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

Dear Mr. Clark:

This letter supplements the comments filed on April 16, 2004 by the Consumer Data Industry Association ("CDIA") 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 ("FACT Act"). In this letter CDIA responds to specific questions that the Commission posed when it published the proposed rule for comment on March 19, 2004 (69 Fed. Reg. 13192 *et seq.*) While many of the issues raised by these questions were specifically addressed in CDIA's comment letter, CDIA believes it would be helpful to the Commission to respond directly to certain questions.

a. *Definitions and Examples*

1. Are the definitions contained in section 610.1(b) of the proposed rule clear, meaningful, and appropriate?

Most of the proposed rule definitions adopt the meanings of the terms provided in the FCRA. The most significant new definition is that of "extraordinary request volume." Under that definition, extraordinary request volume "occurs when the number of consumers requesting file disclosures during any twenty-four hour period is more than twice the daily rolling ninety-day average of consumers requesting file disclosures." § 610.1(b)(6).

This key definition should be amended. The extraordinary request volume definition determines when the rule's surge protections will apply. The national consumer reporting agencies will need to build the centralized source and each request method of the centralized source with enough capacity to handle a consumer request volume equal to the extraordinary request volume. If the national consumer reporting agencies were to build the capacity of the centralized source and of each request method so that it were able to handle only 50% more than the anticipated request volume, under the proposed definition, the extraordinary request volume protections would not apply. As a result, in order to assure that these protections will apply, the national consumer reporting agencies will have to overbuild the capacity of the centralized source and each request method to accommodate double the volume of consumer requests they reasonably anticipate receiving.

To paraphrase the example in the Commission's proposed definition of extraordinary request volume, if over the previous ninety days, an average of 100 consumers per day requested file disclosures, then the nationwide consumer reporting agencies would need to build their own respective capacities, the capacity of the centralized source and of each request method to accommodate a volume that would equal two times 100, or 200 requests in a single 24-hour period. Thus, as a result of the proposed definition, the nationwide consumer reporting agencies would have to build to potentially wasteful capacities.

To avoid the needless expenditure of the nationwide consumer reporting agencies' resources while still encouraging the agencies to build the centralized source with sufficient excess capacity to respond to reasonable spikes in consumer demand, CDIA believes that the extraordinary request volume protections should apply when the number of consumers requesting file disclosures during any 24-hour period is more than a 125% of the daily rolling ninety-day average of consumers requesting file disclosures.

The rule should also include a definition of "high request volume" that extends beyond the transition period. The protections provided to the centralized source and the nationwide consumer reporting agencies by the high request volume provisions should continue as long as the centralized source rule is in effect. The definition of high request volume should make clear that it applies any time the capacity of the centralized source is exceeded.

2. Do the examples provided in various sections of the proposed rule offer helpful guidance for complying with the rule? What additional examples might be helpful if included?

The examples are helpful in explaining the effect of the rule's provisions.

b. *Centralized Source for Nationwide Consumer Reporting Agencies*

3. Are the proposed requirements for establishment and operation of the centralized source, set forth in section 610.2(b), appropriate and adequate to fulfill the purpose of enabling consumers to request easily their free annual file disclosures from all nationwide consumer reporting agencies? Are there other issues or problems with respect to establishment and operation of the centralized source that the rule should address? If so, please identify and discuss how the rule could address the issue or problem.

The proposed requirements for the establishment and operation of the centralized source suffer from two major problems: (1) the extraordinary request volume provisions and (2) the possible adverse circumstances provisions. Both of these are discussed in response to later questions.

4. Is the proposed rule's requirement that if nationwide consumer reporting agencies have the ability to sell a consumer report to a third party they must provide an annual file disclosure to that consumer through the centralized source appropriate?

This provision is designed to require nationwide consumer reporting agencies to disclose to consumers, without charge, those files that are maintained on their system but owned by other consumer reporting agencies. There is no basis, in the language or legislative history of the FACT Act, for the proposed rule's requirement that if nationwide consumer reporting agencies have the "ability" to sell a consumer report to a third party, they must provide an annual file disclosure to the consumer through the centralized source. This provision should be stricken in its entirety.

5. Section 610.2 (b)(2)(ii) allows the nationwide consumer reporting agencies to collect, through the centralized source, only as much information as is reasonably necessary to properly identify the consumer as required under the Fair Credit Reporting Act, section 610(a)(1), 15 U.S.C. 1681h(a)(1), and other applicable laws and regulations, and to process the transaction(s) requested by the consumer.

a) Does the amount of information that is reasonably necessary depend on the request method or the method of delivery of the file disclosure or product or service? What information is reasonably necessary for each request method and delivery method?

The amount of information that is reasonably necessary to properly identify the consumer and process the transaction(s) requested by the consumer through the centralized source can be expected to vary, depending on the request method selected by the consumer and the method of delivery of the file disclosure. This variance may result

from a number of factors, such as an increase in fraudulent requests submitted through a request method, an increase in hacking activity on the Internet or the interception of U.S. mail containing annual file disclosures. For these reasons, the nationwide consumer reporting agencies must have flexibility to adjust the amount and type of information requested from the consumer through the centralized source to protect the consumer from fraud and identity theft and to protect the integrity and viability of the centralized source.

b) What types of personally identifiable information do nationwide consumer reporting agencies currently collect in providing file disclosures to consumers? Do these practices differ from information collection practices related to the collection of personally identifiable information in providing other products (i.e., those not mandated by statute), and if so, how?

The nationwide consumer reporting agencies currently collect the information that they deem necessary and appropriate to fulfill their statutory obligation under FCRA § 610(a) to properly identify the consumer and to process the requested transactions. That information will vary as explained above.

c) How is the personally identifiable information collected in providing file disclosures used and disclosed by the nationwide consumer reporting agencies, affiliated entities and third parties? For what other purposes might this information be used and disclosed? What are the potential benefits and consequences of such use and disclosure?

The nationwide consumer reporting agencies use and disclose nonpublic personal information in accordance with the GLB Act privacy rules, and they use and disclose consumer report information in accordance with the FCRA.

d) 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? If so, what information should such a rule address, i.e., personally identifiable information collected in connection with file disclosures and/or information collected in connection with products provided through the centralized source? Should any restrictions or limitations differ from those that are applicable to the same information collected currently in connection with the provision of such disclosures and products? On what basis should a distinction between information collected through the centralized source and information currently collected by nationwide consumer reporting agencies be made?

Because the GLB Act and the FCRA provide for the use and disclosures of personal information covered by those laws, the final rule should not attempt to interfere with such use and disclosure. To do so would exceed the rulemaking authority vested in

the Commission and would be contrary to the Congressional determination on the appropriate restrictions on use and disclosure of this information.

There is no basis for a distinction between information collected by the nationwide consumer reporting agencies through the centralized source and information that may be currently collected from consumers who directly contact the nationwide consumer reporting agencies for other purposes. Non-public personally identifiable information collected from consumers by the nationwide consumer reporting agencies through any channel remains protected under existing consumer privacy provisions.

The final rule should make it clear that there is no limitation on the information that can be collected by the nationwide consumer reporting agency. This clarification is especially important if the nationwide consumer reporting agencies are to be able to offer related products and services, such as credit scores, credit monitoring and credit counseling, through the centralized source.

e) Are there compelling reasons why nationwide consumer reporting agencies should not be allowed to use separate identification procedures in the centralized source?

There are compelling reasons why the nationwide consumer reporting agencies should be allowed to use separate identification procedures for requests received through the centralized source. FCRA section 610(a) requires each consumer reporting agency to obtain proper identification from the consumer before disclosing the consumer's report to the consumer. Requests received by the nationwide consumer reporting agencies through the centralized source may not contain all the information necessary to properly identify the consumer. Each nationwide consumer reporting agency needs to rely upon its own file information to verify the consumer's identity, and that file information will vary. Finally, a nationwide consumer reporting agency may need to contact a consumer to gather additional information if there is a fraud alert on the requested file. For these reasons, it is imperative that each nationwide consumer reporting agency be able to use separate identification procedures for requests received through the centralized source, and the proposed rule permitting this flexibility should remain in the final rule.

6. Section 610.2(c) of the proposed rule requires that nationwide consumer reporting agencies reasonably anticipate the volume of consumer requests to the centralized source and develop contingency plans to minimize the impact of adverse circumstances that may affect the operation of the centralized source.

The proposed provisions with respect to the "possible adverse circumstances" that could affect the centralized source are misdirected. Instead of creating additional potential liability for these circumstances, the rule should absolve the nationwide consumer reporting agencies of liability if they are unable to process consumer requests because of these circumstances. Moreover because the Commission ties the requirement

to anticipate these circumstances to the extraordinary request volume provisions, the Commission inappropriately links (1) the volume of requests and (2) circumstances that could cause a nationwide consumer reporting agency, the centralized source, or any request method to be unable to process the request.

For example, if a natural disaster or a telecommunications interruption made it impossible to receive or process the request, the number of requests not processed would be immaterial. The nationwide consumer reporting agencies might have recently anticipated the volume of requests, but because of these *force majeure* circumstances, they would be unable to process *any* of the requests. This example demonstrates that the proposed rule has confused two basic concepts: (1) protection for the nationwide consumer reporting agencies from the consequences of a *force majeure* event; and (2) an affirmative requirement to reasonably anticipate demand based on empirical evidence.

Moreover, it would be possible for the nationwide consumer reporting agencies to adopt reasonable procedures to anticipate consumer request volume, but to have the actual demand exceed their reasonable expectations. Under the proposed rule, these agencies could avail themselves of the extraordinary request volume provisions or high request volume provisions only if the agencies had also developed and implemented contingency plans to address circumstances that would materially and adversely impact the operations, even if none of those circumstances affected the actual volume of requests. This result further demonstrates the fact that the rule has confused the *force majeure* provisions with the provisions requiring the agencies to reasonably anticipate consumer demand.

The final rule should adopt language based on the consent decrees between the Commission and the nationwide consumer reporting agencies in January 2000.

a) Is the list of possible adverse circumstances sufficiently inclusive? If there are additional circumstances that should be included in this provision, please identify them and describe their potential impact on the operation of the centralized source.

The fact that the Commission asks this question 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 nationwide consumer reporting agencies, a centralized source request method or the centralized source, how can it fairly expect the nationwide consumer reporting agencies to bear potential crippling liability if the agencies fail to anticipate that which the Commission can not foresee?

b) 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 list of measures to be included in the contingency plans is sufficiently inclusive. However, the nationwide consumer reporting agencies should not be required

to adopt these measures "to the extent possible," because it could be argued that anything is possible. Rather, these measures should be adopted to the extent that they are reasonably practicable under the circumstances.

7. Should the proposed rule provide relief for nationwide consumer reporting agencies during times of extraordinary request volume? If yes, does section 610.2(e) of the proposed rule adequately address those potential situations? If not, what additional provisions are needed and why?

The proposed rule should absolutely provide relief for nationwide consumer reporting agencies during times of extraordinary request volume. That is one of the requirements of the FACT Act, section 211(d). However, as discussed above with respect to the definition of extraordinary request volume, the Commission has set the threshold for triggering those protections at a level that is unreasonably high.

8. Section 610.2(g) of the proposed rule governs the possible use of the centralized source for other communications, including marketing or advertising.

a) Are the provisions of this section, along with the prohibitions of the FTC Act, adequate to ensure that consumers are protected against communications that may interfere with the purpose of the centralized source?

The final rule should certainly permit advertising and marketing communications from the nationwide consumer reporting agencies. As the Commission observed, such communications offer "...an unparalleled opportunity to contribute to consumer education and understanding regarding consumer reports and related products." 69 Fed. Reg. at 13198. The final rule should assure consumers' ease of access, not only to their free annual file disclosures, but also to credit score disclosures, credit monitoring services and other products and services of the nationwide consumer reporting agencies that educate consumers and help prevent identity fraud. There is no indication that such legitimate marketing activities would interfere with the ease of consumer access or the purpose of the centralized source.

b) Are there particular goods or services the marketing or advertising of which would be especially likely to interfere with or complement the purpose of the centralized source; for example, credit scores, credit monitoring, and credit counseling? If so, why? Should the marketing or advertising of such products or services be treated differently under the rule?

Advertising and marketing credit scores, credit monitoring services or credit counseling services by the nationwide consumer reporting agencies would not interfere

with the purpose of the centralized source, but offer "...an unparalleled opportunity to contribute to consumer education and understanding regarding consumer reports and related products." 69 Fed. Reg. at 13198.

Because the marketplace is constantly changing, the final rule must provide flexibility for the nationwide consumer reporting agencies to market such new products and services to consumers through the centralized source. For that reason, the final rule should not place limitations on the types of goods or services that may be marketed or advertised by the nationwide consumer reporting agencies.

9. How could the rule address the potential for fraudulent websites, telephone numbers and other ploys that may mimic the centralized source in order to gain access to consumer personally identifiable information or for other illegal means? Should the rule require the nationwide consumer reporting agencies to undertake specific measures to prevent such illegal schemes? If yes, specify what measures would be appropriate and effective. Should the rule require the nationwide consumer reporting agencies to employ measures to reassure consumers that they are contacting the legitimate centralized source? If yes, specify what measure would be appropriate and effective.

The final rule should absolutely *not impose* a requirement that the nationwide consumer reporting agencies employ measures to monitor for and detect fraudulent websites, telephone numbers and other ploys that may mimic the centralized source. The burden imposed by this rule is great enough without attempting to make the nationwide consumer reporting agencies police the Internet, the telephone systems and the U.S. mail service. No other private company has an obligation to "prevent such illegal schemes" by wholly unrelated entities. Law violations are appropriately the province of the Commission and other federal and state law enforcement officials. There is no basis for deputizing the nationwide consumer reporting agencies in this public function.

Moreover, there is no statutory authority for requiring the nationwide consumer reporting agencies to employ measures to reassure consumers that they are contacting the legitimate centralized source, and no such provision should be in the final rule.

10. What competitive concerns may be raised by the operation of the centralized source and/or other provisions of the proposed rule? How might the final rule address these concerns?

CDIA is not aware of any competitive concerns that are raised by a rule implementing the statutory requirement that the nationwide consumer reporting agencies jointly design, fund, implement, maintain and operate the centralized source through which consumers may request their free file disclosures. The nationwide consumer reporting agencies have jointly designed, funded, implemented, maintained and operated

the automated dispute resolution system (E-OSCAR) mandated by FCRA § 611(a)(5)(D) without any competitive problems.

11. Is the geographic roll-out scheme for the centralized source during the transition period, described in section 610.2(i)(1) of the proposed rule, appropriate to protect the interests of both industry and consumers and to ensure an orderly phase-in of the free annual file disclosures requirement?

a) Is the duration of the roll-out appropriate? Please provide any available information regarding the costs or benefits of different rollout durations.

b) Does section 610.2(i) adequately address the potential problem of extraordinary request volume during the initial transition period?

c) Discuss any additional issues that should be addressed with regard to the transition period.

The FACT Act requires the Commission to consider the efficacy of providing for staggering the availability of the centralized source for consumers. CDIA believes that a staggered availability based on birth month or consumers' last name would better assure a uniform and orderly transition of the centralized source into full operation. If the final rule is to provide for a geographic rollout scheme, it should operate from the eastern part of the country to the west, because that would result in a more even distribution of file requests, as explained in CDIA's letter of comment of April 16, 2004.

The proposed rule does not adequately address the problem of extraordinary request volume during the initial transition. There are several fundamental problems with the proposed rule in this regard. First, as discussed above, the definition of extraordinary request volume places the threshold at too high a level. Moreover, the proposed rule fails to recognize how difficult it will be for the nationwide consumer reporting agencies to anticipate with any level of confidence what the initial request volume will be for the centralized source, for any individual request method, or for each of the nationwide consumer reporting agencies. By failing to provide for a safe harbor with respect to the initial capacity, the proposed rule places these agencies in an untenable position and subjects them to potential liability for failure to predict that which even the Commission admits can not be anticipated. For these reasons, it is essential that the transition period provide for a safe harbor with respect to the anticipated request volume for the centralized source as a whole, for each individual request method and for each nationwide consumer reporting agency. It is also essential that the final rule provide for a two-year transition period during which the nationwide consumer reporting agencies may obtain adequate data upon which to reasonably anticipate the consumer request volume going forward.

Questions 12 through 15 relate to the nationwide specialty consumer reporting agencies and are addressed in the comment letter that CDIA files on behalf of those companies.

16. **Section 698.1, Appendix D, sets out a model standardized form that can be used for mail or Internet requests to the centralized source. Is the form adequate and appropriate for this purpose? Does the form list the minimum information necessary to properly identify the consumer and process the request? If additional information is needed, identify such information and state why it is needed. Does the form include more personal information than is reasonably necessary to properly identify the consumer?**

CDIA's April 16, 2004 comment letter identified a number of significant concerns with the model form. The form provision permitting consumers to designate a preferred method of delivery of their file disclosures is contrary to FCRA § 610(a), which requires that all consumer file disclosures be in writing, *unless the consumer reporting agency and the consumer agree upon a different means of disclosure.* The form also inappropriately permits consumers to designate the manner in which the consumer chooses to be contacted in the event that additional information is needed to verify the consumer's identity or process the request. Giving consumers these options only encourages fraud. The nationwide consumer reporting agency, with the legal obligation to properly identify the consumer, must have complete flexibility in determining the optimal and effective means of doing so.

The model form also misstates the time period within which the nationwide consumer reporting agency must process a free file disclosure request and it ignores the fact that the obligation does not begin until the agency is able to properly identify the consumer. Because the Commission has proposed only one form to be used for both Internet and mail requests and has designed a form that is more appropriate for the latter request method, the final rule should specifically permit the nationwide consumer reporting agencies to adapt the form for use on the Internet.

17. **Are there consumer reporting agencies in the U.S. that compile and maintain files on consumers on substantially a nationwide basis, other than those consumer reporting agencies which, pursuant to the proposed rule, will provide free annual file disclosures through the centralized source?**

18. **Are there any small business entities (i.e., those with less than $6,000,000 in average annual receipts) covered by the proposed rule?**

19. **Please provide comment on any or all of the provisions in the proposed rule with regard to (a) the impact of the provision(s) (including any benefits and costs), if any, and (b) what alternatives, if any, the Commission should consider, as well as the costs and benefits of those alternatives, paying specific attention to the effect of the proposed rule on small entities in light of**

the analysis in section VI of this notice. Costs to "implement and comply" with the proposed rule should include expenditures of time and money for any employee training, attorney, computer programmer or other professional time.

The responses to questions 17, 18 and 19 are outside the scope of CDIA's information and comment letter.

20. Please describe ways in which the proposed rule could be modified, consistent with the FACT Act's mandated requirements, to reduce any costs or burdens for small entities.

This question overlooks the fact that the FACT Act requires the Commission to consider the burden on all the covered entities, regardless of size. By making the free disclosure provisions apply to *nationwide* consumer reporting agencies, Congress was aware that the large consumer reporting agencies will feel the impact, and that the impact will be very significant even in relation to their size. The impact should be modified, consistent with the FACT Act's mandated requirements, by:

(1) providing for a safe harbor at the beginning of the rule's effective date,
(2) setting the levels of surge protection for periods of high request volume and extraordinary request volume at reasonable levels,
(3) staggering access to the centralized source,
(4) providing for a smooth transition by giving the nationwide consumer reporting agencies two years of data upon which to reasonably anticipate consumer request volume after the initial transition period,
(5) providing for *force majeure* relief, and
(6) not creating new liability for violations of the GLB Act Safeguards Rule.

21. Please provide any information quantifying the economic costs and benefits of the proposed rule for regulated entities, including small entities.

While CDIA has no data for quantifying the economic costs to the entities covered by this rule, it is obvious that the impact will be great, particularly if the final rule fails to provide for a safe harbor at the beginning and for meaningful protections against surges in consumer demand and against *force majeure* events. When the potentially dangerous impact of these events is balanced against consumer access to their free file disclosures, it is clear that the balance weighs in favor of providing the protections that CDIA believes are necessary. Consumers will still receive their free file disclosures.

22. Please identify any relevant federal, state, or local rules that may duplicate, overlap or conflict with the proposed rule.

The proposed provisions creating an obligation to comply with the Gramm Leach Bliley Safeguards Rule conflicts with the Congressional intent underlying the act that it be enforced only through appropriate federal and state government actions.

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CDIA trusts that these responses to the Commission's specific questions will assist in making the necessary revisions to the proposed rule. CDIA would welcome the opportunity to meet with the staff to discuss these and other issues in the proposal.

Sincerely yours,

Stuart K. Pratt
President