



April 23, 2004

Mr. Donald S. Clark  
Secretary  
Federal Trade Commission  
Room 159-H (Annex C)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Re: FACTA Free File Disclosures Proposed Rule, Matter No. R411005  
Streamlined process for requesting annual file disclosures from  
nationwide specialty consumer reporting agencies, § 610.3

Dear Mr. Clark:

On April 16, 2004, the Consumer Data Industry Association (“CDIA”) filed comments on the Federal Trade Commission’s (“FTC”) proposed rule on free file disclosures under section 211(d) of the Fair and Accurate Credit Transactions Act of 2003 (the “FACT Act”). CDIA respectfully requests the opportunity to file additional comments on the section 610.3 of the proposed rule, entitled “streamlined process for requesting annual file disclosures from nationwide specialty consumer reporting agencies.”

As amended by the FACT Act, the Fair Credit Reporting Act (“FCRA”) requires that nationwide specialty consumer reporting agencies provide annual file disclosures to consumers, once during any 12-month period upon the request of the consumer and without charge to the consumer. Section 612(a)(1)(C); 15 U.S.C. 1681j(a)(1)(C). The FCRA defines a “nationwide specialty consumer reporting agency” as “a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis relating to (1) medical records or payments; (2) residential or tenant history; (3) check writing history; (4) employment history; or (5) insurance claims.” Section 603(w); 15 U.S.C. 1681a(w). CDIA’s members include nationwide specialty consumer reporting agencies within that definition.

The FACT Act requires the Commission to prescribe regulations for the establishment of “a streamlined process” for consumers to request their free annual file disclosures from the nationwide specialty consumer reporting agencies. FACT Act § 211(a), *codified at* Sec. 612(a)(1)(C), 15 U.S.C. 1681j(a)(1)(C). In promulgating the regulations applicable to nationwide specialty consumer reporting agencies, the Commission must consider the following factors: the significant demands that may be placed on these agencies in providing annual file disclosures; appropriate means to ensure that consumer reporting agencies can satisfactorily meet those demands, including the efficacy of a system of staggering the availability to consumers of such file disclosures; and the ease by which consumers should be able to contact consumer reporting agencies with respect to access to such file disclosures. FACT Act § 211(a)(2)(a)(C)(ii), *codified at* Sec. 612(a)(1)(C)(ii), 15 U.S.C. 1681j(a)(1)(C)(ii).

### **General Comments**

In many respects the proposed rule provisions for the streamlined process for nationwide specialty consumer reporting agencies are substantively similar to those for the centralized source for the nationwide consumer reporting agencies, and CDIA has many of the same concerns.

Perhaps the most troubling provision is the one requiring that from the beginning, the nationwide specialty consumer reporting agencies will have to reasonably anticipate the volume of consumers who will use the streamlined process to request their free file disclosures. This provision creates an impossible situation for these agencies. As CDIA has discussed in its comments concerning the centralized source, there is some empirical basis for predicting consumer request volume for free file disclosures from the nationwide consumer reporting agencies. That is because of the Congressional Research Service report to Congress discussed in the Supplementary Information. 69 Fed. Reg. at 13198.

There is no comparable data upon which to base an estimate as to the consumer request volume for the nationwide specialty consumer reporting agencies. In addition, while many consumers are aware that the nationwide consumer reporting agencies maintain files on them, the same is not true with respect to consumers’ awareness of the existence of their files at the nationwide specialty consumer reporting agencies. In fact, until a consumer is subject to adverse action based upon information in the file of a nationwide specialty consumer reporting agency, in many instances, the consumer may not even know that such an agency exists, let alone that it maintains a file on the consumer. Moreover, although the nationwide consumer reporting agencies maintain files on just about every financially active consumer, the same cannot be said for the nationwide specialty consumer reporting agencies. All these factors illustrate why consumer request volume through the streamlined process cannot be extrapolated from the experience of the nationwide consumer reporting agencies in the free-file disclosure states.

Without any factual basis for predicting consumer request volume, the nationwide specialty consumer reporting agencies will need to overbuild the capacity of the telephone system and overbuild the capacity in terms of personnel to handle the back-end costs or they will face unbearable financial risk. Neither alternative serves the public interest. CDIA appreciates that the Commission has attempted to provide some relief for the nationwide specialty consumer reporting agencies by requiring them to implement reasonable procedures to reasonably anticipate consumer request volume. However, the reasonableness of those procedures and the reasonableness of the prediction can only be measured in hindsight. When this reality is coupled with the prospect of class action litigation, the proposed rule creates unacceptable risk.

The FACT Act gives the Commission the opportunity to alleviate the problem. Under the Act, the Commission may delay the effective date of the rule until March 1, 2005. CDIA believes that the final rule should take effect on December 1, 2004, but that compliance with the rule should not be mandatory until March 1, 2005. Delaying the mandatory compliance date will encourage the nationwide specialty consumer reporting agencies to implement their respective toll-free telephone systems on December 1, 2004 in order to gather data upon which to base their estimate of consumer request volume before they are subject to a possible rule violation for their inaccurate estimates. This safe harbor transition period will fulfill all the statutory requirements that the Commission consider: (1) the significant demands that may be placed on consumer reporting agencies in providing annual file disclosures; (2) appropriate means to ensure that consumer reporting agencies can satisfactorily meet those demands, including the efficacy of a system of staggering the availability to consumers of annual file disclosures; and (3) the ease by which consumers should be able to contact consumer reporting agencies with respect to access to annual file disclosures. Section 612(a)(1)(C)(ii).

CDIA is also concerned about a number of other provisions in the proposed rule. The proposed level of protection for extraordinary request volume is set unreasonably high. If not adjusted to a more reasonable level, it will require the nationwide specialty consumer reporting agencies to build the capacity of their toll-free telephone systems to double the reasonably anticipated consumer request volume. CDIA recognizes that there should be some excess capacity built into the system to accommodate small surges. CDIA believes that level is 125% of the daily rolling 90-day average. CDIA also believes that the final rule should provide for high request volume protections which will be available to the nationwide specialty consumer reporting agencies if they place all consumer requests exceeding the rolling 90-day average into a response queue.

CDIA suggests that the final rule define what constitutes "receipt" of a completed consumer request for a free file disclosure to make clear that the nationwide specialty consumer reporting agencies' obligation to provide free file disclosures and the time period within which they must do so does not begin to run until the nationwide specialty consumer reporting agencies have received completed requests, and that the request is not completed until the requesting consumer has been properly identified.

CDIA is very concerned with the proposed rule's treatment of the *force majeure* circumstances. Instead of insulating the nationwide specialty consumer reporting agencies from liability in the event of such circumstances, the proposed rule affirmatively requires the nationwide specialty consumer reporting agencies to develop and implement contingency plans to address circumstances that could materially and adversely impact the operation of the streamlined process. The proposed rule thus creates potential liability if the nationwide specialty consumer reporting agencies failed to have such contingency plans even if there was nothing they could do to anticipate the *force majeure* circumstances or avoid their consequences. This provision must be modified in the final rule so that the rule appropriately protects the nationwide specialty consumer reporting agencies in the event of a *force majeure* event, rather than creating additional potential liability for the agencies. Finally, the proposed rule contains an inappropriate and unwarranted requirement that the nationwide specialty consumer reporting agencies comply with the FTC's Safeguards Rule. There is no statutory authority for this provision, which has the effect of amending the Gramm Leach Bliley Act (GLB Act). This provision should be deleted in its entirety.

### **Streamlined Process --Toll Free Telephone Number**

The statute requires that, "at a minimum, the streamlined process shall include the establishment by each nationwide specialty consumer reporting agency of a toll-free telephone number for such requests." FACT Act § 211(a), codified at FCRA § 612(a), 15 U.S.C. 1681j(a). Under the proposed rule, the only streamlined process required for nationwide specialty consumer reporting agencies is a toll-free telephone number. CDIA believes that the requirement is appropriately limited to that request method.

As the Commission observed in the Supplementary Information for the proposed rule, in the past, the nationwide specialty consumer reporting agencies have had limited consumer demand for their file disclosures. 69 Fed. Reg. at 13200. CDIA believes that in most instances, when consumers request file disclosures from the nationwide specialty consumer reporting agencies as a result of adverse action, consumers call the toll free telephone number listed on the adverse action notice. For that reason, the nationwide specialty consumer reporting agencies already have established systems to process consumer file disclosure requests by telephone, and consumers have been able to use this method to obtain their files from these agencies without difficulty.

For these reasons, CDIA agrees with the Commission's conclusion that the requirement for a toll-free telephone number for file disclosure requests is sufficient to facilitate consumer access to annual file disclosures from nationwide specialty consumer reporting agencies, and this conclusion also takes into account "the significant demands that may be placed upon those agencies in providing annual file disclosures to all consumers upon request," as the FACT Act requires. FACT Act § 211(a), codified at FCRA § 612(a)(1)(C)(ii)(I), 15 U.S.C. 1681j(a)(1)(C)(ii)(I). CDIA, therefore, urges that the final rule limit the "streamlined process" by which consumers may request their free file disclosures from the nationwide specialty consumer reporting agencies to a toll-free telephone number. The final rule could provide that the requirement of a toll-free telephone number for a streamlined process shall not preclude a specialty agency from

also making other methods available for consumers to request a copy of their file, such as by mail or through a web site.

CDIA is concerned that the proposed rule requires that when consumers contact the toll-free telephone number, they be given “clear and prominent” instructions for requesting the disclosures by any available request method offered by the nationwide specialty consumer reporting agency. § 610.3(a)(1)(i). Such a requirement essentially makes the Internet and mail request methods part of the streamlined process, as they would be methods to which consumers would have to be referred, if available. The requirement also complicates the instructions given to the consumer at the toll-free number, thus interfering with the requirement under the FACT Act for the consumer’s ease of contacting the consumer reporting agency with respect to the free file disclosure. Moreover, requiring referral to these other request methods discourages smaller nationwide specialty consumer reporting agencies from offering to receive requests for free file disclosures at these other sites. For these reasons, CDIA believes that the requirement to notify consumers of other request methods should be deleted from the final rule.

The proposed rule also requires that the toll-free number be published in any telephone directory in which any telephone number for the nationwide specialty consumer reporting agency is listed, § 610.3(a)(1)(ii), and that it be posted on any website that the nationwide specialty consumer reporting agency owns or maintains, § 610.3(a)(1)(iii). In the Supplementary Information, the Commission explains that “nothing in the rule requires a nationwide specialty consumer reporting agency to establish a website; however, if an agency chooses to have a website, it must post its toll-free number and streamlined process instructions on that site.” 69 Fed. Reg. at 13200.

CDIA believes that this requirement may increase the significant demands that may be placed on the nationwide specialty consumer reporting agencies in providing consumer reports and that it is not necessary in order to fulfill the Commission’s mandate under the FACT Act.

### **Streamlined Process Requirements**

As in the case of the proposed rule’s requirements for the centralized source for the nationwide consumer reporting agencies, the proposed rule requires that streamlined process have adequate capacity to accept reasonably anticipated volume, § 610.3(a)(2)(i); to collect only as much personal information as is reasonably necessary to properly identify the consumer, § 610.3(a)(2)(ii); and to provide clear and easily understandable information and instructions, § 610.3(a)(2)(iii). Nationwide specialty consumer reporting agencies, like nationwide consumer reporting agencies, must implement reasonable procedures to anticipate and respond to the volume of consumers who will contact the nationwide specialty consumer reporting agency to request annual file disclosures. § 610.3(b). The proposed rule also provides for “extraordinary request volume” protection if the nationwide specialty consumer reporting agencies have implemented reasonable procedures to anticipate and respond to such volume. § 610.3(c).

These requirements are nearly identical to those imposed upon nationwide consumer reporting agencies under section 610.2 of the proposed rule, and they create many of the same problems described in CDIA's comments filed on April 16, 2004. However, the provisions for the transition period are even worse for the nationwide specialty consumer reporting agencies than for the nationwide consumer reporting agencies.

### **Transition Period – Effective Date**

The proposed transition period for the nationwide specialty consumer reporting agencies is less than 3 months – from December 1, 2004 through February 28, 2005. At the beginning of that period, the nationwide specialty consumer reporting agencies will have had to perform the same impossible tasks as the proposed rule imposes on the nationwide consumer reporting agencies – implement reasonable procedures to anticipate and respond to reasonably predicted request volume.

This proposed transition suffers from many problems. First, it assumes that the nationwide specialty consumer reporting agencies can reasonably predict the number of consumers who will contact the agency through the streamlined process. As the Commission has recognized, there is simply no data on which the nationwide specialty consumer reporting agencies may rely in reasonably predicting consumer demand for free file disclosures. There is no other basis for predicting this demand. The proposed rule thus creates an impossible standard for the nationwide specialty consumer reporting agencies.

This impossible situation is made worse by the fact that the transition period will be less than 3 months. There is no empirical basis for assuming that, within that short time period, the nationwide specialty consumer reporting agencies will have sufficient data for anticipating and responding to the volume of consumers who will request their free file disclosures.

The proposed rule is scheduled to become effective approximately six months after it is published in final form, or on December 1, 2004. § 610.3(f). However, for the provisions relating to nationwide specialty consumer reporting agencies and the streamlined process, the statute allows the Commission to set an effective date that is nine months from the date on which the final regulations will issue. Although the Commission has determined that December 1, 2004 is an appropriate effective date for these provisions, in the Supplementary Information, the Commission recognized that nationwide specialty consumer reporting agencies will need some time to develop and implement the streamlined process required under the proposed rule. The Commission invited specific comment on whether a longer time period is necessary and appropriate to establish the streamlined process required under the proposed rule.

CDIA urges the Commission to extend the effective date for mandatory compliance until at least March 1, 2005. The final rule could provide for the nationwide specialty consumer reporting agencies to begin compliance on December 1,

2004, but that they would not be *required* to comply until March 1, 2005. This grace period would enable the nationwide specialty consumer reporting agencies to establish their respective toll free numbers based upon their good faith estimates as to consumer request volume, but would insulate them of liability if they underestimated the actual volume during that time period. A later mandatory effective date would enable the nationwide specialty consumer reporting agencies to make whatever modifications in the streamlined process are necessary to ensure a smoother transition to a fully functional streamlined process.

From March 1, 2005 to November 30, 2005, the nationwide specialty consumer reporting agencies should be able to rely upon the rule's transition period to reasonably anticipate the number of consumers who are reasonably anticipated to request their free file disclosures.

### **Surge Protection**

#### **1. *Transition period – March 1, 2005 through November 30, 2005.***

The proposed rule's provisions for extraordinary request volume during the transition period are patterned on the definition for extraordinary request volume for the nationwide consumer reporting agencies. The proposed rule provides:

Extraordinary request volume occurs when the number of consumers contacting or attempting to contact the nationwide specialty consumer reporting agency directly or through a streamlined process request method in a 24-hour period is more than twice the daily total number of consumers who were reasonably predicted to contact that request method, in compliance with paragraph (b) of this section.

§ 610.3(g)(1); 69 Fed. Reg. at 13209.

The proposed rule compounds the burden placed on the nationwide specialty consumer reporting agencies by setting the extraordinary request volume at *double* the total number of consumers who are reasonably predicted to request their free file disclosure through the streamlined process. If these agencies have no basis for predicting consumer demand in the first place, how can they be expected to build a capacity for the streamlined process that is *double* that which they cannot predict!

As in the case of the nationwide consumer reporting agencies, the final rule should provide that the extraordinary request volume provisions will be different during the transition period (as discussed below) and that these provisions will apply when the total consumer request volume is 125% of that which is reasonably anticipated.

Further, the final rule for the nationwide specialty consumer reporting agencies should provide for surge protection during periods of high request volume in the same

manner as the proposed rule provides such protection for the nationwide consumer reporting agencies. During periods of high request volume, the nationwide specialty consumer reporting agencies should be able to queue consumers' requests.

The proposed rule's surge protection provisions for the nationwide specialty consumer reporting agency also suffer some drafting deficiencies. For example, there is no definition of "extraordinary request volume" after the transition period.

Based on these comments, CDIA suggests the following revisions to the surge protection provisions governing the nationwide specialty consumer reporting agencies during the transition period from March 1, 2005 through November 30, 2005:

*Definitions.*

*High request volume.* High request volume occurs when the number of consumers contacting or attempting to contact the streamlined process request method to request their free file disclosures in a 24-hour period is more than the daily total number of consumers who were reasonably anticipated to contact the streamlined process request method to request their free file disclosures, in compliance with paragraph (b) of this section.

*Extraordinary request volume.* Extraordinary request volume occurs when the number of consumers contacting or attempting to contact the streamlined process request method to request their free file disclosures in a 24-hour period is more than 125% of the daily total number of consumers who were reasonably anticipated to contact the streamlined process request method to request their free file disclosures, in compliance with paragraph (b) of this section.

N.B. These proposed provisions anticipate that the Commission will provide for a three month grace period during which the nationwide specialty consumer reporting agencies will be able to process requests for free file disclosures without any liability.

**2. *After December 1, 2005.***

After a year of providing free file disclosures through the streamlined process request method, the nationwide specialty consumer reporting agencies should have sufficient experiential date upon which to reasonably anticipate the consumer request volume. After that point, therefore, it will be appropriate for the nationwide specialty consumer reporting agencies to have reasonable procedures to reasonably anticipate and respond to the volume of consumers who will request, or will attempt to request, their file disclosures directly or through the streamlined process request method. It will then be appropriate for the permanent definitions of high request volume and extraordinary request volume to apply.



CDIA, therefore, suggests the following definitions of high request volume and extraordinary request volume from December 1, 2005 onward:

***Definitions***

*High Request Volume.* High request volume occurs when the number of consumers requesting file disclosures, at any time during any 24-hour period, is more than the more than the daily rolling 90-day average of the number of consumers who requested their file disclosures.

*Definition of Extraordinary Request Volume.* Extraordinary request volume occurs when the number of consumers requesting file disclosures, at any time during any 24-hour period, is more than the more than 125% of the daily rolling 90-day average of the number of consumers who requested their file disclosures.

***Provisions for high request volume and extraordinary request volume.***

*Provision for high request volume.*

*High request volume.* A nationwide specialty consumer reporting agency shall not be deemed in violation of this rule for any period of time during which:

- (1) a particular request method experiences high request volume; or
- (2) the nationwide specialty consumer reporting agency experiences high request volume,

provided that the nationwide consumer reporting agency:

- (a) collects all consumer request information and delays accepting the request for processing until a reasonable later time; and
- (b) clearly and prominently informs the consumer of when the request will be accepted for processing.

***Provisions for extraordinary request volume.***

*Extraordinary request volume.* A nationwide specialty consumer reporting agency shall not be deemed in violation of this rule for any period of time during which:

- (1) a particular request method experiences extraordinary request volume; or
- (2) the nationwide specialty consumer reporting agency experiences extraordinary request volume.

## **Security**

The proposed rule also provides that the nationwide specialty consumer reporting agencies must comply with the FTC Safeguards Rule, 16 CFR part 314, for information collected and disclosed through the streamlined process. § 610.3(d). This provision is the same as in that portion of the rule that applies to the nationwide consumer reporting agencies. When applied to the nationwide specialty consumer reporting agencies this requirement is even less appropriate and beyond the scope of the Commission's rulemaking authority than in the case of the nationwide consumer reporting agencies. The nationwide specialty consumer reporting agencies encompass a wide range of consumer data reporting, some of which may be financial in nature, as that term is defined in the GLB Act and implementing regulations. Other consumer data reported by the nationwide specialty consumer reporting agencies, such as landlord and employment records, do not involve financial products or services, and the companies reporting such information are not financial institutions under the GLB Act or its regulations. There is no statutory basis for expanding the coverage of that Act or regulations to entities that are clearly outside its scope.

If the nationwide specialty consumer reporting agencies are financial institutions covered by the GLB Act, they are already subject to the Safeguards Rule, and the proposed compliance requirement adds nothing in the form of consumer protection, but subjects those companies to potential private rights of action. Therefore, if the nationwide specialty consumer reporting agencies are already subject to the Safeguards Rule, the proposed rule's requirement creates an unnecessary risk of liability without any corresponding consumer benefit. It also ignores the clear Congressional intent that these provisions be enforced only through appropriate federal or state government actions. Nothing in the FACT Act authorizes the Commission to impose this requirement.

For these reasons, proposed section 610.3(d) should be deleted in its entirety.

## **Requirement to Accept or Redirect Requests**

Under the Commission's interpretation of the FACT Act, a nationwide specialty consumer reporting agency must honor requests for free file disclosures that come to it directly, as well as through the streamlined process. The Commission bases this interpretation on the difference between the language of the FACT Act free file disclosure provisions for the nationwide consumer reporting agencies and those for the nationwide specialty consumer reporting agencies. In the case of the former, the FACT Act specifically limits the requirement to respond to requests for free file disclosures to those requests that come through the centralized source. FACT Act § 211(d), codified at FCRA section 612(a)(1)(B). The Commission states that there is "no similar statutory limitation applicable to the streamlined process for the specialty consumer reporting agencies. Many consumers may request their free annual file disclosures through a method other than the streamlined process established in compliance with this part. Therefore, the rule requires specialty consumer reporting agencies either to honor those requests, or to redirect the consumer to the streamlined process." 69 Fed. Reg. at 13200.

CDIA submits that the Commission's conclusion is based upon a statutory interpretation that ignores the FACT Act language that requires the Commission to prescribe regulations applicable to each nationwide specialty consumer reporting agency that will "require the establishment of a streamlined process for consumers to request" their free file disclosures. FACT Act § 211(d), codified at FCRA section 612(a)(1)(C)(i). The purpose of such a requirement is to provide for a streamlined process for each nationwide specialty consumer reporting agency to receive consumer requests for free file disclosures.

The Commission's interpretation also ignores the clear Congressional intent. The whole purpose of the streamlined process is to provide for a manageable means by which the nationwide specialty consumer reporting agencies may receive and fulfill consumers' requests for free file disclosures. Allowing consumers to also request their files directly from the nationwide specialty consumer reporting agencies would defeat the purpose of this streamlined uniform process. It would also impose burdens on the nationwide specialty consumer reporting agencies that are not imposed on the much larger nationwide consumer reporting agencies. Clearly Congress would not have intended such a result. Moreover, this interpretation ignores the Congressional requirement that in providing for the establishment of the streamlined process, the Commission must consider the "appropriate means to ensure that the consumer reporting agencies can satisfactorily meet" consumer demand. Section 612(1)(C)(i)(II).

Nationwide specialty consumer reporting agencies are willing to redirect consumers who make these requests to them directly, as long as they are able to recognize those requests. However, there should be no legal obligation for them to do so. Moreover, some nationwide specialty consumer reporting agencies may choose to provide the disclosures when they have no obligation to do so, but the final rule should not impose that requirement.

For these reasons, CDIA respectfully requests that the final rule delete any requirement that a nationwide specialty consumer reporting agency respond to or redirect consumer free file disclosures requests that do not come through the streamlined process.

### **Other Issues**

As indicated above, because the provisions in the proposed rule are substantially the same in many respects for both the centralized source and the streamlined process, many of the concerns that CDIA raised in its April 16 comment letter with respect to the provisions for the centralized source also apply to the provisions for the streamlined process for requests made to the nationwide specialty consumer reporting agencies.

Particularly noteworthy is the lack of any provisions as to what constitutes "receipt" of a completed consumer request for a free file disclosure. As in the case of the

provisions for the centralized source, the final rule should make clear that the obligation to process file disclosure requests received through the streamlined process request method, and the time period for processing these requests, are predicated upon *receipt* of a *completed request*. CDIA suggests that the Commission adopt a definition of “completed request” similar to the concept of a “completed application” under Regulation B of the Equal Credit Opportunity Act (12 C.F.R. 202.2(f)):

*Completed request* means a request by a consumer for an annual file disclosure submitted to a nationwide specialty consumer reporting agency through the streamlined request method that contains proper identification of the consumer making the request in accordance with section 610(a)(1) of the Fair Credit Reporting Act, 15 U.S.C. 1681h(a)(1).

*Receipt*. A nationwide specialty consumer reporting agency receives a request by a consumer for an annual file disclosure through the streamlined request method when the nationwide specialty consumer reporting agency receives a completed request from the consumer.

### **Responses to specific questions.**

The following questions in the Supplementary Information pertain to the proposed provisions for the nationwide specialty consumer reporting agencies. (The question numbers reflect the fact that they are included with other questions on the proposed rule.)

**12. Are the proposed requirements for a streamlined process for consumers to request free annual file disclosures from nationwide specialty consumer reporting agencies, as set forth in section 610.3(a), appropriate and adequate? Are there other issues or problems with respect to the streamlined process that this provision should address? If so, please identify and discuss how the rule could address the issue or problem.**

As discussed above, the proposed requirements for a streamlined process for requesting free file disclosures from the nationwide specialty consumer reporting agencies raise many concerns, particularly with respect to the following:

- lack of a safe harbor transition period;
- unreasonably high thresholds before surge protections become available;
- lack of any definition of constitutes “receipt” of a completed consumer request for a free file disclosure;
- failure to limit the obligation to respond only to consumer requests that are received through the streamlined request method;
- unworkable *force majeure* provisions; and
- inappropriate requirement to comply with the FTC’s Safeguards Rule.

These problems could be rectified, consistent with the FACT Act's mandated requirements, by:

- deferring the mandatory compliance date to March 1, 2005;
- providing for surge protections for high request volume and extraordinary request volume at reasonable levels;
- defining what constitutes "receipt" of a completed consumer request for a free file disclosure;
- limiting the obligation to respond to consumer requests only to those completed requests that are received through the streamlined request method;
- providing for *force majeure* relief, and
- not creating new liability for violations of the FTC's Safeguards Rule.

**13. Section 610.3(b) of the proposed rule requires that nationwide specialty consumer reporting agencies reasonably anticipate the volume of consumer requests for annual file disclosures and develop contingency plans to minimize the impact of adverse circumstances that may affect the operation of the streamlined process. Is the list of measures to be included in the contingency plans sufficiently inclusive? If there are additional measures that should be included in this provision, please describe them.**

The fact that the Commission asks whether the list of possible adverse circumstances is sufficiently inclusive demonstrates the problem with this provision. If the Commission cannot anticipate all of the possible adverse circumstances that could adversely impact the operations of the streamlined process, how can it fairly expect the nationwide specialty consumer reporting agencies to bear potential crippling liability if they fail to anticipate that which the Commission can not foresee?

The final rule should provide specific relief for the nationwide specialty consumer reporting agencies from their obligations under the rule in the event of *force majeure* circumstances.

**14. Does section 610.3(c) of the proposed rule adequately address the potential situation of extraordinary request volume for nationwide specialty consumer reporting agencies? If not, what additional provisions are needed and why?**

As discussed above, the proposed rule creates an unreasonably high threshold for surge protection based upon extraordinary request volume. It is imperative that the final rule reflect the fundamental fact that the increase over the daily average request volume that triggers surge protection will necessarily be the level at which a nationwide specialty consumer reporting agency will need to build the capacity of its streamlined process. For that reason, the final rule should set that level at a point that reflects extraordinary request volume, which is 125% of the daily rolling 90-day average of requests. The final rule

should also provide for surge protection at a level that is less than extraordinary request volume, and should thus include provisions for high request volume during which the nationwide specialty consumer reporting agencies could queue consumer requests. The high request volume provisions should be triggered anytime the daily consumer request volume exceeds the daily rolling 90-day average of requests.

**15. Does section 610.3(g) adequately address the potential problem of extraordinary request volume during the transition period for the streamlined process? Discuss any additional issues that should be addressed with regard to the transition period.**

As CDIA has explained, one of the most troubling aspects of the proposed rule as it applies to the nationwide specialty consumer reporting agencies is the requirement that from the beginning they reasonably anticipate consumer request volume when there is no data whatsoever upon which they can base any reliable prediction. For that reason, the final rule should reflect a transition period based upon an optional compliance date of December 1, 2004, and a mandatory compliance date of March 1, 2005. The optional compliance period will encourage the nationwide specialty consumer reporting agencies to implement the toll-free number based upon their good faith predictions on December 1, knowing that they will not be liable if they fail to accurately predict that demand before March 1.

CDIA appreciates the opportunity to provide these comments on behalf of the nationwide specialty consumer reporting agencies and would also welcome a meeting with the Commission staff to discuss these issues more fully.

Sincerely yours,

Stuart K. Pratt  
President