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TO: Federal Trade Commission
Office of the Secretary
Room 159-H (Annex C)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

**Re: Comments Regarding FACTA Interim Final Rule Prohibiting
Circumvention, Project No. P044804**

These comments on the proposed FACTA Interim Final Rule Prohibition Against Circumventing Treatment as a Nationwide Consumer Reporting Agency¹ are submitted by the National Consumer Law Center on behalf of its low income consumer clients.² These comments are also filed on behalf of the U.S. Public Interest Research Group.³

We commend the FTC for its proposed rule and its effort to ensure that the intent of the FCRA and the FACT Act, and their many provisions intended to provide consumers with additional rights concerning information gathered and maintained by nationwide credit reporting agencies, are not circumvented by any means. The Commission correctly interprets Congress' mandate in the FACT Act to grant the Commission broad authority to prevent all circumvention and not only those types specified in the FACT Act.

The Commission has also appropriately addressed concerns about new entities entering the credit reporting marketplace, by prohibiting them from circumventing the FCRA and FACT Act requirements. By prohibiting any "organization" and "structuring" to evade these requirements, the Commission's rule ensures that any newly created entity cannot absolve itself from the

¹ 69 Fed. Reg. 8532 (Feb. 24, 2004).

² **The National Consumer Law Center** is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit transactions to determine appropriate claims and defenses their clients might have. As a result of our daily contact with these practicing attorneys, we have seen numerous examples of invasions of privacy, embarrassment, loss of credit opportunity, employment and other harms that have hurt individual consumers as the result of violations of the Fair Credit Reporting Act. It is from this vantage point--many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities--that we supply these comments. *Fair Credit Reporting* (5th ed. 2002) is one of twelve practice treatises which NCLC publishes and annually supplements. These comments were written by Anthony Rodriguez, Margot Saunders and Carolyn Carter.

³ **U.S. Public Interest Research Group** is the national lobbying office for the state PIRG's, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

requirements of the FCRA and FACT Act. The language in the Commission's rule is consistent with the intent of Congress in passing the FACT Act to establish uniform national standards and ensure accuracy and transparency in the credit reporting process.

It is clear from the anti-circumvention rule and examples contained therein, that the Commission followed the plain language in the FCRA and the FACT Act with respect to actions that are covered by the rule. Consistent with the definition of a nationwide credit reporting agency as defined in § 1681a(p), the rule, including the first example, prohibits circumvention by, *inter alia*, "reorganization by data type." This addresses any concerns that an organization may cease to meet one element of the definition of a nationwide credit reporting agency (i.e., compilation and maintenance of files on a nationwide basis), yet continue to meet other elements of the definition (i.e., maintaining public information). The rule recognizes that such actions are exactly the type that Congress sought to prohibit by including in the FACT Act a requirement that the Commission promulgate an anti-circumvention rule. Congressional intent to prohibit the manipulation of corporate structure or consumer records as a means to avoid the legislative requirements was clear.⁴ The Commission's proposed rule and example complies with this intent.

There is one area in which we believe the Commission can clarify, through the circumvention rule, credit reporting agency responsibilities. We urge the Commission to consider adding language stating that nationwide credit reporting agencies, as defined by § 1681a(p), are responsible for the acts not only of their officers, directors and employees, but all of their agents, independent contractors, partners, subsidiaries, and joint venturers, as well as anyone to whom these entities subcontract their work. Inclusion of such language would address many problems associated with outsourcing by the nationwide credit reporting agencies, a problem specifically identified when the FACT Act was passed.⁵ This suggested addition would prevent the use of outsourcing to circumvent the requirements of the FCRA and the FACT Act. It would make it clear that entities to which such duties are outsourced must fully comply with such requirements and that nationwide credit reporting agencies are legally responsible for any violations.

We also recommend that example No. 4 in the proposed rule be revised to address the possibility of a nationwide credit reporting agency engaging in a joint venture, licensing arrangement, or outsourcing arrangement with another company. At a minimum, we recommend that the Commission amend the third sentence in this example to state: "Foster Ltd. ceases to assemble, evaluate and maintain public record information on consumers residing nationwide, and ceases to offer, **directly or indirectly**, reports containing public record information."

Further, Section 211(d)(6)(A) of the FACT Act directs the Commission to determine, by rulemaking, "whether to require a consumer reporting agency that compiles and maintains files on consumers on substantially a nationwide basis, other than one described in section 603(p)[1681a(p)] of the Fair Credit Reporting Act," to make free reports available through a centralized source. For this reason, and to ensure there will be no circumvention of other requirements, the Commission should consider inclusion of agencies that provide tri-merged

⁴ "The FTC is directed to prescribe regulations preventing consumer reporting agencies from avoiding being treated as an agency defined in section 603(p) by manipulating their corporate structure or consumer records in a manner that allows them to operate with essentially identical activities but for a technical difference." Statement by Rep Oxley, Cong. Rec. E2514 (Extension of Remarks Dec.9, 2003).

⁵ Cong. Rec. H12222, Statement of Rep. Markey (Nov. 21 2003).

reports and resellers that may obtain public information from a fourth party as falling within the scope of the anti-circumvention rule. This would be consistent with the purposes behind both the circumvention rule requirement and the free report requirement for those entities that maintain files on a substantially nationwide basis, but may not fit within the requirements of section 603p.

Some who have submitted comments on the proposed rule have suggested a requirement that a violation of the anti-circumvention rule would only occur if it is intentional and where there is no legitimate business reason for the action. There is no rational basis for such requirements. Adding them would create too narrow a standard that would invite evasion and be detrimental to consumers and the national credit reporting system. Companies could easily create business reasons for a spin-off to avoid their real intent from appearing in any documents, thereby eroding existing consumer protections.

Others who have submitted comments have also advocated for additional examples of circumvention and for specific elements that must be present for a violation of the rule to occur. While additional, but not exhaustive, examples may be beneficial, there are all varieties of ways that companies could invent to circumvent the FCRA and FACT Act requirements. An exclusive list or closed definition would undermine the goal of Congress.

We appreciate the opportunity to comment on the Commission's proposed rule prohibiting circumvention pursuant to § 211(b) of the FACT Act. This rule is an important component of the statutory and regulatory framework Congress established to protect consumers and ensure accountability with respect to credit reports and nationwide agencies that gather such reports.

Sincerely,

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