FEDERAL TRADE COMMISSION
OFFICE OF THE SECRETARY
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THE FACT ACT DISPOSAL RULE, R-411007

COMMENTS OF ACA INTERNATIONAL IN RESPONSE TO THE FEDERAL TRADE COMMISSION'S REQUEST FOR COMMENT ON THE FACT ACT DISPOSAL RULE

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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 on the notice of proposed rulemaking to issue regulations implementing the disposal of consumer report information and records set forth in section 216 of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"). *See* 69 Fed. Reg. 21388 (April 20, 2004) ("NPRM").

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"), the Fair Credit Reporting Act ("FCRA"), the Gramm-Leach-Bliley Act ("GLBA"), and other federal and state laws.

ACA members generally are "furnishers" of consumer information under the FCRA, as amended by the FACTA. As accounts receivable management firms, ACA members possess consumer report information and records. This information generally is provided by the clients of ACA members, for example, credit grantors, healthcare organizations, and various retail merchants. The information is used for a "business purpose" within the meaning of section 216, namely, to attempt the collection of past due accounts receivable on behalf of the underlying creditor. In some instances, ACA members also are "users" of consumer reports where permissible under the FCRA for purposes of effectuating collection.

II. Summary of section 216 and the Proposed Rule

Section 216 of the FACTA requires "any person that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived from consumer reports for a business purpose to properly dispose of any such information or compilation." § 216(a). There is no affirmative statutory requirement to dispose of the information. *See* § 216(b)(1) (stating that the disposal provisions shall not be "construed to require a person to maintain or destroy any record pertaining to a consumer that is not imposed under other law"). Section 216(b)(2) clarifies that the disposal rules do not "alter or affect any requirement imposed under any other provision of law to maintain or destroy such a record." Finally, as the Commission notes in the NPRM, the proposed Rule must be consistent with existing Federal laws, including the GLBA. 69 Fed. Reg. at 21388 col. 3. Consequently, section 216(a) establishes the basic requirement that a person who maintains consumer report

information and intends to destroy the information must properly dispose of the information in order to reduce the risk of unauthorized access to sensitive financial data.

The Disposal Rule proposes a "reasonable measures" standard to implement the statutory requirements. Under the standard, a person that maintains consumer information, or any compilation of consumer information, which identifies specific consumers for a business purpose must use reasonable procedures to protect against the unauthorized disclosure of the consumer-specific information when disposed. Under the proposed rule, data that does not contain consumer-specific information (so-called "de-identified" data) will not trigger the rule. 69 Fed. Reg. at 21389 col. 1. Disposal is defined to include not only discarding or abandonment, but also the transfer of any "medium" storing consumer information, including, computers and presumably software.

The scope for the Disposal Rule is broadly defined by the Commission to include "any person over which the Federal Trade Commission has jurisdiction, that, for a business purpose, maintains or otherwise possesses consumer information, or any compilation of consumer information." 69 Fed. Reg. at 21389 col. 2. Although the Commission maintains primary jurisdiction over debt collectors under the FDCPA, the NPRM's examples of entities that possess or maintains consumer information includes many types of business that use consumer reports, but not debt collectors. *Id.* However, the Commission's interpretation is that "[c]ompanies that possess consumer information in connection with the provision of services to another entity are also directly covered to the extent that they dispose of the

consumer information." *Id.*

III. Specific Comments on the Disposal Rule

A. The Commission Should Clarify An Inconsistency as to Whether the Commission or the Federal Reserve Board Regulates Debt Collectors' Compliance with section 216

ACA requests that the Commission clarify an inconsistency as to whether the Federal Reserve Board or the Commission has primary Federal authority to regulate debt collectors under the Disposal Rule. Section 216 makes the enforcement authority of the respective Federal agencies coextensive to the authority conferred by section 621 of the FCRA. Section 621 of the FCRA gives the Commission primary authority to regulate entities subject to the Federal Trade Commission Act. 15 U.S.C. § 1681s.

However, section 216 also states that the Federal agencies' regulations must be consistent with Federal laws, and, as the Commission states in the NPRM, this consistency extends to the enforcement of the GLBA. 69 Fed. Reg. at 21388 col. 3. The GLBA applies to "financial institutions" which are defined statutorily as "any institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956 [BHCA]". 15 U.S.C. § 6809(3)(A). As the Commission stated in its final rule implementing the GLBA, the Federal Reserve Board has concluded in Regulation Y that "collection agency services" are financial activities under the BHCA subject to its regulation:

> The statute [BHCA] is clear that debt collection agencies are financial institutions under its terms. As noted in the discussion of the definition of "financial institution" below, the statute treats a broad range of activities as

> "financial in nature." Section 509(3) of the G-L-B Act defines the term to mean "any institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956." Section 4(k)(4)(F) of the Bank Holding Company Act includes all financial activities deemed by the Federal Reserve Board "to be so closely related to banking or managing or controlling banks as to be a proper incident thereto." In Regulation Y, 12 C.F.R. § 225.28(b)(2)(iv), the *Board specifically designated "collection agency services" as such a financial activity.*

65 Fed. Reg. 33646, 33655 n.25 (May 24, 2000) (emphasis added). Significantly, the GLBA does not authorize concurrent jurisdiction of Federal agencies. 15 U.S.C. § 6805(a). The FTC has jurisdiction only "for any other financial institution or other person that is not subject to the jurisdiction of any [other] agency or authority" listed in the GLBA. 15 U.S.C. § 6805(a)(7).

The result is an inconsistency wherein the FTC appears to have primary jurisdiction over ACA members pursuant to section 621 of the FCRA; however, the Federal Reserve Board appears to have authority over the "collection agency services" provided by ACA members pursuant to the GLBA, BHCA and Regulation Y. Indeed, the Commission itself notes in the NPRM that "the entities subject to the FTC's jurisdiction under the FACT Act and the GLBA are overlapping but not coextensive. . . ." 69 Fed. Reg. at 21388 n.1.

ACA respectfully requests that the Commission clarify in the final rule implementing section 216 that the Commission, not the Federal Reserve Board, will be the primary Federal agency responsible for debt collectors' compliance with the Disposal Rule based on the interplay of the FTC Act and the FCRA in light of mandate of Congress that section 216 be

consistent the GLBA, the BHCA and Regulation Y.

B. Definition of Disposal of Consumer Information

ACA believes the proposed definition of "disposal" of "consumer information" should be modified. As proposed, the Disposal Rule defines "consumer information" as "any record about an individual, whether in paper, electronic, or other form, that is a consumer report or is derived from a consumer report." Proposed § 682.1(b). The Disposal Rule defines "disposing" or "disposal" as "the discarding or abandonment of consumer information", and "the sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored." The Commission states in the proposed rule that a broad construction of these terms will best effectuate the meaning of the FACTA. 69 Fed. Reg. 21389 col. 1.

The present construction of the two key terms, however, is so broad that it regulates conduct that Congress clearly did not intend to include in the scope of section 216. The problem is that by defining "disposal" to including any "transfer of any medium" containing information "derived from a consumer report," the proposed rule has the unintended consequence of including basic transfers of information in the collections context as "disposal" events subject to the regulation when clearly the parties have no intention of disposing of the data. Two examples suffice. First, ACA members collect debts on behalf of their clients. As part of this process, "consumer information" is "transferred" between the parties to effectuate collection, but clearly not for disposal purposes. Second, ACA members

furnish information to nationwide consumer reporting agencies on behalf of their clients as contemplated by section 623 of the FCRA. The consumer information is "transferred" electronically in most instances. In both instances, the conduct is not the type intended for regulation by section 216, but the broad construction the proposed Disposal Rule potentially sweeps this conduct within the scope of the rule as a disposal vent.

To resolve this confusion, the final rule issued by the Commission should clarify that transfers of consumer information between collection agencies, nationwide consumer reporting agencies and consumers' creditors are not regulated by the rule.

CONCLUSION

ACA appreciates the opportunity to comment on the Commission's proposed Disposal Rule. If you any questions, please contact Rozanne Andersen, ACA International General Counsel and Senior Vice President of Legal and Governmental Affairs, at (952) 928-8000 ext. 132, or Andrew M. Beato at (202) 737-7777.