



June 15, 2004

Donald S. Clark
Secretary
Federal Trade Commission
Office of the Secretary
Room 159-H (Annex H)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20850

Re: The FACT Act Disposal Rule, R-411007

Dear Mr. Clark:

The American Financial Services Association (“AFSA”) submits its comments on the Proposed Rule specifying the disposal obligations of an entity with regard to consumer information as required by section 628 of the Fair Credit Reporting Act (“FCRA”). AFSA is the national trade association for approximately 400 finance companies and other consumer and commercial lenders operating over 10,000 offices. The credit products offered by AFSA’s members include personal loans, first and second mortgage loans, home equity lines of credit, credit card accounts, retail sales financing and credit insurance.

Because AFSA’s members rely upon consumer reports obtained from consumer reporting agencies (“CRAs”), AFSA is vitally interested in the Commission’s rulemaking process to implement section 216 the Fair and Accurate Credit Transactions Act (“FACTA”) which added section 628 to the FCRA.¹ The Final Rule governing the disposal of “consumer information” directly impacts the business of AFSA’s members.

INTRODUCTORY COMMENTS

AFSA appreciates the Commission’s effort to formulate a Proposed Rule that “reduce[s] the risk of consumer fraud and related harms, including identity theft, created by the improper disposal of consumer information”² while remaining consistent with the Gramm-Leach-Bliley Act (“GLBA”).³ AFSA is, however, sensitive to the needs of its members who are already subject to the Commission’s Safeguards Rule and are thereby required to develop, implement, and maintain Information Security Programs (“ISPs”) that include the disposal of “customer information”⁴ in a manner that protects against

¹ FCRA § 628 is codified at 15 U.S.C. § 1681w.

² Proposed Rule § 682.2(b).

³ 69 FR 21388.

⁴ The Commission’s Safeguards Rule defines “customer information” to mean:

“unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.”⁵

In its Supplementary Information accompanying the Proposed Rule, the Commission recognizes the existing burdens on financial institutions that are required to comply with the Safeguards Rule with regard to “*customer* information” and indicates that, in appropriate circumstances, the application of an ISP to the “*consumer* information” covered by the Proposed Rule may constitute compliance with both Rules.⁶ AFSA agrees and will discuss this regulatory overlap in the comments that follow.

The Commission’s Exemption Authority; FCRA § 628(a)(3).

FCRA § 628 permits the Commission to exempt “any person or class of persons from application” of the Disposal Rule.⁷

As financial institutions, AFSA’s members are already subject to the Commission’s Safeguards Rule and are required to implement ISPs that include:

[A]dministrative, technical, or physical safeguards you use to access, collect, distribute, process, protect, store, use, transmit, *dispose of*, or otherwise handle *customer information*.⁸

AFSA respectfully submits that the Commission should expressly exempt from coverage of the Disposal Rule any entity that is within the FTC’s jurisdiction and subject to the GLBA’s Safeguards Rule. The Legislative History to the FACTA Disposal Rule provision makes clear that it was intended to apply only to those entities that are not covered by the Safeguards Rule. Specifically, the sponsor of that provision, Sen. Nelson, explained that the purpose of the Disposal Rule was “close the loophole” that permitted companies that were not subject to the Safeguards Rule to improperly dispose of a consumer’s private financial records.⁹

[A]ny record containing nonpublic personal information as defined in 16 CFR § 313.3(n), about a customer of a financial institution, whether in paper, electronic, or other form, that is handled or maintained by or on behalf of you or your affiliates.

16 C.F.R. § 314.2(b).

⁵ 16 C.F.R. § 314.3(b)(3).

⁶ 69 FR 21391.

⁷ FCRA § 628(a)(3); 15 U.S.C. § 1681(a)(3).

⁸ 16 C.F.R. § 314.2(c) (emphasis added).

⁹ See, 149 Cong. Rec. S13863-02, 13999 (S. Nelson) The FTC’s safeguards rule “applies to credit reporting agencies and financial institutions that maintain consumer records and also contains guidance for businesses, which includes the storage and proper disposal of records. Although check-cashing businesses, ATM operators, real estate appraisers, and even couriers are covered by the safeguards rule, rental property companies that assess the creditworthiness of tenants and businesses that maintain consumer accounts, such as cell phone companies and utilities, are not covered by the rule. Improper disposal of a credit report could

To the extent that the Commission is concerned that the Safeguards Rule, which applies to “*customer* information,” does not cover the same information as the Disposal Rule, which applies to “*consumer* information,” AFSA believes that it is appropriate for the Commission to modify the Safeguards Rule to expand the scope of its coverage to include “consumer information.”

Amending the Safeguards’ Rule in this manner would be consistent with the disposal rule proposed by the federal banking agencies with respect to financial institutions within their respective jurisdictions.¹⁰

AFSA believes that it is counterproductive and wasteful of the Commission’s resources to enforce, and wasteful of the resources of financial institutions to have to comply with, two different rules that seek to achieve the same purpose; that is, the protection of consumer information from unauthorized access and use. By exempting those financial institutions that are covered by the Safeguards Rule from the coverage of the Disposal Rule, the Commission will achieve the goals envisioned by Congress while eliminating duplicative compliance obligations.

Alternatively, if the Commission does not believe that an exemption for financial institutions covered by the Safeguards Rule is warranted, duplicative compliance obligations could be avoided by making it clear, perhaps as the first example in Proposed Rule § 682.3(b), that a financial institution that applies its Safeguards Rule compliant ISP to “consumer information” also complies with the Disposal Rule. AFSA believes this result could be achieved with addition of the following example to Proposed Rule § 682.3(b):

(b) Examples. Reasonable measures to protect against unauthorized access to or use of consumer information in connection with its disposal would include:

(1) The application of an entity’s Information Security Program, that complies with 16 C.F.R. §§ 314.3, 314.4, to the entity’s consumer information.

This revision would have the effect of accomplishing the harmonization sought by the Commission and minimizing the compliance burden on those entities that are subject to the Safeguards Rule.

compromise driver's license information, Social Security numbers, employment history and even bank account numbers. My amendment will close the loophole and further protect credit information by requiring the Federal Trade Commission to issue regulations regarding the proper disposal of consumer credit information.”

¹⁰ See 69 FR 31913 *et seq.* (June 8, 2004.)

Alternatively, if the Commission will not provide the above-described exemption, AFSA believes that the Proposed Rule should be revised to ensure that no private right of action is created for the alleged violation of the Safeguards Rule through the promulgation of the Disposal Rule. Neither GLBA nor the Safeguards Rule provide for such a right of action. Consumers should not be permitted to allege virtually identical claims in the guise of a lawsuit under FCRA § 628.

COMMENTS ON SPECIFIC SECTIONS

1. The Definitions.

A. The definition of “consumer information;” Proposed Rule § 682.1(b).

The Proposed Rule provides that “consumer information” means “any record about an individual ... that is a consumer report or is *derived* from a consumer report.” (Emphasis added). AFSA believes that the use of the word “derived” in this definition may be read to imply a broader scope for the Disposal Rule than is intended by the Commission or is authorized by FCRA § 628.¹¹

The definition of consumer report¹² itself makes the proper focus of the Disposal Rule clear: “consumer information” is that information which relates to an individual’s *financial* characteristics (i.e., eligibility for credit, insurance, employment, or other permissible purpose) or *personal* characteristics (i.e., credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living). AFSA acknowledges that “consumer information” is somewhat broader than “consumer report” information for purposes of the Disposal Rule. AFSA believes, however, that this broader scope should encompass only the information otherwise excepted from the definition of consumer report by FCRA § 603(d)(2). AFSA is concerned that the Proposed Rule’s inclusion of the word “derived” in the definition of “consumer information” will have unintended negative consequences.

The phrase “derived from a consumer report” should not be read to include within the definition of “consumer information” *all* information that may appear *in* a consumer report. The Commission has previously explained that “public record information,” even if provided by a CRA, is not a consumer report unless it is collected or used as a factor in establishing a consumer’s eligibility for credit, insurance, employment, or another

¹¹ Proposed Rule § 682.1(a) (“the terms used in this part have the same meaning as set forth in the [FCRA]...”).

¹² FCRA § 603(d)(1); 15 U.S.C. § 1681a(d)(1). The FCRA defines “consumer report” as “any ... communication of any information by a consumer reporting agency bearing” on one of the so-called “seven factors” and “used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for” credit, insurance, employment, or any other permissible purpose under FCRA § 604.

permissible purpose.¹³ The Commission has also previously limited the definition of consumer report by excluding reports “limited solely to the consumer’s name and address alone, with no connotations as to credit worthiness or other characteristics...”¹⁴ The definition of “consumer information” should make clear that purely identifying information is not “consumer information” merely because it is contained in the credit header portion of a consumer report.

Similarly, AFSA believes that, to the extent the Disposal Rule will apply to “derived” information, the Rule should state that the consumer report user must know that the information in its possession has been derived from a consumer report before such information is subject to the disposal requirement. AFSA is concerned that, absent this knowledge requirement, consumer report users will be left to guess whether any or all information contained in a consumer’s file is “derived” from a consumer report.

Finally, although the Commission acknowledges in its Supplementary Information that information derived from a consumer report that does *not identify* any particular consumer is *not* subject to the Disposal Rule, AFSA believes this exclusion should be explicitly stated in the Rule itself to eliminate any uncertainty as to whether such information must be monitored by consumer reports users for disposal purposes.

The principal benefit of revising the definition of “consumer information” as suggested above is that it directly links the meaning of the term to the Commission’s prior pronouncements relating to consumer reports. Although discussed in the Supplementary Information, AFSA also believes the Proposed Rule should be revised to expressly state what is *not* “consumer information.” To accomplish this purpose, AFSA believes that the following “exclusion” should be added as subsection “(c)” to Proposed Rule § 682.1 and that the existing subsection “(c)” (defining “disposing” and “disposal”) should be renumbered as subsection “(d)”:

(c) “Consumer information” does not include:

- (1) information that includes only the names and/or addresses of consumers, without consumer report information or the information or characteristics identified in subparagraph (b); or
- (2) information that the person does not know is a consumer report or taken from a consumer report.

B. The definition of “disposing” or “disposal;” Proposed Rule § 682.1(c).

¹³ Commission Commentary on the FCRA, 16 C.F.R. Part 600, App. § 603, cmt. 4E.

¹⁴ Commission Commentary on the FCRA, 16 C.F.R. Part 600, App. § 603, cmt. 4F.

The Proposed Rule defines “disposing” or “disposal” to include “*the sale, donation, or transfer* of any medium ... upon which consumer information is stored...”¹⁵ (Emphasis added).

In its Supplementary Information, the Commission states that: “By itself, the sale, donation, or transfer of consumer information would not be considered ‘disposal’ under the proposed Rule.”¹⁶ The Commission’s comment is consistent with FCRC § 628, which authorizes the Commission to issue regulations governing the proper disposal of consumer information. FCRA § 628 says nothing about the sale, donation, or transfer of such information. AFSA believes that Proposed Rule 682.1(c)(2), as written, exceeds the Commission’s authority and injects uncertainty into the determination of what actions are subject to the Disposal Rule. AFSA believes that the definition of “disposing” and “disposal” should be revised in the following manner:

(Existing Definition in Proposed Rule)

- (c) As used in this part, “disposing” or “disposal” includes:
- (1) the discarding or abandonment of consumer information; and
 - (2) the sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored.

(Suggested Definition for Final Rule)

- (c) As used in this part, “disposing” or “disposal” means the discarding or abandonment of consumer information or of any medium, including computer equipment, upon which consumer information is stored.

2. The Proper Disposal of Consumer Information.

A. The standard; Proposed Rule § 682.3(a).

The Proposed Rule requires “any person” who maintains or possesses consumer information for a business purpose to “properly dispose of such information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.” In its Supplementary Information, the Commission explains that it expects entities covered by the Proposed Rule to consider the following factors in determining what is a “reasonable measure:”

- the sensitivity of the consumer information;
- the nature and size of the entity’s operations;
- the costs and benefits of different disposal methods; and

¹⁵ Proposed Rule § 682.1(c)(2).

¹⁶ 69 FR 21389.

- relevant technological changes.¹⁷

AFSA believes that it is essential that the Commission’s flexible approach to the reasonableness of an entity’s disposal measures be incorporated into the text of the Final Rule so as to eliminate the possibility that complying entities will be held to a strict liability or “perfect” disposal standard. To achieve this result, AFSA believes that the Proposed Rule should be revised as follows:

(Existing Definition in Proposed Rule)

(a) Standard. Any person who maintains or otherwise possesses consumer information, or any compilation of consumer information, for a business purpose must properly dispose of such information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.

(Suggested Definition for Final Rule)

(a) Standard. Any person who maintains or otherwise possesses consumer information, or any compilation of consumer information, for a business purpose must properly dispose of such information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal. In developing and implementing these measures, a person may consider the sensitivity of the consumer information, the nature and size of the entity’s operations, the costs and benefits of different disposal methods; and relevant technological changes.

As the Commission recognized, the Rule does not require “perfect destruction”¹⁸ The suggested revision to the Proposed Rule will make clear the Commission’s flexible, risk-based approach.

B. The examples; Proposed Rule § 682.3(b).

In the Supplementary Information accompanying the Proposed Rule, the Commission invited comments concerning the “merits of the examples included in this notice.”¹⁹

AFSA appreciates the Commission’s efforts to provide guidance to those entities that will have to comply with the Disposal Rule. AFSA believes that the examples, while

¹⁷ 69 FR 21389.

¹⁸ *Id.*

¹⁹ 69 FR 21390.

helpful as written, would be of greater assistance if the Final Rule made clear that compliance with the procedures identified in the examples is deemed compliance with the Disposal Rule.

3. The Effective Date; Proposed Rule § 682.5.

The Proposed Rule indicates that the Final Rule will become effective 3 months after it is published in the Federal Register.

For those entities that have not had to comply with the Commission's Safeguards Rule, AFSA believes that 3 months is an insufficient time to implement a compliant disposal program. As the examples in Proposed Rule § 682.3(b) make clear, many entities will have to implement policies and procedures relating to the burning, pulverizing, or shredding of documents. Other entities will contract with another party to fulfill the consumer information disposal function. As part of this contracting process, these entities will have to identify competent and reliable third-party contractors, negotiate the terms of the disposal agreement, and monitor the contractors to ensure compliance.

AFSA believes that an effective date that is 6 months from the date of publication of the Final Rule would provide a more reasonable period during which complying parties could develop and implement their consumer information disposal programs.

CONCLUSION

Because the Disposal Rule will directly impact AFSA's members, AFSA hopes that due consideration will be given to its comments as the trade association representing hundreds of creditors who extend credit and loans to millions of American consumers.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert E. McKew", with a long horizontal flourish extending to the right.

Robert E. McKew
Senior Vice President and General Counsel
American Financial Services Association