Securities Industry Association
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October 20, 2004

Via Electronic Mail

Jonathan G. Katz, Secretary
Securities and Exchange Commission
Office of the Secretary
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Disposal of Consumer Report Information; File Number S7-33-04

Ladies and Gentlemen:

The Securities Industry Association ("SIA")[1] appreciates the opportunity to comment to the Securities and Exchange Commission (the "Commission") on the Commission's notice of proposed rulemaking under the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act"). 69 *Fed. Reg.* 56304 (September 20, 2004). The notice requests public comment on a proposed rule to implement § 216 of the FACT Act ("§ 216"), which requires the Commission to issue regulations regarding the disposal of consumer information derived from consumer reports (the "Proposed Rule").

SIA supports the goal of § 216, which is to prevent unauthorized disclosure of consumer information and to reduce the risk of fraud and identity theft by ensuring that records containing sensitive financial or personal information are appropriately disposed of or destroyed. The securities industry has long recognized the importance of respecting the privacy of customers' personal and financial information, and our member-firms work diligently to ensure that such information is safeguarded and properly destroyed or disposed of when the information is no longer needed.

[1] The Securities Industry Association, established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Banker's Association, brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs 790,600 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2003, the industry generated $213 billion in domestic revenue and an estimated $283 billion in global revenues. (More information about SIA is available on its home page: www.sia.com.)

Accordingly, we are pleased to provide the following comments: 1) firms should be provided sufficient time to implement the changes required by the rule; 2) the definition of "consumer information" should follow the language of the FACT Act and examples should be provided of the kind of information subject to the rule; 3) firms should not be required to conduct ongoing monitoring of a third-party vendor used to destroy a firm's information subject to the rule; 4) firms subject to the SEC's Safeguard Rule (17 C.F.R 248.30) should be required to have policies and procedures in writing; and 5) the Safeguard Rule should not be revised to specify additional elements because that will undermine the flexibility of the rule. These comments and certain other requests for clarification are discussed more fully below.

PLACEMENT OF THE PROPOSED RULE

The Commission proposes to incorporate the Proposed Rule regarding disposal of records into Regulation S-P's procedures to safeguard information and records, which are codified at 17 C.F.R. § 248.30. SIA believes it is useful to have rules relating to the safeguarding and disposal of information in one place. Accordingly, SIA supports the proposed placement of the disposal rule.

The Commission also proposes to require that policies and procedures to implement the Safeguard Rule must be in writing. Most, if not all of our member firms already have written policies and procedures relating to the safeguarding of information they maintain, and we believe that it is appropriate for such policies and procedures to be in writing. Accordingly, SIA supports this aspect of the proposal.

CONSUMER REPORT INFORMATION

The Proposed Rule applies to "consumer report information," which is defined in the Proposed Rule as any record about an individual that is a consumer report or derived from a consumer report. The Commission asks if the definition of consumer report information should be further clarified. We note that the term "consumer report information" is not used in § 216. Rather, § 216 provides that the rule shall require "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." (Emphasis added.) The Proposed Rule, however, does not follow the language set forth in § 216. Rather, it provides that it covers a record that is a consumer report, as well as, information derived from a consumer report, or any compilation from a consumer report.

The Commission provides no rationale as to why it departed from the statutory language, nor does it explain what additional information, if any, may be subject to coverage under the different language used in the Proposed Rule. In view of the fact that § 216 uses specific language as to what consumer information Congress intended to cover, and in view of potential confusion as to what additional information may be

subject to the Proposed Rule, SIA recommends that the Commission use the actual language enacted by Congress.

SIA also believes it would be helpful for the Commission to provide examples of the types of information that may be subject to the Proposed Rule. For example, it would be helpful to clarify that information such as names and addresses, which do not reveal any additional information about the individuals, would not ordinarily be regarded as consumer report information. The Commission should also clarify in the preamble that the information covered by the Proposed Rule is not the same as "eligibility information" covered under the FACT Act.

The Commission's release also states that information derived from a consumer report that does not identify any particular individual would not be covered by the Proposed Rule. 69 *Fed. Reg.* at 56305. SIA agrees that limiting consumer report information to information that identifies particular persons is consistent with the scope of the term consumer report as defined in the Fair Credit Reporting Act ("FCRA") and with the purposes of § 216 of the FACT Act. If information cannot be identified with a specific person, there is little reason to subject it to the Proposed Rule. However, SIA notes that the language of the Proposed Rule does not explicitly provide for this interpretation. Read literally, the Proposed Rule would apply to <u>any</u> information derived from a consumer report, even information that does not identify a particular individual. Because the *Federal* R*egister* preamble is not part of the final rule, SIA recommends that the Commission add language to the final rule to clarify that the rule will not apply to information that cannot be identified with a specific person.

DEFINITION OF DISPOSAL

The Proposed Rule defines "disposal" as:

> (1) the discarding or abandonment of consumer report information; and
>
> (2) the sale, donation, or transfer of any medium, including computer equipment, on which consumer report information is stored.

The Commission's *Federal Register* preamble clarifies that the sale, donation or transfer of consumer report information is not a "disposal" unless the information is discarded or abandoned. The transfer of consumer report information in connection with a business transaction, such as the sale of a business or transfer for marketing purposes, is not a disposal. 69 *Fed. Reg.* at 56305. SIA is concerned that the language of the Proposed Rule has the potential to confuse firms who may read the above definition in the disjunctive and not realize that a transfer of information is a disposal only if both (1) and (2) above are satisfied. Accordingly, SIA recommends that the language of the regulation itself clarify that both conditions must be met for a transfer of consumer information to be regarded as a disposal.

REASONABLE METHODS OF DISPOSAL

The Proposed Rule requires firms that maintain or possess consumer report information or any compilation of consumer report information for a business purpose to properly dispose of the information by taking reasonable measures to protect against unauthorized access to or use of the information. We support the Commission's statement that this standard does not require firms to ensure perfect destruction of consumer report information in every instance. We also believe that a firm should, as the Commission suggests, consider such factors as the sensitivity of the information, the size of the firm and the complexity of its operations, and the costs and benefits of different disposal methods. Such an approach will enable firms to make decisions based upon their unique situations and reduce the burden on the securities industry. In this regard, we do not believe that it is necessary, nor desirable, for the language of the final rule to contain specific examples of disposal measures.

SIA also supports the Commission's position that a firm could comply with the Proposed Rule by applying its policies and procedures under the Regulation S-P's safeguard rule (17 C.F.R. § 248.30) to consumer report information.

CONSUMER REPORT INFORMATION SHARED WITH OTHERS

The preamble to the Proposed Rule provides that any covered entity that possesses consumer report information, including an affiliate, would be obligated to properly dispose of it. As a practical matter, recipients of information may not recognize that the information they have received is consumer report information. As a result, such a recipient could inadvertently be exposed to liability for its failure to dispose of the information in accordance with the rule despite its lack of knowledge. We believe a more appropriate standard for the Commission to apply is whether or not the recipient of the information knows or should know that the information it plans to discard is consumer report information. Such a standard will ensure that firms that receive information with knowledge that such information is consumer report information will be on notice that such information should be disposed of in accordance with the requirements of the final rule.

USE OF VENDORS

The Proposed Rule indicates that if an outside vendor is used to destroy a firm's records, reasonable disposal methods may include conducting due diligence on the vendor and entering into a written contract with the vendor to dispose of consumer report information in a manner consistent with the Proposed Rule. The proposal also suggests that the firm should monitor the vendor's compliance with the contract.

While firms often conduct due diligence before entering into a contract with a vendor to confirm the vendor's ability to perform, SIA does not believe it is practical for the Commission to suggest that firms must continue to monitor a vendor's compliance with the contract. Ordinarily, firms rely upon the reputation of the vendor, its past and current actions and other relevant behavior as an indication of the vendor's performance. To suggest that firms should devote additional resources and take additional measures to monitor vendor compliance with the contract will impose a significant burden on firms without achieving additional benefit. Accordingly, we urge the Commission to eliminate the suggestion that monitoring compliance is an appropriate standard.

In addition, many firms already have contracts with vendors for the disposal of records and other information. Many of these contracts will have to be identified and reviewed in connection with the final rule. If existing contracts do not meet the record destruction and disposal requirements of the final rule, firms will have to reopen negotiations with vendors to incorporate such provisions into existing contracts. SIA believes that such a task will impose considerable burden on firms without achieving much benefit. Accordingly, we suggest that the Commission provide that existing contracts with vendors are grandfathered and require that only contracts entered into after the effective date of the rule be subject to its provisions and that pre-existing contracts will remain unaffected by the rule.

EFFECTIVE DATE

The Commission's proposal does not set forth an effective date. The proposals of the other federal agencies that were required to issue this rule indicate that their regulations go into effect three months from the date the final rule is adopted.[2] SIA believes that three months is too short an interval for firms to determine where consumer report information is maintained or otherwise held throughout the organization, determine procedures for the proper disposal of such information, train staff that may be responsible for disposal of information and fully implement the procedures that are adopted. We also anticipate that it will take a considerable amount of time for firms to amend existing contracts they may have with companies with which they have contracted for record destruction and to establish compliance monitoring programs, as provided for in the Commission's release. We anticipate firms will require at least 24 months to fully implement the proposal. Accordingly, SIA recommends that the Commission's proposed rule become effective 24 months after adoption.

At a minimum, if the Commission does not grandfather existing contracts, SIA recommends that firms be given at least 24 months to conform outstanding contracts to the final rule. Many of these contracts cannot be amended before they expire; others may

[2] 69 *Fed. Reg.* 21388, 21392 (April 20, 2004)(Federal Trade Commission); 69 *Fed. Reg.* 31913, 31915 (June 8, 2004)(banking agencies); 69 *Fed. Reg*. 30601, 30606 (May 28, 2004)(National Credit Union Administration).

contain termination provisions that subject firms to significant penalties for early termination. Others may involve protracted negotiations with vendors. A period of 24 months would be identical to the time period the Commission provided to firms to conform outstanding contracts with service providers under the privacy provisions of the Gramm-Leach-Bliley Act, *See* 65 *Fed*. *Reg*. 40334, 40354 (June 29, 2000).

REOPENING THE SAFEGUARD RULE

The SEC asks for comment on whether it should propose amending its Safeguard Rule (17 C.F.R. 248.30) to specify additional elements that a firm should include in its policies and procedures. SIA believes that the Commission's current Safeguard Rule provides appropriate guidance to firms to structure policies and procedures to safeguard customer information that take into account their unique structures. SIA believes that specifying additional elements will undermine the flexibility the current rule provides and will not markedly assist firms or increase the already high standards firms employ to protect the security of customer information. Accordingly, SIA opposes reopening the Safeguard Rule in this manner.

EFFECT ON OTHER LAWS

The Proposed Rule indicates that nothing in the rule shall be construed to require firms to maintain or destroy any records pertaining to individuals nor does it affect any other law regarding maintaining or destroying records. SIA believes this provision is important and should be adopted as part of the final rule.

As a technical matter, however, SIA notes that the language of proposed §248.30(b)(2)(ii)(B) does not accurately mirror the language of the statute. Section 628(b)(2) of the FCRA, as added by § 216 of the FACT Act, reads as follows:

> Nothing in this section shall be construed -- . . . (2) to alter or affect any requirement imposed under any <u>other</u> provision of law to maintain or destroy such a record. (Emphasis added.)

The Proposed Rule does not contain the word "other." Because the language of the Proposed Rule is essentially identical to that of § 216, SIA recommends that the word "other" be included in the final rule in order to avoid any negative implication that the scope of the Proposed Rule is different from that of the statute.

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SIA appreciates the Commission's consideration of our views. If we can provide additional information, please contact the undersigned at (202) 216-2000.

Sincerely,

Alan E. Sorcher
Associate General Counsel