



COALITION TO IMPLEMENT THE FACT ACT

June 14, 2004

Federal Trade Commission
Office of the Secretary
Room 159-H (Annex H)
600 Pennsylvania Ave., NW,
Washington, DC 20580

Re: The FACT Act Disposal Rule, R-411007

To Whom It May Concern,

This comment letter is submitted by the Coalition to Implement the FACT Act ("Coalition") in response to the proposed rule issued by the Federal Trade Commission ("FTC") pursuant to Section 628 of the Fair Credit Reporting Act ("FCRA") ("Proposed Rule"). The Coalition represents a full range of trade associations and companies that furnish and use consumer information as well as those who collect and disclose such information. The Coalition represents a full range of trade associations and companies that furnish and use consumer information, as well as those who collect and disclose such information. We appreciate this opportunity to provide our comments to the FTC.

Definitions

The FCRA requires the FTC to issue regulations "requiring any person that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived from consumer reports for a business purpose to properly dispose of any such information or compilation." As part of the Proposed Rule, the FTC establishes definitions for the two key concepts in this requirement: "consumer information" and "disposing" of such information.

For purposes of compliance with a final rule issued by the FTC pursuant to Section 628 of the FCRA ("Final Rule"), it will be critical that "consumer information" be defined precisely. A wide range of entities could be subject to the requirements of the Final Rule and it will be important for each of them to understand exactly what is required by the Final Rule. The importance of this is magnified because not only will covered entities be subject to the FTC's broad enforcement authority for violations of the Final Rule, but such entities could also face significant liability as a result of private rights of action and class action litigation. Therefore, we urge the FTC to provide as much clarity as possible when defining the types of information covered in the Final Rule.

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The Proposed Rule defines "consumer information" to be any record about an individual, whether in paper, electronic, or other form, that is a consumer report or derived from a consumer report. The FTC has not provided for a definition of what would be "derived from a consumer report" in the Proposed Rule. However, the FTC provides that it would cover "all of the information about a consumer that is taken from a consumer report, including information that results in whole or in part from manipulation of information from a consumer report or information from a consumer report that has been combined with other types of information." The FTC also implies that information that has been shared among affiliates pursuant to Section 603(d)(2)(A)(iii) of the FCRA would be "consumer information" under the Proposed Rule.

We believe that the FTC has provided an extremely broad definition of "consumer information" that is not appropriate in all circumstances. For example, a credit card issuer may share information with its retail affiliate pursuant to Section 603(d)(2)(A)(iii) of the FCRA. The retail affiliate may print catalogs and other documents with consumers' names that is derived from this information. We do not believe that such documents are of such a sensitive nature as to warrant coverage under the Proposed Rule. In fact, there may be nothing that distinguishes such documents from other documents that are compiled using information other than "consumer information." We do not believe that it would be appropriate to require the retail affiliate to incur unique costs to dispose of relatively innocuous information simply because at one point in time it may have been derived from a consumer report. We believe that a more appropriate alternative would limit the definition of "consumer information" to sensitive information that can be used to cause harm to the consumer. For example, it could include a consumer's name and Social Security number if the information was derived from a consumer report. A discarded catalog with a consumer's name on it would obviously not meet this definition.

The Coalition also notes that the Proposed Rule does not appear to distinguish between circumstances in which a person may or may not be able to determine whether or not information was derived from a consumer report. For example, recipients of information from affiliated or third parties may not know that certain information was "derived" from a consumer report. It would not be appropriate to impose liability on persons in such circumstances if they are unaware that the information is subject to the Final Rule. Therefore, the definition of "consumer information" should apply only when the person disposing of the information is aware that it was derived from a consumer report.

We are pleased that the FTC has provided guidance with respect to information that does not identify a particular individual. Specifically, the FTC states that such information would not be covered, "even if the information was originally 'derived from consumer reports,'" since that information is not about an individual. We ask the FTC to retain this interpretation and include it in the text of the Final

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Rule itself. Indeed, it would not further the objectives of the Proposed Rule, to reduce the risk of consumer fraud such as identity theft, to apply the Proposed Rule to information that does not include identities.

The Proposed Rule also defines what it means to dispose of information. The term "includes" the discarding or abandonment of consumer information and the sale, donation, or transfer of any medium, including computer equipment, upon which computer information is stored. We agree with the FTC's examples of what it means to dispose of information. However, we believe the FTC should *define* what it means to dispose of information—not only to provide what such term *includes*. Again, we note that covered persons must have some specificity with respect to what is intended by the Final Rule in order to avoid unnecessary liability. Therefore, we ask the FTC to change the word "includes" to "means" in the definition of disposing or disposal. We also ask that the FTC state in the text of the Final Rule, as opposed to in the Supplementary Information, that the sale, donation, or transfer of consumer information would not be considered "disposal" under the Final Rule. We also believe that it would be important to clarify what it means to "transfer" information. For example, it should obviously include the sale of a business, including the entity's computers and consumer data on those computers. It should also include something as basic as including a consumer's name and address on an envelope to be mailed, such as would occur as part of a written prescreened solicitation.

Scope

The Proposed Rule applies to any person over which the FTC has jurisdiction that, for a business purpose, maintains or otherwise possesses consumer information or any compilation of consumer information. The FTC has specifically asked whether it should exempt any persons or classes of persons from the Proposed Rule. If the FTC does not amend the definition of "consumer information" to exclude those entities who do not know that the information is derived from consumer report information, it should exclude such persons from coverage under the Final Rule. We also believe that financial institutions subject to the FTC's information safeguarding regulations issued under the Gramm-Leach-Bliley Act ("Information Safeguarding Rule") should not be subject to the Final Rule. Financial institutions subject to the Information Safeguarding Rule already must take the proper precautions to dispose of customer information, whether it is their own customer information or another financial institution's customer information. We do not believe the Final Rule would add significant consumer benefits to this existing requirement. Financial institutions should not shoulder additional compliance burdens and liability given that there is little corresponding consumer benefit.

Proper Disposal of Consumer Information

The Proposed rule requires any person who maintains consumer information

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for a business purpose to dispose of such information properly by taking "reasonable measures" to protect against unauthorized access to or use of the information in connection with its disposal. In the Supplementary Information, the FTC notes that it does not expect covered persons to ensure the perfect destruction of consumer information in every instance. Rather, covered persons must consider the sensitivity of the consumer information, the nature and size of the person's operations, the costs and benefits of different disposal methods, and relevant technological changes and develop reasonable procedures to protect the data. The Proposed Rule also provides some examples of such reasonable measures.

We commend the FTC for developing an approach that allows each covered person to assess its unique situation and to develop reasonable procedures accordingly. The Coalition believes that this is the best way to approach the FTC's statutory mandate. Indeed, it would be virtually impossible to establish regulations that would apply equally appropriately to each of the covered persons. Such an approach is also consistent with the Information Safeguarding Rule. Therefore, it is our hope that this approach will be retained in the Final Rule.

Relation to Other Laws

The Proposed Rule restates the statutory direction that nothing in the Proposed Rule is to be construed to require a person to maintain or destroy any record pertaining to a consumer that is not imposed under other law. In this regard, the Proposed Rule does not require a covered person to dispose of information. Rather, the Proposed Rule states that if a covered person is disposing of consumer information, such information must be disposed of pursuant to reasonable procedures. We ask the FTC to provide specific clarification to this effect in the text of the Final Rule.

Effective Date

The FTC proposes to make the Final Rule effective three months after it is published in the *Federal Register*. The Coalition is concerned that many entities may not have sufficient time to develop appropriate compliance programs within three months of the Final Rule being released. We believe that covered persons should have at least six months, if not more, to comply with the Final Rule.

Conclusion

Definitional clarity regarding the concepts of "consumer information" and "disposing" of such information is critical to the ability of coalition members to comply with the regulation in the face of broad FTC enforcement authority for violations of the final rule combined with exposure to private rights of action and class actions. In regard to the proper disposal of consumer information, the Coalition again ex-

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presses its support for the approach developed by the FTC to allow each covered person to assess its unique situation and to develop reasonable procedures accordingly.

Thank you again for allowing the Coalition to comment on this issue. Please do not hesitate to contact me at 202 464 8815 if the Coalition can be of further assistance.

Sincerely,



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