburdensome measures a creditor could take to prevent a very probable harm."[6]

Rate Regulated Energy Utilities.

[3] Xcel's citation to 15 U.S.C. Sec. 1681m(e) is to the specific Red Flags section.

[4] See also, Johnathan Rhodes, "Protecting Personal Information from Identity Theft: An Integrated Approach," *80-Jun J. Kan. B.A.* 18 (June 2011) ("Finally, the FACT Act, which contains the Red Flags Rule, does not preempt state law "with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with [the Act]." Therefore, a "creditor" must comply with both the Kansas security breach statute *and* the Red Flags Rule because they are not inconsistent.") (internal citations omitted).

[5] Eric Glynn, The Credit Industry and Identity Theft: How to End an Enabling Relationship," 61 *Buffalo L.Rev.* 215, 242 (2013).

[6] Glynn, supra, at 250, citing (and quoting Kevin D. Lyles, Red Flags Rules Requires Companies to Take Identity Theft Seriously (Nov. 2008) ("In any event, it is likely over time, the Red Flags Rules will become a de facto standard of care applied to determine whether a company has negligently allowed a customer's identity to be stolen."); see also, Mignon Arrington, "Establishing Appropriate Liability Under the Fair and Accurate Credit Transactions Act," 15 *N.C. Banking Inst.* 357, 380 (March 2011).

Given that the Red Flags Rule is expected to be a "de facto standard of care" in state judicial actions for ***negligence***, it is difficult to conceive of how or why the use of the Red Flags Rule as a standard of care under a utility regulatory "just and reasonable" review would not also be appropriate. As one commentator noted:

> Certainly the Red Flags rule should also come into play as an effective standard, if not a per se presumption of negligence, at least as evidence that it would not take any additional effort for creditors to undertake the measures that they are already legally obligated to assume. Of course, creditors could not, and should not, be liable for every case of identity theft, but only those cases where the creditors did not adhere to a minimum standard of preventative measures."[7]

The "Conduct Required" Preemption Limitation

The Xcel argument in Minnesota further ignores the new language added to the preemption sections of FACTA. FACTA created a new exception to the inconsistency rule set forth in Section 1681t(a). "The new exception preempts states laws only 'with respect to the conduct required by the specific provisions' of particular sections or subsections."[8]

As noted by one commentator, "the conduct required by the listed provisions both defines and limits the scope of their preemptive effect. . .If the red flag guidelines do not require specific step to be taken, states will remain free to impose such requirements under the 'conduct required' standard."[9]

Contrary to the Xcel argument, there is not a broad-based preemption of state utility commission actions under FACTA.

> The basic FCRA preemption rule for state identity theft statutes is one of non-preemption except for inconsistency with specific provisions of the statute. This was accomplished by adding the subject of identity theft prevention or mitigation to the general rule of 'no preemption except for inconsistency.' The key exception is narrow, preempting state laws only with respect to the 'conduct required' under specific sections or subsections. States remain free to impose: further requirements and prohibitions in areas in which the federal law is silent, obligations on persons not covered by the federal law, and supplemental requirements and prohibitions.[10]

Hillebrand notes in language relevant to the scope of utility regulatory authority over natural gas and electric companies (or other utilities should commissions so choose):

> States should also be able to require users of credit reports and others to engage in additional preventative behavior, such as nonuse of Social Security numbers as customer identifiers, purging of personal information from records, and other identity theft prevention steps, if these approaches are not addressed in the red flag identity theft guidelines.
>
> Although the 'red flag' section will preempt

[7] Glynn, supra, at 250.
[8] Gail Hillebrand, "After the FACTA: State Power to Prevent Identity Theft," 17 *Loy. Consumer L.Rev.* 53, 72 (2004).
[9] Hillebrand, supra, at 72 and 76.
[10] Hillebrand, supra, at 78.

> only to the extent it requires conduct, the statute leaves to the regulatory process to determine what conduct will be required. It is not yet known whether the guidelines will require any specific conduct, or merely recommend conduct. The section contemplates guidelines, plus regulations. The regulations are to require financial institutions and creditors to institute 'reasonable policies and procedures for implementing the guidelines.' The more that the regulators attempt to craft guidelines which are not binding, the less likely it is that those guidelines will have any preemptive effect under FCRA, since the section is preemptive only to the extent of the 'conduct required.' Advisory guidelines do not require conduct. In addition, states can continue to act in a variety of identity theft prevention areas upon which the guidelines are silent.[11]

Hillebrand's conclusions are entirely consistent with the explanation of the FACTA statute on the floor of the Senate when the legislation was presented for deliberation. According to Senator Paul Sarbane's floor statement in presenting the bill:

> After careful consideration by the conferees, the conference report provides for preemption of the States with respect to conduct required by specific listed provisions of the Act on identity theft. This narrowly focused preemption will leave States free to supplement these protections and to develop additional approaches and solutions to identity theft.[12]

The argument that utility regulators are preempted by federal law from imposing obligations on public utilities regarding privacy protection and the prevention of identity theft is not well-founded. No such federal preemption exists except in extremely narrow circumstances.

Conclusion

The federal FACTA statute creates minimum standards for identity theft prevention activity on the part of public utilities. Even in light of these minimum federal standards, state utility commissions have a role to play in identity theft prevention under each state's statutory dictate that public utilities deliver "just and reasonable" service.

The Minnesota PUC proceeding presents a good case study of the type of argument that utilities may advance in opposition to state-imposed privacy protection obligations adopted by state regulators. As has been found above, the argument that state utility regulators are preempted from reviewing privacy protection under a state standard is not well-founded.

For more information on the FACTA obligations of public utilities, and on identity theft prevention by public utilities, please write:

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[11] Hillebrand, supra, at 83 (internal citations omitted).
[12] 149 Cong. Rec. S15,806, S15,807 (2003).