Comment #: 46

June 15, 2004

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room 159-H (Annex H)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: The FACT Act Disposal Rule, R-411007

Dear Mr. Clark:

The Consumer Data Industry Association ("CDIA") respectfully submits these comments on the proposed rule regarding the proper disposal of consumer report information and records, pursuant to § 216 of The Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), 69 CFR 21388 *et seq.* (April 20, 2004).

CDIA is an international trade association representing over 500 consumer information companies that provide fraud prevention and risk management products, credit and mortgage reports, tenant and employment screening services, check fraud and verification services and collection services in the United States. CDIA sets industry standards and provides business and professional education for its members. It also provides educational materials for consumers regarding their credit rights and how consumer reporting agencies can better serve their needs.

The Proposed Rule's General Objectives And Approach

CDIA strongly supports the proposed rule's objectives. CDIA members believe that safeguarding and properly disposing of consumer information is one of our most important responsibilities.

CDIA applauds the proposed rule's approach because it is non-prescriptive, allowing for flexibility and tailoring. Each covered entity is permitted to develop a

1090 Vermont Avenue, NW, Washington, D.C. 20005
202-371-0910 Phone 202-371-0134 FAX

method that is tailored to its own operation. The proposed standard does not require perfection, but only requires persons to take "reasonable measures" to protect against unauthorized access to or use of consumer information in connection with its disposal. CDIA agrees that the final rule should permit entities to consider the sensitivity of the information, the nature and size of the entity's operations, the costs and benefits of different disposal methods, as well as relevant technological changes. The success of CDIA members in protecting our data is attributable to our ability to adapt to a rapidly changing environment and meet new threats to data security as they arise.

CDIA commends the proposed rule's treatment of information that does not identify a particular individual. In the Summary of the Proposed Rule, the Commission states that under the definition of "consumer information", information that is "derived from consumer reports but does not identify any particular consumers would not be covered under the proposed Rule." We urge the Commission to retain this language and insert it into the text of the Final Rule. To apply the rule to information that does not include consumer identities would not further the statutory purpose of reducing the risk of identity theft. Obviously, such information would not be about a specific consumer and regulating its disposal would not further the purpose of the rule – preventing unauthorized disclosure and reducing the risk of identify theft. Therefore, CDIA believes that it is appropriate that information that does not identify particular consumers is not covered by the disposal rule requirements.

Additionally, the proposed rule does not address *when* consumer report information must be disposed, but only how it must be disposed. This too is a proper approach and permits compliance with other laws that govern how long consumer report information must be kept.

CDIA urges the Commission not to add additional prescriptive requirements to the rule, especially those which may not be required from an actual data security perspective. Unnecessary requirements only increase the costs of the use of consumer reports, which are passed on to consumers and others.

The Proposed Rule's Scope Is Overbroad As Applied to Consumer Reporting Agencies

Section 216 of the FACT Act provides that the Commission "issue final regulations requiring 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."

Under a plain reading of § 216, consumer reporting agencies are not covered by the disposal requirement. The phrase "derived from consumer reports for a business purpose" modifies *both* "possesses consumer information" and "any compilation of consumer information." A person cannot "derive" information from a consumer report for a business purpose until it is provided to that person by the consumer reporting

agency.[1] Therefore, only persons that possess consumer information derived from consumer reports for a business purpose or persons possessing compilations of consumer information derived from consumer reports for a business purpose, are covered by the text of the statute.

Contrary to the clear intent of Congress to exclude consumer reporting agencies, § 682.3(a) of the proposed rule does not contain the phrase "derived from consumer reports," but instead covers "[a]ny person who maintains or otherwise possesses consumer information, or any compilation of consumer information, for a business purpose." In the summary, the Commission states that this section "tracks the language of section 216 of the FACT Act" by creating "two criteria for determining whether a person would be required to comply with the Disposal Rule." 69 Fed. Reg. at 21389. "First, does the person maintain or otherwise possess the consumer information for a business purpose? Second, does the record being disposed of contain consumer information, or any compilation of consumer information?" *Id.* However, upon analysis, it is clear that this section does not track the narrow language of § 216, but instead creates a much broader scope.

Section 682.1(b) of the proposed 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." The proposed rule is therefore much broader than the text of § 216 of the FACT Act and encompasses anyone who maintains or possesses consumer information or a compilation of consumer information. The proposed rule reaches not just persons maintaining or possessing information derived from a consumer report, but also persons maintaining or possessing consumer reports. The Commission acknowledges this broad scope by stating, "the Rule would likely cover any person that possesses or maintains consumer information other than an individual consumer who has obtained his or her own consumer report." 69 Fed. Reg. at 21389. Therefore, CDIA urges the Commission to revise the definition of "consumer information" in § 682.2 to mirror the text of § 216 of the FACT Act, so that it will read as follows:

> § 682.2(b) *Scope.* This rule applies to any person over which the Federal Trade Commission has jurisdiction, that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived from consumer reports for a business purpose.

CDIA's reading of § 216 of the FACT Act is supported by a statement made by Senator Nelson when offering the amendment to require the FTC to adopt a disposal rule.

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[1] FCRA § 603(d) provides that a "'consumer report' means any . . . *communication* of any information by a consumer reporting agency . . ." (emphasis added). Therefore, no consumer report is created until information is communicated to a third party.

Senator Nelson referenced closing a loophole, and in doing so, he acknowledged that there is no loophole to close for consumer reporting agencies:

> Mr. NELSON of Florida. Mr. President, most companies are required to adopt rules to ensure the proper disposal of a consumer's private financial records. I learned last year, before comprehensive privacy regulations took effect, that some companies do not have protocols in place outlining the proper way to dispose of private consumer information when it is no longer needed. Last year, thousands of files containing sensitive customer records were discarded in a dumpster. If the wrong person came across these files, he or she would have had everything necessary to commit numerous crimes, including identity theft.
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> Since this incident, the company has acted to correct its privacy policies and the Federal Trade Commission issued its safeguards rule. The rule applies to credit reporting agencies and financial institutions that maintain consumer records and also contains guidance for businesses, which includes the storage and proper disposal of records.
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> Although check-cashing businesses, ATM operators, real estate appraisers, and even couriers are covered by the safeguards rule, rental property companies that assess the creditworthiness of tenants and businesses that maintain consumer accounts, such as cell phone companies and utilities, are not covered by the rule.
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> Improper disposal of a credit report could compromise driver's license information, Social Security numbers, employment history and even bank account numbers. My amendment will close the loophole and further protect credit information by requiring the Federal Trade Commission to issue regulations regarding the proper disposal of consumer credit information.

149 CONG. REC. S13889 (daily ed. Nov. 4, 2003) (statement of Sen. Nelson).

Excluding consumer reporting agencies from the scope of the final rule is not only consistent with the text of the FACT Act, but inclusion provides little additional protection. Under the pre-FACT Act FCRA, consumer reporting agencies have been required to protect consumer reports. These protections are found in the permissible purpose requirements and in the civil and criminal penalties sections for the improper disclosure of consumer report information, as well as in the requirements of Gramm-Leach-Bliley and the Safeguards Rule.

Therefore, it is quite clear that the proposed rule crafts an overbroad definition of consumer information that applies to consumer reporting agencies, contrary to the clear intent of § 216 of the FACT Act. Consequently, CDIA urges the Commission to revise

the rule so that it tracks exactly the language of § 216 and properly excludes consumer reporting agencies from the coverage of the disposal requirement.

Interaction With Gramm-Leach-Bliley And Other Federal Law

The Commission posited whether there are any persons or classes of persons covered by the proposed rule that it should consider exempting from the rule's application pursuant to § 216(a)(3) of the FACT Act. As discussed above, CDIA believes that the text of § 216 and Senator Nelson's floor statement clearly indicate that consumer reporting agencies should not be covered by the final rule. Therefore, there is no need to exempt them from the rule's application if the Commission revises the rule to mirror § 216 of the FACT Act.

CDIA also believes that all persons and entities (including consumer reporting agencies, should the Commission maintain its view that they are otherwise covered by the rule) that must comply with Gramm-Leach-Bliley ("GLB") or the FTC's Safeguards Rule should be exempt from the final rule. The final rule should avoid unproductive duplication of requirements so that each compliance dollar spent contributes directly to improving the security of consumer information.

Under the GLB/Safeguards Rule, entities must have an information security program which covers, among other things, the disposal of customer information. The GLB/Safeguards Rule is the most comprehensive federal law addressing the confidentiality and safeguarding of consumers' financial information.

The GLB/Safeguards Rule is significantly broader and more protective of consumer information than the proposed rule. Under the GLB/Safeguards Rule, providing for proper disposal is only one part of a broader information security program. Entities that must comply with the GLB/Safeguards Rule must also establish appropriate safeguards to protect against unauthorized access to or use of such information, insure the security and confidentiality of information, and to protect against any anticipated threats or hazards to the security or integrity of such records. By recognizing compliance with these laws as compliance with the FTC's Disposal Rule, the Commission will avoid imposing additional compliance costs that do not benefit consumers. To accomplish this, CDIA proposes the following language be added as a new subsection to § 682.2:

> (c) *Exception.* This rule does not apply to any person which must comply with § 501(b) of the Gramm-Leach-Bliley Act or with the Safeguards Rule, 16 CFR part 314, implementing § 501(b) of the Gramm-Leach-Bliley Act.

The Commission should also revise the proposed rule to ensure that it is clear there is no private right of action under the final rule for alleged violations of either this Disposal Rule or the GLB/Safeguards Rule. Neither the GLB nor the Safeguards Rule provides for a private right of action for alleged violations of security and disposal

guidelines; therefore, consumers should not be permitted to bootstrap these claims by bringing a nearly identical lawsuit alleging violation of the Disposal Rule under the FACT Act. This may be accomplished by inserting a new subsection (c) in § 682.4 to read as follows:

> (c) to provide a private right of action for alleged violations of this rule, the Gramm-Leach-Bliley Act or its implementing regulations, including, but not limited to, the Federal Trade Commission's Safeguards Rule.

Finally, CDIA believes that the Commission has defined "consumer information" in § 682.1(b) appropriately because it is consistent with the way "customer information" is defined in § 314.2(b) of the Safeguards Rule. Section 314.2(b) of the Safeguards Rule defines "customer information" as "any record containing nonpublic personal information as defined in 16 CFR 313.3(n), about a customer of a financial institution, whether in paper, electronic, or other form. . . ." This will help to ensure that entities that must comply with both the GLB/Safeguards Rule and the final Disposal Rule can do so more easily. While CDIA believes that consumer reporting agencies should not be covered by the final rule, and if so, that compliance with the GLB/Safeguards Rule should constitute compliance with the disposal rule, in any event, the definitions of "consumer information" and "customer information" should be consistent to avoid confusion and make compliance easier.

The Proposed Rule Should Be Modified To Include Safe Harbor Provisions

The proposed rule should be modified to include safe harbor provisions if entities follow specific guidelines. However, to maintain flexibility, the rule should provide that these guidelines are not the only way to be in compliance with the rule. For example, the final rule could provide that the use of a certified records destruction company would constitute compliance with the rule.

Additionally, the final rule should provide that compliance with more restrictive state laws constitutes compliance with this rule.

To accomplish, this Commission could add a new subsection (c) to § 682.3:

> (c) *Safe Harbor*. The following practices shall be considered compliance with this Rule:
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> > (1) the disposal of consumer information or any compilation of consumer information by a certified records destruction company.
> >
> > (2) compliance with more restrictive state laws governing disposal of consumer information or any compilation of consumer information.

Comments On Examples

CDIA recommends that Example (4)(b) regarding "traditional garbage collectors engaged in the normal course of business" needs to be clarified to avoid misinterpretation. CDIA is concerned that this Example could be read to permit possessors of "consumer information" to simply deposit it in garbage cans in readable form, allowing dumpster divers, garbage collector employees, and others to see consumer information. Therefore, CDIA suggests that this Example be amended to state that in some cases consumer information may need to be shredded, destroyed, erased or otherwise rendered so that it cannot practicably be read or reconstructed prior to depositing it into the traditional garbage collection system.

The Effective Date

In order for small users of consumer reports to have adequate time to institute proper disposal procedures, the effective date should be six months after the final rule is published in the Federal Register.

CDIA appreciates the opportunity to file these comments.

Respectfully submitted,

Stuart K. Pratt
President and CEO