

April 16, 2004



Donald S. Clark
Secretary
Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, NW
Washington, DC 20580

Experian
475 Anton Boulevard
Costa Mesa, CA 92626

Re: FACTA Free File Disclosures Proposed Rule, Matter No. R411005

Dear Mr. Clark:

Experian Information Solutions, Inc.¹ (“Experian”) respectfully submits its comments on the Federal Trade Commission’s (“Commission”) proposed rule on free file disclosures implementing section 211(d) of the Fair and Accurate Credit Transactions Act of 2003 (the “FACTA”).²

As one of only three consumer reporting agencies identified in the proposed rule as a nationwide consumer reporting agency (“NCRA”), as defined in section 603(p) of the Fair Credit Reporting Act (“FCRA”) [15 U.S.C. § 1681a(p)],³ Experian is vitally interested in the outcome of the rulemaking process relating to the centralized source. Experian therefore provides its comments in the interests of furthering the Congressional purpose underlying FACTA amendments to the FCRA while also permitting NCRAs, like Experian, to operate within objective parameters and without being subject to unnecessary and excessive liability in the creation and ongoing operation of the centralized source.

Experian also joins with the Consumer Data Industry Association (“CDIA”) and supports the comments CDIA has provided to the Commission concerning the proposed rule, except to the extent specified in its comments on “associated consumer reporting agencies” below.

1. General Comments.

The proposed rule implements FCRA section 612(a), as amended by the FACTA, which created a new consumer right to request a free credit report once during any 12-month period, if the request is made using a centralized source established for that

¹ Although referred to only as “Experian” in the proposed rule, 69 FR 13197 n. 13, Experian Information Solutions, Inc., an Ohio corporation, is the only Experian-affiliated entity that has been identified as a nationwide consumer reporting agency as defined in the FCRA.

² 69 FR 13192 *et seq.* (March 19, 2004).

³ Proposed rule § 610.1(b)(8).

purpose. Congress instructed the Commission to consider the following during its rulemaking process:

- (A) the significant demands that may be placed on consumer reporting agencies in providing such consumer reports;
- (B) 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 consumer reports; and
- (C) the ease by which consumers should be able to contact consumer reporting agencies with respect to access to such consumer reports.⁴

Separately, the FACTA requires that the Commission *also* “shall provide for an orderly transition by [the NCRAs] to the centralized source for consumer report distribution required by section 612(a)(1)(B) . . . in a manner that – (A) does not temporarily overwhelm such consumer reporting agencies with requests for disclosures of consumer reports beyond their capacity to deliver; and (B) does not deny creditors, other users, and consumers access to consumer reports on a time-sensitive basis for specific purposes, such as home purchases or suspicions of identity theft, during the transition period.”⁵

Experian understands the complexity inherent in the Commission’s efforts to achieve a balance between the consumers’ desire to obtain the free disclosures contemplated by the FACTA amendment and the NCRAs’ need to meet their other obligations to consumers, users of consumer reports and furnishers of consumer report information. Experian recognizes the difficulty the Commission faced in drafting a proposed rule with very limited historical data as a predictor of the anticipated consumer request volume for free annual disclosures through the centralized source. In the end, however, the Commission has imposed upon the NCRAs the task of predicting the unknowable (i.e., what consumer demand will actually be). Under the proposed rule, the NCRAs are left with an impossible choice: build a system to provide free annual disclosures with a capacity far beyond that likely to be needed (other than, perhaps, due to media-driven initial interest), or risk being exposed to claims for the failure to provide free annual disclosures within the statutory timeframes. The cost to the NCRAs is huge, the harm to consumers in potential delays in receiving free reports is minimal; Experian believes the Commission has failed to find the proper balance in some aspects of the proposed rule.

⁴ FACTA § 211.

⁵ FACTA § 211(d)(4).

2. Concepts That Should be Retained in the Proposed Rule.

As the following comments indicate, the proposed rule does adopt certain important concepts that help address some of the uncertainties and difficulties relating to the creation and operation of the centralized source. The Commission should retain these concepts in the final rule.

A. Staggered Rollout: Congress instructed the Commission to consider “the efficacy of a system of staggering the *availability* to consumers of such consumer reports” from a centralized source.⁶ The proposed rule only applies the staggered availability suggested by Congress during the initial rollout of the centralized source, and then on a cumulative basis. Although Experian agrees that the availability of free file disclosures should be staggered during the rollout, Experian also believes that inadequate consideration was given to staggering the availability of free annual disclosures through the centralized source following the initial rollout period. Experian believes that free annual disclosures should continue to be available on a staggered basis following the rollout period. The Congressional mandate in this regard was to consider “the efficacy” of such a system. This instruction was not one to make a binary decision as to whether or not to allow permanent staggering, but rather to determine whether staggering has “the power or capacity to produce a desired effect.”⁷ A system of staggering most assuredly would produce the effect desired by Congress.

B. All Credit Report Disclosures as a Measure of Adequate Capacity: Experian agrees that, in determining the centralized source’s “adequate capacity” to receive and respond to consumer requests for free annual credit reports, consideration should be given to the NCRAs’ obligation to respond to credit report requests from creditors, other credit report users, and consumers who will make their requests for a free file disclosure following receipt of an adverse action notice, risk-based pricing notice, or in conjunction with a fraud alert.⁸ File disclosures inevitably lead to a certain percentage of consumer questions concerning the information in the consumer’s file and disputes with respect to particular items of information. The Commission has properly been mindful of the capacity constraints in (if not the costs of) dealing with this “backend” processing after the initial disclosure, all of which, whether generated through free annual disclosures or otherwise, must be dealt with by each NCRA.

C. Ability of NCRAs to Market Related Products and Services: Experian agrees that the NCRAs should be permitted, as part of their operation of the centralized source, to market additional fee-based products and services to interested consumers.⁹ As the Commission correctly notes, the provision of these products and services (e.g., the consumer’s credit score) at the time that consumers request their free annual credit reports may be beneficial and convenient for consumers and efficient for the NCRAs.¹⁰

⁶ FACTA § 211(d)(2)(B).

⁷ *Webster’s II New College Dictionary*, 1995.

⁸ FCRA §§ 615(a),(h), 605A(a)(2); 15 U.S.C. §§ 1681m(a),(h), 1681cA(a)(2).

⁹ Proposed rule § 610.2(g)(1); 69 FR 13198.

¹⁰ 69 FR 13198.

D. Flexibility to Identify Requesting Consumers: Experian agrees with the proposed rule's flexibility in permitting each NCRA to implement its own identification and authentication procedures for those consumers who request their consumer reports through the centralized source.¹¹ Experian believes it is essential to permit the NCRAs to complete their individualized authentication and verification processes in order to prevent the disclosure of sensitive consumer information to identity thieves and those seeking to perpetrate consumer frauds.

3. Needed Clarification Regarding the Proposed Rule.

A. Method of Consumer Report Disclosure: The proposed rule requires the NCRAs to design, fund, implement, maintain, and operate a centralized source that enables consumers to *request* their free annual file disclosure: (1) through a dedicated Internet website; (2) a single dedicated telephone number; and (3) a single mailing address.¹² As the Commission notes, the FACTA "does not mandate the method by which the [NCRAs] may deliver those file disclosures" and, further, "the proposed rule allows [the NCRAs] flexibility in determining what methods of annual file disclosure delivery to make available to consumers."¹³ Notwithstanding this clarity in the text, the proposed rule includes a standardized form entitled "Request for Free Credit Report."¹⁴ The proposed standardized form includes 3 spaces for "available delivery method."¹⁵ The 3 spaces appear intended to permit consumers to request delivery of their file disclosure by Internet, telephone, or mail.

Experian is concerned that, as drafted, the standardized form will confuse consumers requesting their free file disclosure and imply delivery obligations on the part of the NCRAs that are not intended and cannot be met. First, the NCRAs have no means of verbally delivering a consumer's free file disclosure over the telephone. As a consequence, telephone delivery of a consumer's file is not possible. Second, permitting consumers to identify a particular email address on the standardized form where an annual file disclosure should be delivered invites identity theft. A consumer's personal email address, or work email address, may have no identifying characteristics that would permit the NCRAs to match the provided email address with the information contained in the consumer's file. To avoid the risk of identity theft, any request on the standardized form for the delivery of the consumer's file over the Internet will result in an unnecessary delay as the NCRAs complete a *manual* identity verification procedure that will include contacting the requesting consumer using the information in the consumer's file.

As the Commission anticipates, the NCRAs will respond to consumer file disclosure requests in a manner that is consistent with their need to verify the consumer's identity, and otherwise as appropriate to fulfill their obligations to provide disclosures.

¹¹ Proposed rule § 610.2(b)(2)(ii), 610.3(a)(2)(iii); 69 FR 13195.

¹² Proposed rule § 610.2(b)(1).

¹³ 69 FR 13194.

¹⁴ Proposed rule, App. D to Part 698.

¹⁵ *Id.*

Experian believes that proposed rule section 610.2(b)(3) should make clear that, if consumers use the standardized form to make their free file disclosure request, the form must be provided to the centralized source in its original form and not altered and that an altered form will be an invalid request to which the centralized source and the NCRAs will not be required to respond. Experian encourages the Commission to accept further input from the NCRAs with respect to numerous technical and practical aspects relating to the form.

B. Postponement of Response Time During Identity Verification: The Commission recognizes that there are times when it may be necessary to delay the running of the 15-day period during which the NCRAs must respond to a free file disclosure request through the centralized source.¹⁶ Experian supports this concept as essential to regulating surges in demand for free annual disclosures.

Experian believes that the proposed rule should be modified to make clear that a consumer's annual file disclosure request is only "received" by the NCRA for purposes of the 15-day response period when the NCRA has properly identified the consumer requesting the disclosure. Given the proposed rule's provision for the NCRAs' communication with the consumer in the event the consumer cannot be properly identified,¹⁷ Experian believes that the requested delay in the running of the 15-day response period was the Commission's intention, but the proposed rule does not clearly resolve this issue.

4. Necessary Changes to the Proposed Rule.

A. Staggered Rollout: As mentioned above, Experian agrees with the concept of the staggered rollout of the centralized source as the best means of achieving the goal of making free credit reports available to all consumers within a 12-month period.

In amending the FCRA to provide for the establishment of a centralized source, Congress recognized that significant demands would be placed on the NCRAs in responding to consumer requests for free annual reports.¹⁸ Congress instructed the Commission to consider these demands and the efficacy of a system of staggering the availability to consumers of such reports.¹⁹ The Commission responded with a proposed rule that divides the country into 4 geographic regions, each containing between 63.1 million people (western region) and 81.4 million people (eastern region).²⁰

The purpose of this geographic division is to separate the country into roughly

¹⁶ 69 FR 13196 ("By permitting NCRAs to decline to accept some requests ... during times of extraordinary request volume, the proposed rule allows the NCRAs to postpone *receiving* those requests...") (emphasis added).

¹⁷ Proposed rule § 610.2(b)(2)(iv)(C).

¹⁸ FACTA § 211(d)(2)(A).

¹⁹ FACTA § 211(d)(2)(B).

²⁰ 69 FR 13198 n. 18.

equal quarters based on population data from the 2000 Census. Experian understands that the Commission regards a regional division of roughly equal proportions as the ideal method for a staggered rollout of the centralized source. We note, however, that this method may provide for exaggerated demand through heightened local media coverage, and that it favors certain regions of the country. These results would be avoided through the use of a system of availability based on birth dates or social security number. These methods are particular to a consumer, as well, avoiding issues involved in moving from an “eligible” region to one where free annual disclosures are not available. If the Commission stays with a regional staggering device, however, Experian believes that the division should be based upon the number of consumers who are likely to request their free file disclosures. Experian’s own data reveals that 40% of the file disclosures that it currently makes are for those consumers who live in the western region, the first region of the proposed rule’s rollout program.²¹ If the current rollout program is retained, it is likely that Experian will have to respond to almost double the number of consumers seeking free file disclosures as the Commission believes are likely during the first period of the staggered rollout.²²

To remedy this discrepancy between what the Commission intended to accomplish through the staggered rollout and the actual effect of the proposed rule’s west-to-east staggered rollout, Experian proposes that the rollout be reversed, beginning in the eastern region, and moving westward. None of the NCRAs is predominant in the east. In addition, given the Commission’s acknowledgement of the uncertain consumer demand for the free file disclosure, and the significant burden the NCRAs will face in anticipating this demand and adjusting to it during the transition and rollout period, Experian supports CDIA’s recommendation that the country be divided into six, rather than four, geographic regions. To meet the proposed rule’s apparent goal of making the centralized source available to the entire country within a 12-month period, Experian also supports CDIA’s recommendation that the rollout period for Regions 1 and 2 be three months each and that the rollout period for Regions 3 through 6 be two months each.

Experian believes the following table sets forth a more practicable rollout schedule:

Region	Rollout Date
Region 1	December 1, 2004
Region 2	March 1, 2005
Region 3	June 1, 2005
Region 4	August 1, 2005
Region 5	October 1, 2005
Region 6	December 1, 2005

²¹ Proposed rule § 610.2(h)(i)(1)(i).

²² The Commission’s Supplementary Information reveals that, in proposing the current west-to-east rollout, the Commission believed that 22.1% of the NCRAs’ free file requests would come from the western region. 69 FR 13198 n. 18.

Because the initial consumer demand estimates are, as the Commission recognizes, uncertain and based on limited data of questionable applicability,²³ Experian believes that the proposed revision to the rollout schedule will permit the NCRAs to better assess the level of consumer demand and to adjust their response systems accordingly before the centralized source is rolled out to consumers in the next region in the sequence. This additional time is necessary because, if left unchanged, the current rollout schedule makes all consumers eligible to request their free file disclosure on September 1, 2005, just 9 months after the initial December 1, 2004 rollout in the first region. Because of the admitted uncertainty concerning the NCRAs' ability to anticipate consumer demand, the unknown actual consumer demand, and the adjustments the NCRAs may have to make to meet the actual consumer demand, Experian believes that 9 months is an inadequate period of time for the complete rollout of the centralized source to all regions of the country. Experian believes that the east-to-west rollout, coupled with an increase in the number of regions, with the consequent decrease in the number of consumers per region, will further the Commission's goal of providing for "an orderly transition to a national system of free annual file disclosures."²⁴

B. Capacity: As is necessitated by the extremely short timeframe dictated by Congress, the NCRAs have begun the process of planning and building the centralized source, even before the proposed rule is finalized. The question central to that effort is the scope or capacity of the centralized source and its request methods. The answer will lie in the dictates of the final rule on capacity and on the protections granted if and when demand for free reports exceeds that planned capacity. The proposed rule's answer in this regard is, in essence, that the NCRAs should start at a level of *at least* 300% of current disclosure capacity (as long as "intervening factors" don't suggest it should be bigger), but *build double that capacity* (or more), and from that starting point be prepared for demand to double on a weekly basis in the transitional phase of the implementation.

An examination of the proposed rule's provisions on capacity and "extraordinary request volume" makes this flaw clear. The Commission's proposed rule provides that the centralized source shall have:

[A]dequate capacity to accept requests from the *reasonably anticipated volume of consumers* contacting the centralized source through each request method, *as determined in accordance with paragraph (c)* of this section.²⁵

Paragraph (c) then provides that:

The nationwide consumer reporting agencies shall implement *reasonable procedures to anticipate, and to respond to, the*

²³ 69 FR 13198 (recognizing that "the precise demand for consumer free annual file disclosures ... is largely unknown" and basing estimates on an analysis of free file requests in states with a state law provision requiring such disclosures).

²⁴ 69 FR 13198.

²⁵ Proposed rule § 610.2(b)(2)(i) (emphasis added).

volume of consumers who will contact the centralized source through each request method, to request, or attempt to request, a file disclosure, including developing and implementing contingency plans to address circumstances that materially and adversely impact the operation of the nationwide consumer reporting agency, a centralized source request method, or the centralized source.²⁶

In turn, the proposed rule states:

Circumstances that may materially and adversely impact operations shall include, but are not necessarily limited to, natural disasters, telecommunications interruptions, equipment malfunctions, labor shortages, computer viruses, coordinated hacker attacks, and seasonal and other fluctuations in the volume of consumer requests for annual disclosures.²⁷

The proposed rule then grants the NCRAs the ability to defer requests for free reports once levels of “high request volume” or “extraordinary request volume” are reached. In the case of “extraordinary request volume” this begins at 200 % of the “reasonably anticipated” volume for the first week of operation, and thereafter continues at 200% of actual volume calculated on a seven-day or 90-day rolling average. This aspect of the rule is discussed in more detail below, but operates to require the NCRAs to build a system of twice the reasonably anticipated capacity in order to have even a fleeting hope of having any protection from claims arising out of failure to provide a free report. There are thus a myriad of faults and unintended consequences as a result of the interplay of these provisions of the proposed rule.

First, the proposed rule requires the NCRAs to anticipate that which the Commission admits is: “extremely difficult” to predict; without “comparable historical data;” and will be subject to the “unpredictable effect of nationwide media coverage.”²⁸ Second, the NCRAs must respond to unknowable events that are completely outside their control (e.g., natural disasters, seasonal and “other” fluctuations).²⁹ Based upon these “unknowables,” the NCRAs must design, fund, implement, maintain and operate the centralized source with the capacity to accept requests from an unknown volume of consumers who will request their free reports from this newly established source using three different request methods. Even with a system built to handle at least six times the current number of disclosures made by the NCRAs in states without a free report requirement, if demand turns out to be that high, the NCRAs could be forced to double capacity *in the second week of operation* in order to be assured of protection against extraordinary request volume.

²⁶ Proposed rule § 610.2(c) (emphasis added).

²⁷ Proposed rule § 610.2(c)(1).

²⁸ *Id.*

²⁹ Proposed rule § 610.2(c)(1).

An example bears this out. Suppose an NCRA's current disclosure rate in states that do not require a free report averages 100 per day. Under the proposed rule, the Commission expects the NCRAs to be able to make an average of 300 disclosures per day,³⁰ but offers no "extraordinary request volume" protection unless requests exceed 600 per day. Suppose that requests run at this level (600 per day) during the first week of operation. The NCRAs must fulfill this level of requests. Thereafter, "extraordinary request volume" is two times the rolling seven-day average. In the example, the rolling seven-day average on day eight of operation is 600. The NCRAs' protection in the form of "extraordinary request volume" is double this, or 1200 disclosures per day. If demand in the second week indeed turns out to be 1200 disclosures per day, the protections in the third week (for which the seven-day rolling average has now increased to 1200) only apply at **2400** disclosures per day. The only theoretical limit to the doubling is the number of credit-active adults in a given region of the country.³¹

This potential requirement to increase the capacity of the centralized source exponentially not only contradicts the Congressional mandate to craft a rule that protects the NCRAs from being overwhelmed, but also contradicts the Commission's own knowledge of the difficulties faced by the NCRAs. As noted by the Commission, "it is clear that once the centralized source is designed and implemented, its capacity cannot be expanded quickly, *i.e.*, in a month or less."³² This ignores the even longer time frame required to recruit, train and integrate new employees to perform consumer assistance for consumers contacting the NCRAs with questions about their reports. Yet in commenting on the implications of the seven-day moving average surge protection, the Commission admits that "this standard for extraordinary request volume in fact requires rapid expansion of the system. If extraordinary levels of demand persist, the system's capacity **would have to double every week to remain in compliance.**"³³ Thus, the Commission risks launching a regime destined to fail.

Experian believes that the proposed rule should be modified to provide the NCRAs with the ability to comply with the free file disclosure requirement without subjecting them to the possibility of violating the rule despite their good faith efforts during the transition period and thereafter. The Commission should do this by adopting an objective capacity standard based on the only data available to it or the NCRAs – the rate of disclosure in states that currently require a free report.

1. Anticipating consumer demand volume.

There is no reliable empirical basis for anticipating consumer demand for the new free file disclosure. However, the proposed rule requires that from the first day of the

³⁰ 69 FR 13198.

³¹ Conversely, under the Commission's scheme, if the request method, centralized source or a given NCRA experiences abnormally low volume for the applicable measurement period, a return to normal volumes thereafter may trigger "extraordinary request volume" protections, even if overall capacity is not an issue.

³² *Id.*

³³ 69 FR 13199 (emphasis added).

transition period and thereafter, that NCRAs have “adequate capacity to accept requests from the reasonably anticipated volume of consumers contacting [it].”³⁴ The uncertainty of consumer demand is exacerbated by the consumers’ ability to choose among three different methods of requesting their free file disclosure.³⁵ Moreover, during the transition and rollout periods, the NCRAs will still have to meet their obligations to provide consumer reports to users and to consumers who request reports following receipt of adverse action notices or risk-based pricing notices.

The Commission’s Supplementary Information offers some guidance concerning the anticipated initial demand. A Congressional Research Service Report to Congress shows that the consumer request rate for all free file disclosures in those states where free annual disclosures are currently available is, on average, 2.31 times higher than the request rate in other states.³⁶ Without any other data, the Commission posits that “it would be reasonable to anticipate that the number of requests for annual file disclosures will be 300% of the current disclosure rate, absent any unanticipated intervening factors.”³⁷ The FTC’s only support for this figure is its speculation that “the publicity likely to be generated by the promulgation of the final rule” makes this a reasonable guess. However, even that reasonable guess is not enough if, as the FTC notes, there are “unanticipated intervening factors.”³⁸ In other words, even if the NCRAs build the centralized source to anticipate demand at 300% of the current disclosure rate, they may still violate the rule if they fail to anticipate “any unanticipated intervening factors.”

Experian submits that it is appropriate to require that the NCRAs build and maintain the centralized source to anticipate consumers’ request volume only once there is data upon which to estimate long-term consumer demand. Conversely, it is fundamentally unfair and inappropriate, in the absence of definitive data, to require the NCRAs to anticipate the volume of consumer demand from the first day that the centralized source becomes available to the first consumer and to make the NCRAs failure to do so a violation of the rule. Any rule that allows the possibility that the NCRAs would have to satisfy ever increasing demands demonstrably fails to meet the Congressional mandate to “provide for and orderly transition . . . that does not temporarily overwhelm”³⁹ the NCRAs.

Experian understands that the proposed rule attempts to soften this burden by requiring that the NCRAs implement “*reasonable procedures*” to anticipate this volume.⁴⁰ However, neither the proposed rule nor the Commission’s Supplementary Information offers any reliable standard against which the reasonableness of the NCRAs’ procedures will be measured. As a consequence, for purposes of determining whether the

³⁴ Proposed rule § 610(b)(2)(i).

³⁵ Proposed rule § 610.3(a) (requiring the NCRAs accept free file disclosure requests by mail, toll-free telephone number, and over the internet).

³⁶ 69 FR 13198.

³⁷ *Id.*

³⁸ *Id.*

³⁹ FACTA § 211(d)(4)(A).

⁴⁰ Proposed rule § 610.2(c).

NCRAs have violated the rule, the reasonableness of the NCRAs' procedures will be examined *after the fact* to determine whether the NCRAs guessed right or wrong. At worst, this is tantamount to strict liability for these agencies. At best, it is an invitation to class action lawsuits that will be costly for the NCRAs to defend, a cost that will be exacerbated by the vague language in the rule (e.g., "reasonable procedures," "contingency plans," "materially and adversely impact," etc.).⁴¹ Experian submits that the Commission has not adequately considered the burden that will be imposed on the NCRAs who must build a centralized source with the capacity to respond to an unknowable volume of consumer requests during the transition period.⁴²

The proposed rule should set forth the volume of consumer requests that the centralized source must be able to receive and respond to during the transition period. This fixed percentage increase over current file disclosure requests would provide a standard against which the "reasonableness" of the NCRAs procedures could be judged.

Assume, for example, that the NCRAs are able to rely upon existing data and build the centralized source to handle that portion of the increase that will come through the centralized source. If a figure of 231% of the current rate of disclosure in states that do not offer a free report is an accurate estimate of the actual request total volume (not just the request volume coming through the centralized source), the centralized source will be able to receive and process all consumer requests for free file disclosures.⁴³ If consumer demand is greater than the fixed percentage increase, the centralized source will experience "high request volume" or "extraordinary request volume." Consumers will still be able to request their free annual credit reports, but they may have to wait to submit their request (because the request is briefly deferred), or they may have to wait to receive their file disclosure (because the request is queued). Consumers seeking their free annual credit reports through the centralized source have not received an adverse action notice, a risk-based pricing notice, nor have they been the victims of identity theft. Their free annual file disclosures are not time-sensitive. Those consumers who request free reports in connection with an adverse action notice or risk-based pricing notice will not have their access to the NCRAs affected in any way whatsoever.

Experian's recommendation that the capacity of the centralized source and each NCRA be set at a fixed amount during the transition period is not meant to suggest that Experian believes that capacity should ultimately remain unchanged. Experian does *not* assume that once the rollout and transition periods end, the NCRAs will maintain and operate the centralized source based only on this fixed percentage of current disclosures. Rather, on a going forward basis, the NCRAs will adjust the long-term capacity of the centralized source based on the actual volume of consumer requests received during the

⁴¹ *Id.*

⁴² At the very least, the Commission should adopt a "good faith" standard, such that estimates of capacity made by the NCRAs in good faith are not subject to attack.

⁴³ The precise calculation of total initial capacity is the sum of (i) the total current annual number of disclosures in states that do offer a free report, plus (ii) 2.31 times the current annual number of disclosures in states that do not offer a free report.

transition period. As stated in the CDIA's comments, this adjustment to actual volumes should take place only after the rollout and the transitional year following the rollout.

If the centralized source is built to handle a specific volume of consumer requests during the transition period and that capacity proves to be insufficient, consumers *might* experience a minor delay in receiving their free file disclosures. When this potential delay is balanced against the burden imposed on NCRAs to build a centralized source without a specific target capacity, the balance favors giving the NCRAs a fixed target capacity that can be adjusted when actual long-term consumer request data becomes available. Moreover, providing the NCRAs with a target capacity would appropriately reflect the Commission's consideration of the "significant demands" placed on the NCRAs that Congress required be part of the rulemaking process.

Accordingly, during the rollout and transition periods, the capacity of the centralized source and of the NCRAs, taken together, should be 231% of the request volume (based on rates of disclosures in states not offering a free report) preceding the rollout of the centralized source. Following the complete nationwide rollout of the centralized source, and a subsequent 12-month transition period during which the NCRAs may assess continuing consumer demand, the NCRAs can adjust the capacity of the centralized source based on actual data. This period of time is critical to permit the NCRAs to make business decisions concerning the staffing of their telephone and mail response units as well as any programming changes to their website response infrastructure. More important, it helps reduce the chance of disruption to ongoing consumer dispute resolutions activities, both of the NCRAs and their respective data furnishers. In the absence of such a period of information collection and business adjustment, the NCRAs will be attempting to meet subjective and poorly defined targets through ill-considered business modifications that may prove ineffective and costly.

2. Emergencies should not result in de facto rule violations by the NCRAs.

The proposed rule only protects NCRAs from rule violations during periods of extraordinary request volume if, as part of their reasonable procedures to anticipate and respond to the volume of consumers who will contact the centralized source, the NCRAs develop and implement "contingency plans to address circumstances that may materially and adversely impact the operation of the nationwide consumer reporting agency, the centralized system or the centralized source."⁴⁴ The Commission provides the following non-exclusive list of those circumstances that may materially and adversely impact operations: natural disasters, telecommunications interruptions, equipment malfunctions, labor shortages, computer viruses, coordinated hacker attacks, and seasonal or other fluctuations in consumer request volume.⁴⁵ Under the proposed rule, the required contingency plans must include measures to minimize the impact of such circumstances,

⁴⁴ Proposed rule § 610.2(c), (e).

⁴⁵ Proposed rule § 610.2(c)(1).

including taking all reasonable steps to restore the centralized source to normal operating status as quickly as possible.⁴⁶

In other words, the nationwide consumer reporting agencies must anticipate and plan for every circumstance that could materially and adversely impact the operation of the nationwide consumer reporting agency, the centralized system or the centralized source, even those that are not listed above, regardless of whether the nationwide consumer reporting agency has an ability to predict or control the event.

Experian respectfully submits that the proposed rule turns the Commission's usual approach to such circumstances upside down. Circumstances beyond the NCRAs' control should *insulate* the NCRAs from liability for rule violations resulting from the failure of the centralized source to receive or process requests, *not create additional liability*. The proposed rule violates generally accepted standards of commercial reasonableness and is inconsistent with the Commission's standard *force majeure* clauses in consent decrees, which are designed to assure compliance with applicable laws. For example, the consent decrees the Commission executed in January 2000 to address the NCRAs' compliance with the FCRA-mandated disclosure of toll-free numbers with personnel accessible to consumers contains the following language:

Defendant shall not be deemed in violation of . . . of this Consent Decree if circumstances beyond defendant's reasonable control (such as acts of God, telecommunications interruptions, equipment malfunctions, labor shortages caused by illness or organized labor action, or significant increases in call volume due to unforeseen circumstances) preclude it from complying with [this Consent Decree] provided that the defendant takes reasonable steps to minimize the impact of these events on its toll-free telephone number service and promptly restores service to levels that comply with this Consent Decree.⁴⁷

The final rule should create a similar safe harbor for the NCRAs. Instead of affirmatively requiring the NCRAs to develop and implement contingency plans to address unknown and unknowable circumstances that may materially and adversely affect operations; the proposed rule should provide that the NCRAs are not liable for those circumstances if they develop and implement reasonable steps to minimize their impact.

The proposed rule also requires that the NCRAs' contingency plans include measures to minimize the impact on operations. These measures include, *but are not necessarily limited to*:

- A. To the extent possible, providing information to consumers on how

⁴⁶ Proposed rule § 610.2(c)(2).

⁴⁷ See Consent Decree, ¶ 21 available at <http://www.ftc.gov/os/2000/01/equifaxconsent.htm>; Consent Decree, ¶ 21 available at <http://www.ftc.gov/os/2000/01/experianconsent.htm>; Consent Decree, ¶ 21 available at <http://www.ftc.gov/os/2000/01/transunionconsent.htm>.

to use another available request method;

- B. To the extent possible, communicating, to a consumer who attempts but is unable to make a request, the fact that a condition exists that has precluded the centralized source from accepting all requests, and the period of time after which the centralized source is reasonably anticipated to be able to accept the consumer's request for an annual file disclosure; and
- C. Taking all reasonable steps to restore the centralized source to normal operating status as quickly as possible.⁴⁸

Under the proposal, measures to minimize impact may also include, as appropriate, collecting request information but declining to accept the request for processing until a reasonable later time, provided that the consumer is clearly and prominently informed, to the extent possible, of when the request will be accepted for processing.⁴⁹

The difficulty with these proposed provisions is that depending upon the circumstances, it may or not be reasonable for them to apply. Experian recognizes that the proposal attempts to create flexibility by providing that some of the measures would apply "to the extent possible." However, if the final rule is to require any contingency plans, they should be based upon the NCRAs' assessment of what is reasonably *practicable* under the circumstances, rather than what is "possible."

C. Surge Protection: Experian is concerned that, under the proposed rule, during the initial transition period, the extraordinary request volume is based upon 200% of the anticipated demand.⁵⁰ As pointed out above, this standard in effect dictates building a system at least two times larger than reasonably necessary, and potentially requires that system to double its capacity in a short period.

Experian believes that this threshold is too high and imposes an unnecessary burden upon the NCRAs. The Commission has provided no data upon which to base this arbitrary threshold. If the 200% threshold remains in the final rule, the NCRAs will have to develop a centralized source capable of handing twice the initially anticipated consumer demand, which the Commission estimates will be 300% of the current file disclosure rate in states where free credit reports are not currently available. Because the proposed rule does not make clear that this 200% threshold applies to the centralized source's cumulative capacity with each respective NCRA (for adverse action and other free disclosures not made through the central source), this means doubling the size of the mail handling facility, telephone bank, and website response resources, all without knowing whether there is an actual need for such a resource buildup. Experian emphasizes that these are not purely systems costs. Rather, Experian and the other

⁴⁸ Proposed rule § 610.2(c)(2)(i).

⁴⁹ *Id.*

⁵⁰ 69 FR 13198-99 ("During the initial week of operations, extraordinary request volume is defined as twice the reasonably predicted consumer request volume.").

NCRAs will have to interview, hire, train, and supervise additional employees who may not, in fact, be needed beyond the transition or rollout periods, if even then. And, as stated above, file disclosures will result in consumer contacts to the assistance centers of the respective NCRAs. Each NCRA will have to staff to handle this increased volume of contacts, as will data furnishers who must reinvestigate disputes.⁵¹

Like the Commission, Experian believes in the surge protection concept. However, Experian believes that the surge protection threshold should be reasonable given the costs that it will impose upon the NCRAs. If reasonable, the surge protection will allow the centralized source to continue to respond to consumer requests during periods of extraordinary request volume without making the failure to respond within 15-days a rule violation. Experian believes that this change is essential for the efficient operation of the centralized source during the rollout period. Moreover, this change will permit the NCRAs to increase the capacity of the centralized source based on actual experience without having to overbuild in the initial rollout only to terminate employees if actual demand does not equal double the anticipated 300% increase over the current demand that the Commission believes will occur.

To address its concern, Experian believes that extraordinary request volume should be defined as being no greater than a 25% increase over (125% of) the initial anticipated request volume. Experian believes this reduced threshold strikes the correct balance between the need to provide timely responses to consumer requests for free file disclosures and the uncertainty of demand associated with this newly created consumer right. Similarly, the “high request volume” concept should be retained, but defined as any amount of disclosures over the initial centralized source and NCRA capacities. In addition, the high request volume protections outlined in the proposed rule should continue after the rollout and transition periods.

Moreover, the proposed rule should make clear that, with respect to the capacity of a given NCRA, this definition applies to the cumulative capacity of all file disclosure request methods. The centralized source will only handle some proportion of total file disclosures requested. As the Commission noted in the Supplementary Information:

Congress specifically directed the Commission to consider “the significant demands that may be placed on consumer reporting agencies in providing [annual file disclosures],” and “appropriate means to ensure that consumer reporting agencies can satisfactorily meet those demands.” FACT Act sec. 211(d)(2). The significant demands of providing annual file disclosures include demands associated with simultaneously responding to requests for other types of file disclosures, such as free file disclosures resulting from adverse action under FCRA section 612(b), 15 U.S.C. 1681j(b), and free file disclosures provided in response to suspected fraud under FCRA section 612(c)(3), 15 U.S.C. 1681j(c)(3). Further, consumer reporting

⁵¹ It is these “back end” costs that will prove to be the most expensive aspect of free annual disclosures, making the Commission’s estimates of costs stated in the Supplementary Information, which focused solely on fulfillment obligations, far too low.

agencies may face additional significant demands in responding to inquiries, or requests for reinvestigation, generated through each of these types of file disclosures. Delays in this system caused by excess demand may adversely impact consumers with a specific, immediate need for access to their file disclosures and to reinvestigation procedures. Accordingly, it is appropriate to consider the volume of request for all types of file disclosures in determining “extraordinary request volume” for the purpose of limiting liability under the proposed rule. Proposed rule sec. 610.1(b)(6).⁵²

Experian agrees, but believes that the proposed rule does not clearly state this intention. Experian believes this uncertainty should be remedied by modifying the definition of “extraordinary request volume” to make clear that the reference point is consumer file disclosure requests made to the NCRAs through the centralized source as well as to the individual NCRAs directly.

Experian also believes that the availability of surge protection to the NCRAs should not be tied to whether the NCRAs have met their obligation to anticipate the volume of consumer demand as required by proposed rule 610.2(c). The question of whether the NCRAs have properly anticipated the actual request volume is entirely separate from the impact of an extraordinary request volume. As currently drafted, the proposed rule precludes a NCRA from relying upon the surge protection even if the extraordinary request volume is so great that the NCRA could not have responded to the actual demand even if it had complied with the requirement to anticipate. Similarly, under the proposed rule, the NCRAs could not rely on the extraordinary request volume protections if they failed to develop and implement contingency plans to address circumstances that are outside their control even if these circumstances had no effect on the extraordinary request volume.

To remedy the identified concerns, the extraordinary request volume protections should be separated from the requirement that NCRAs anticipate the volume of consumer requests and provide for circumstances beyond their control. Simply stated, if there is an extraordinary request volume, then the surge protections should be available to the NCRAs.

D. Associated Consumer Reporting Agencies: The proposed rule requires that an NCRA provide a annual free file disclosure to a consumer upon request through the centralized source if the agency has the “*ability*” to provide a consumer report relating to that consumer to a third party.⁵³ As explained in the Commission’s Supplementary Information, this provision is aimed at consumer reports owned by contractual affiliates of the NCRAs. The Commission refers to these companies as “associated consumer reporting agencies,”⁵⁴ which are the agencies that maintain “consumer files within

⁵² 69 FR 13194.

⁵³ Proposed rule § 610.2(d).

⁵⁴ 69 FR 13193.

systems operated by one or more nationwide consumer reporting agencies.”⁵⁵ As the Commission explains, some NCRAs have contractual relationships with independent regional or local consumer reporting agencies. These contractual relationships generally consist of agreements pursuant to which either party may *purchase* the others’ consumer reports in providing consumer reports to users. This relationship is beneficial to both parties, and helps the associated consumer reporting agency expand its product offering and total market.

By linking the NCRAs’ “ability” to provide these reports owned by associated consumer reporting agencies” with the NCRAs’ obligation to do so through the centralized source, the Commission oversteps its authority and forces one company to buy another company’s consumer report and give it away. A plain reading of the FACTA amendment to FCRA section 612(a) does not support this requirement.

Experian respectfully suggests that the Commission may accomplish its purpose of making the reports owned by the associated consumer reporting agencies available to consumers without overreaching in the manner set forth in the proposed rule.

Consumer reporting agencies that are contractually affiliated with the NCRAs are substantially nationwide consumer reporting agencies. By participating in a nationwide credit reporting system operated by the NCRAs, the associated consumer reporting agencies are able to sell their credit file information nationwide and are able to market to their customers’ credit files that are compiled and maintained by the NCRAs on consumers who are outside of the associated consumer reporting agency’s own geographic area. In effect, the associated consumer reporting agencies have a market scope that is considerably larger than the local geography of the credit files which they actually own.

The Commission believes that Congress intended that all consumers be able to obtain annual free file disclosures. If the associated consumer reporting agencies are not required to provide free annual credit reports for their respective geographic areas, consumers in those areas would be unable to receive the free annual credit reports Congress intended. The cost to the associated consumer reporting agencies to provide access to credit reports free of charge on an annual basis should be similar to the costs incurred to provide free consumer disclosures as required by current law.

Moreover, the relative competitive viability of associated consumer reporting agencies that are contractually affiliated with the NCRAs is maintained by the requirement that all such agencies provide free annual credit reports through the centralized source. If the associated consumer reporting agencies were not required to provide free annual credit reports, they would have a competitive advantage over the NCRAs who must provide such reports.

Experian believes that the associated consumer reporting agencies may be included in the proposed rule if the rule is revised to provide that:

⁵⁵ Proposed rule § 610.1(b)(2).

- (1) The NCRAs may receive consumer requests through the centralized source for free credit reports relating to files that are owned by associated consumer reporting agencies that are contractually affiliated with the NCRAs.
- (2) Each associated consumer reporting agency must fulfill any free file disclosure request that is forwarded to it by the centralized source either directly in its own name or indirectly through the NCRA with which it is contractually affiliated.

Experian believes that the above revision will provide the greatest number of consumers with the ability to obtain free file disclosures through the centralized source without forcing the NCRAs to pay for reports which they must then give away, simply because the NCRAs could otherwise purchase the reports owned by the associated consumer reporting agencies for other purposes.

E. Unnecessary to Add GLB Safeguards Rule: Experian believes that the proposed rule's provision requiring that NCRAs comply with the GLBA Safeguards Rule should be deleted.⁵⁶ The Commission previously established that the existing Safeguards Rule already applies to financial institutions, including the NCRAs.⁵⁷ Experian is concerned that the proposed rule provision inadvertently subjects the NCRAs to potential class action liability for violation of the FCRA, something that was not available to class plaintiffs under the GLBA and its implementing regulations.⁵⁸ Because the requirement that NCRAs comply with the Safeguards Rule is redundant and inadvertently creates liability for the NCRAs where none should otherwise exist, the provision should be deleted from the final rule.⁵⁹

F. Should be no Joint and Several Liability: The proposed rule requires that all aspects of the centralized source be *jointly* funded, implemented, maintained and operated by nationwide consumer reporting agencies. The FACTA does not require this, and the final rule should provide that although the nationwide consumer reporting agencies may participate jointly in the centralized source, no NCRA will be jointly and severally liable for actions or failures of either or both of the other NCRAs unless that NCRA would be liable based upon its own actions or failures to act.

G. NCRAs Should not be Required to Respond to Invalid Requests or Provide Ongoing Updates: Neither the centralized source nor the NCRAs should be required to respond to requests from consumers who are not entitled to free file disclosures. For

⁵⁶ Proposed rule § 610.2(f).

⁵⁷ 16 C.F.R. § 314.1(b); *see also*, 67 FR 36485 (where the Commission noted in its final Safeguards Rule that "financial institution" includes "consumer reporting agencies.").

⁵⁸ 15 U.S.C. § 6805(a).

⁵⁹ Similarly, the application of the GLBA Privacy Rule answers the Commission's various inquiries on the potential use of data collected by the NCRAs, and obviates any need for further restrictions on the use of such data.

example, if a consumer requests a free file disclosure within 12-months of the consumer's last free file disclosure request, the centralized source and the NCRAs should be permitted to treat such a request as an invalid request to which no response is required. The final rule should make this clear.

Similarly, the proposed rule should be revised to eliminate the requirement that the centralized source or the NCRAs provide "progress reports" to consumers requesting their free file disclosures.⁶⁰ The existing progress report requirement is unnecessary and imposes undue burdens on the centralized source and the NCRAs. FCRA section 612(a), as amended by FACTA, already requires a response within 15-days. Requiring the centralized source to "track" the consumer's request and to report on the progress of the request during this very short period is an unnecessary administrative layer that should not be added to the response process. Further, the final rule should make clear that no response (and certainly no progress report) is necessary when an annual free file disclosure request is made directly to one of the NCRAs, rather than through the centralized source. Such requests should be treated as invalid requests to which no response is required. To mitigate the significant demands already placed on the NCRAs and that will be placed on the NCRAs under the final rule, the Commission's final rule should make clear that only free file disclosure requests made through the centralized source will merit a response of any kind from either the centralized source or the NCRAs.

Experian provides the foregoing comments in the expectation that as one of only three NCRAs subject to the proposed rule, its views will be given the appropriate consideration. To assist the Commission in its rulemaking, Experian may supplement the above comments to address those questions posed by the Commission in its Supplemental Information.

Sincerely,



Christopher A. Callero, President
Experian Information Solutions

⁶⁰ Proposed rule § 610.2(b)(2)(iv).