FEDERAL TRADE COMMISSION
OFFICE OF THE SECRETARY
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FACTA FREE FILE DISCLOSURES

PROPOSED RULE

MATTER NO. R411005

COMMENTS OF ACA INTERNATIONAL IN RESPONSE TO THE FEDERAL TRADE COMMISSION'S REQUEST FOR COMMENT ON PROPOSED RULE:

FACTA FREE FILE DISCLOSURES

FILED APRIL 16, 2004

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INTRODUCTION

The following comments are submitted on behalf of ACA International ("ACA") in response to the request by the Federal Trade Commission ("FTC" or "Commission") for comments regarding a proposed rule implementing certain free file disclosure elements of the Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952 ("FACTA" or the "Act"). *See* FTC Proposed Rule, ___ Fed. Reg. ___ (Mar. 16, 2004) [hereinafter cited the printable version of the proposed rule available electronically on the FTC's web site] ("Proposed Rule").

ACA believes that debt collection agencies cannot be directly regulated by the proposed rule. As confirmed by at least two federal court decisions, debt collection agencies are *not* consumer reporting agencies ("CRAs") under the Fair Credit Reporting Act ("FCRA"). *See Mitchell v. Surety Acceptance Corp.*, 838 F. Supp. 497, 500-01 (D. Colo. 1993); *D'Angelo v. Wilmington Med. Center, Inc.*, 515 F. Supp. 1250, 1253 (D. Del. 1981). FACTA incorporates FCRA's definition of "consumer reporting agency." *See* FACTA § 2(3). There should be no question that debt collection agencies fall outside the scope of those entities regulated under the Proposed Rule.

Nonetheless, the complexity and uncertainties associated with the proposed rule, *see* Proposed Rule at 10 (noting "the complexity of the rule and its potential impact on a variety of entities"), compel ACA to comment on some of the rule's features. ACA also wishes to express its willingness to work with FTC staff and other interested parties and stakeholders in

assuring that the free file disclosure elements of FACTA are designed to maximize the public benefits of the Proposed Rule while minimizing the Rule's costs.

I. Statement on ACA

ACA International is an association of credit and collection professionals who provide a wide variety of accounts receivable management services. Founded in 1939 and headquartered in Minneapolis, ACA represents approximately 5,300 third party collection agencies, attorneys, credit grantors, and vendor affiliates. ACA members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms employing thousands of workers. ACA's mission is to help its members serve their communities and meet the challenges created by changing markets through leadership, education, and service. ACA members comply with all applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. ACA members are regulated by the Commission under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*., FCRA, and other state and federal laws.

II. Summary of Comments

This comment addresses the following issues in no order of priority:

- ACA requests confirmation regarding the limited application of the proposed rule.
- ACA requests that the FTC not prohibit or otherwise limit the ability of collection agencies to use the reports which will contain the most current information about a debtor's location and other facts critical to successful collection.

- ACA believes the Commission should establish clear and cost-effective procedures governing consumer disputes communicated to the centralized source, particularly as it relates to a furnishers obligation to reinvestigate consumer disputes.
- ACA requests clarification that FACTA requirements do not conflict with mandates established by the Health Insurance Portability and Accountability Act of 1996 and the Department of Health and Human Service's Privacy Rule.
- ACA requests confirmation that truncation of a consumer's social security number applies only to reports requested by consumers.

III. Specific Comments on the FACTA Free File Disclosure Proposed Rule

1. FTC Should Confirm the Limited Scope of this Rulemaking

The Proposed Rule addresses a limited range of issues, namely, the creation of: (1) a centralized source through which consumers may request a free annual file disclosure from each nationwide consumer reporting agency; (2) a standardized form for such requests; and (3) a streamlined process for consumers to request free annual file disclosures from nationwide specialty consumer reporting agencies. *See* Proposed Rule at 1 (identifying and seeking comment on these three subjects); Proposed Rule at 57-75 (proposed regulatory language).

Despite the limited nature of this rulemaking, the FTC requests comment on questions that are far outside the parameters of the Proposed Rule. *See, e.g.*, Proposed Rule at 15 (requesting comment on "how the differing types of information currently collected in providing file disclosures are used and disclosed by the nationwide consumer reporting

agencies and whether such information should be treated differently when it is collected through the centralized source."). This is particularly evident in Part VII, where the Commission asks a number of open-ended questions falling outside the scope of the Proposed Rule. *See, e.g.*, Proposed Rule at 51-52 ("Should the rule address the use of information collected by the centralized source (i.e., by allowing, prohibiting, restricting, or limiting such use)? If so, how?").

ACA recognizes that FACTA imposes tight deadlines for FTC rulemaking. ACA commends the Commission's efforts to promulgate regulations within these time frames. At the same time, ACA is concerned that the Proposed Rule, taken as a whole, ranges too far from its stated purpose and scope to provide reasonable notice to interested parties of the many issues potentially implicated by the language of the Proposed Rule's Supplementary Information and Questions for Comment.

The Commission's analysis of the Proposed Rule's regulatory impact, *see* Part VI (Regulatory Flexibility Act), confirms the limited scope the Proposed Rule. The Commission states that the Proposed Rule applies only to two types of entities. The first are nationwide consumer reporting agencies (of which there are three). The second are nationwide specialty consumer reporting agencies (of which there "fewer than 50") (Proposed Rule at 46). According to the Commission, none of these CRAs are small business entities. *Id.* ("This document serves as notice to the Small Business Administration of the agency's certification of no effect.").

2. The Proposed Rule Should Not Prohibit or Otherwise Limit Use by Debt Collectors of Consumer Reports Provided Through the Centralized Source

In Part VII(5) of the Proposed Rule, the Commission raises several issues concerning the use of personally identifiable information gathered in the process of providing file disclosures to customers. Of particular concern to ACA is the prospect that FTC will place limitations on the use of such information by third-party debt collectors. Such limitations, if adopted, would contradict well-established law concerning the permissible purposes for which consumer reports may be furnished to third parties. The law on this question is crystal clear: under section 604 of FCRA, CRAs may furnish consumer reports to third party debt collectors. *See* FCRA § 604(a)(3)(A).

The Commission, however, asks whether the Proposed Rule should "address the use of information collected by the centralized source (i.e., allowing, prohibiting, restricting, or limiting such use)?" In ACA's view, this question raises a disturbing possibility that the Commission might attempt to prohibit through rulemaking what Congress plainly allows by statute. A rule that would limit disclosures of consumer reports by CRAs to third party debt collectors is plainly inconsistent with section 604 of FCRA. If a CRA collects personally identifiable information in the process of complying with a consumer request for a free file disclosure, the information collected would be subject to the permissible purposes provision of FCRA § 604. If the case were otherwise, Congress surely would have amended section 604 to reflect this restriction.

The primary purpose of free file disclosure under FACTA is to enable consumers to obtain free and easy access once a year to their own credit reports. It places the burden of establishing this system – the centralized source – on the three nationwide CRAs now in existence and on any others that may be established in the future. The disclosure elements of FACTA make it easier and cheaper for Americans to obtain their own credit information, a goal that ACA supports. But it would be wrong to say that in enacting FACTA Congress intended, *sub silencio*, to impede the ability of debt collection agencies to obtain current information about debtors, such as their present location. Such a limitation would do violence to congressional intent, and would seriously undermine the many benefits provided by the collection industry.

No one disputes that bad debt harms the economy. As financial professionals, ACA members return billions of dollars to the United States economy every year. For example, in 1999 alone collection agencies recovered more than $30 billion, a massive infusion of money into the economy. Collection agencies also help consumers obtain or regain favorable credit scores, help businesses design credit policies that minimize bad debt, and lower the economic burden placed on responsible consumers who ultimately bear the cost of bad debt. The collection services provided by ACA members are an essential part of a healthy domestic economy.

The practices of ACA members are governed by the FDCPA, a statute aimed directly at the collection industry. The FDCPA establishes uniform standards for the treatment of

consumers when collecting past-due accounts and minimizes the potential for abusive collection practices. As the FTC recently emphasized, the FDCPA "permits reasonable collection efforts that promote repayment of legitimate debts, and the Commission's goal is to ensure compliance with the Act without unreasonably impeding the collection process. The Commission recognizes that the timely payment of debts is important to creditors and that the debt collection industry offers useful assistance toward that end." FTC, *Annual Report: Fair Debt Collection Practices Act*, at 1 (2004).

Given the many benefits provided by the collection industry, the Commission should avoid new restrictions that would make collecting bad debt more difficult. Indeed, the centralized source offers a unique opportunity for the Commission to fulfill its mission under all the laws it administers by allowing collection professionals to have access to consumer information maintained and updated through the centralized source. Enabling collection agencies to access fresh information – particularly location and contact information – would promote the overarching goal of FCRA: improving the accuracy and fairness of consumer credit information and disclosure. *See* FCRA § 602 (congressional findings and statement of purpose); 15 U.S.C. § 1681.

For all of these reasons, ACA requests the FTC to allow collection agencies access to the centralized source for the permissible purpose of locating and collecting payment from debtors.

3. FTC Should Establish Procedures Governing Consumer Disputes

Communicated to the Centralized Source

Section 623(a)(8) of FCRA, as amended by FACTA, permits consumers to dispute the accuracy of their reports directly with data furnishers. A direct dispute with a data furnisher triggers, among other things, a duty to reinvestigate under certain circumstances. This is a significant change from pre-FACTA law. The new dispute, reinvestigation, and other requirements of section 623(a)(8) are likely to have a significant impact on ACA members.

One likely scenario is that consumers will attempt to dispute information by communicating their dispute initially to the centralized source. While the law is clear that consumers may dispute the accuracy of their reports *directly* with data furnishers, it is not clear what procedures, if any, would apply when consumers take their disputes to the to-be-established centralized source.

The Commission should establish a clear and cost-effective process for dealing with such disputes because they represent a new pathway for a consumer to voice concerns about information contained in a consumer report by disputing with the centralized source. Although the FCRA and FACTA contain provisions about investigating and resolving consumer disputes, it is not clear whether those provisions would accommodate situations where a consumer attempts to raise a dispute based on information provided by the centralized source. At a minimum, the stringent time limitations to resolve disputes (particularly as it relates to furnishers' obligations) would be impacted by reason of the fact that the centralized source might be the first recipient of the dispute.

ACA encourages the FTC to address the dispute procedures so that furnishers of

consumer information are well-advised of the compliance requirements. In this regard, ACA has significant experience that may be valuable to the Commission based on the expertise of the thousands of furnishers of consumer information that are members of ACA.

4. FTC Should Clarify that FACTA Does Not Conflict with HIPAA and its Implementing Regulations

The Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 (Aug. 21, 1996), codified as amended in various sections of the United States Code ("HIPAA"), in conjunction with the Department of Health and Human Service's ("HHS") Privacy Rule, imposes numerous requirements pertaining to the use and disclosure of protected health information. ACA is concerned that the collection of medical bills may be hindered by possible inconsistencies or contradictions between HIPAA/Privacy Rule mandates and obligations imposed by FACTA. ACA therefore is seeking clarification that there is no conflict between HIPAA and the Privacy Rule requirements, on the one hand, and FACTA on the other – particularly as it relates to sharing protected health information with the centralized source.

HHS policy suggests that the two sets of regulatory requirements would not be inconsistent. As HHS explained in a recent modification of the Privacy Rule:

> The Privacy Rule permits a covered entity, or a business associate acting on behalf of a covered entity (*e.g., a collection agency*), to disclose protected health information as necessary to obtain payment for health care, and does not limit to whom such a disclosure may be made. See the definition of "payment" in [45 C.F.R.] § 164.501. Therefore, *a collection agency*, as a business associate of a covered entity, is permitted to contact persons other than the individual to whom health care is provided as necessary to obtain payment for such services.

> . . . . [HHS] clarifies that the Privacy Rule permits covered entities to use and disclose protected health information as required by other law, or as permitted by other law . . . . For example, the Privacy Rule permits *a collection agency*, as a business associate of a covered health care provider, to use and disclose protected health information as necessary to obtain reimbursement for health care services, which could include disclosures of certain protected health information to a credit reporting agency, or *as part of collection litigation*.

67 Fed. Reg. 53218-19 (Aug. 14, 2002) (emphasis added).

ACA requests the Commission to clarify that HIPAA and the Privacy do not conflict with the requirements of FACTA.

5. FTC Should Confirm that Social Security Number Truncation Applies Only to Consumers

Finally, ACA requests confirmation that the truncation of social security numbers in consumer reports provided by CRAs applies only to the reports specifically requested by the consumer. As the Commission states on page 30 of the Proposed Rule, "nationwide consumer reporting agencies must offer consumers the option of receiving their file disclosures with truncated social security numbers." (citing 15 U.S.C. § 1681g(a)(1)).

The Commission should clarify the fact that truncation would *not* apply to consumer reports obtained directly from consumer reporting agencies, nor is it required of collection agencies and similarly situated data users and furnishers. Social security information is a vital data element when collecting a debt. It permits debt collectors and creditors alike to identify debtors with similar information, for example, two debtors with the name of "John Smith." FACTA was not intended to create barriers to the identification of debtors by collection professionals.