June 15, 2004

Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Ave., NW
Washington, D.C. 20580

Re: The FACT Act Disposal Rule, Matter No. R-411007

I. INTRODUCTION

Equifax Information Services LLC ("Equifax") is a consumer reporting agency that furnishes consumer reports to its financial institution customers, other businesses that have a permissible purpose as defined in the Fair Credit Reporting Act (FCRA), and consumers. Equifax is a subsidiary of Equifax Inc., a 105-year-old company and member of the Standard & Poor's (S&P) 500® Index, a global leader in turning information into intelligence, serving customers across a wide range of industries and markets, including financial services, retail, telecommunications, utilities, mortgage, brokerage, insurance, automotive, healthcare, direct marketing and transportation. Equifax Inc. is not a consumer reporting agency.

Equifax appreciates the opportunity to submit comments to the Federal Trade Commission (FTC) in the above captioned matter, which would implement § 628 of the FCRA, as added by the Fair and Accurate Credit Transactions Act of 2003 (the FACT Act). We believe, as discussed below, that the FTC's overall approach in crafting the Rule is appropriate; adopting flexible standards which recognize that a prescriptive "one-size-fits-all" approach is neither feasible nor practical given the diversity of entities potentially subject to the rule. We believe, however, that the proposed rule is overly broad to the extent that it applies to consumer reporting agencies. In addition, we believe that the proposed rule also could be improved upon in several respects, which we discuss further below.

II. COMMENTS AND SUGGESTIONS REGARDING THE DISPOSAL RULE

A. <u>The broad, flexible standard set in the proposed rule is appropriate</u>.

The FTC is right, in our view, to draft a disposal rule that is highly flexible and not prescriptive with respect to disposal methods. The disposal rule will apply to a wide range of diverse entities, including everyone from "mom-and-pop" businesses that are only occasional users of consumer reports to highly-sophisticated, multi-billion dollar corporations that obtain many reports on a regular basis. As such, the rule is correct to provide flexibility for such a diversity of users of varied sophistication and resources.

We also believe that the factors the FTC suggests be considered in determining whether a reasonable disposal program is in place are appropriate.[1]

The flexible approach adopted by the FTC also allows those covered by the rule to manage costs by deploying disposal solutions that dispose of consumer information in a responsible manner, without driving up costs. A more prescriptive approach, such as mandating particular disposal methods, could increase costs by imposing disposal methods that are not the most efficient for a particular entity. These costs would ultimately be borne, albeit indirectly, by consumers.

In addition, we believe that the FTC is correct to recognize in the proposed rule that "there are few foolproof methods of record destruction" and also correct not to require covered persons to ensure perfect destruction of consumer information in every instance.[2] A strict liability regime is inappropriate, and the FTC was correct not to propose such a regime.

Finally, we believe that the FTC is correct to draft the proposed rule in such a manner that it does not prescribe when (or whether) consumer information must be disposed of. We believe that this approach is consistent with the text of the statute and congressional intent. We suggest that the FTC include an explicit statement that the disposal rule does not impose obligations with respect to how information is maintained and that the disposal rule does not apply to information that is involuntarily disclosed as a result of theft or other security breach, where the holder of the information was not in the process of disposal. We believe that this is implicit in the standard set in proposed § 682.3(a), as well as with the proposed definition of "disposal" in § 682.1(c). We believe, however, that an explicit statement would be beneficial for purposes of clarity.

B. <u>The disposal rule should not apply to consumer reporting agencies. Neither the language of §628 nor the provision's legislative history support extending coverage of the disposal rule to consumer reporting agencies. In addition, consumer reporting agencies already are subject to the GLB Safeguards Rule and have other obligations under the FCRA which require that consumer information be disposed of with care.</u>

We urge the FTC to revise the proposed rule to exempt or otherwise exclude consumer reporting agencies from its coverage. By its terms, FCRA § 628 addresses the disposal of consumer information or compilations "derived from" consumer reports, not information collected or maintained by consumer reporting agencies in the preparation of consumer reports. In addition, Congress did not intend for consumer reporting agencies and other entities subject to the GLB Safeguards Rule to be subject to the disposal rule; rather the disposal rule was intended to impose disposal obligations on consumer report users that are not subject to the Safeguards Rule, such as landlords, telephone companies, and utilities.[3]

---

[1] 69 Fed. Reg. 21389 (April 20, 2004).
[2] *Id.*
[3] Cong. Rec. S 13889 (Nov. 4, 2003) (Statement of Senator Nelson).

Even if the language of the statute and congressional intent did not clearly indicate that consumer reporting agencies are not subject to the disposal rule, it would be wholly proper and appropriate for the FTC to use its discretionary authority to exempt consumer reporting agencies from coverage. Consumer reporting agencies already are obligated to restrict the disclosure of consumer reports and they may be subject to liability under other provisions of the FCRA if consumer report information is improperly released or provided (e.g., for disclosing a report without a permissible purpose). As such, application of the disposal rule to consumer reporting agencies accomplishes little other than creating an additional, redundant obligation and potential cause of action.

In addition, consumer reporting agencies are subject to the GLB Safeguards rule. As the FTC noted in the overview to the proposed rule, "[a]n entity subject to the Safeguards Rule is required to address the disposal of customer information as one part of a larger, written information security program reasonable and appropriate for that entity."[4] As such, requiring entities subject to the Safeguards Rule to comply with the Disposal Rule for the same information is duplicative, is unnecessary to accomplish congressional intent or the stated purpose of the regulation, and does nothing to further safeguard customer information. All that is accomplished by extending the disposal rule to this information is the creation of additional potential liability for consumer reporting agencies and other GLB financial institutions.

C. The final rule should state clearly that it does not create a private right of action, either with respect to the disposal rule or the GLB Safeguards Rule.

The GLB Safeguards Rule is not enforceable through private rights of action. Nor does § 216 of the FACT Act, which instructs the FTC to provide for the proper disposal of consumer information by regulation, create such a private right of action for violations of either the disposal rule or the Safeguards Rule. We believe that this is the correct approach, given that the disposal rule's requirements are a subset of the broader obligations already imposed by the Safeguards Rule. As such, we urge the FTC to specifically state in the final rule that neither the disposal rule nor the GLB Safeguards Rule can be enforced through private actions.

D. The proposed rule's definition of "consumer information" and related concepts require additional treatment.

In our view, it is particularly important that the FTC carefully define what information is subject to the disposal rule, given the possible liability that may result from improper disposal, as well as the potentially enormous number of entities of varying practices and sophistication that may be subject to the disposal rule.

[4] 69 Fed. Reg. 21390 (April 20, 2004).

- The status of de-identified information should be addressed in the rule itself. The proposed rule correctly excludes de-identified information from the scope of the proposed rule. In our opinion, however, the FTC should include an explicit statement to this effect, rather than the interpretive statement in the overview which opines that such information is not covered because it is not "about a consumer."

  The final rule also should include a provision which deems information not to be subject to the disposal rule if specified direct identifiers have been removed (e.g., name, address, date of birth, social security number, telephone number; and e-mail address). Failure to include such a safe harbor could create uncertainty as to whether information has been adequately de-identified.

- The concept of "information derived from consumer reports" requires careful definition. The concept of "information derived from consumer reports" is a new concept introduced into the FCRA by the FACT Act and is potentially very broad in scope. The FTC, therefore, should define this term to guide those with disposal obligations under the Act and to reduce the potential for extensive and costly litigation.

  - The GLB concept of "derivative information" is instructive. The FTC should consider defining "information derived from consumer reports" in a manner similar to the definition of "derivative information" used in the Gramm-Leach-Bliley Act. The overview accompanying the final GLB rule defines "derivative information" as "information that is part of a list, description, or other grouping of consumers that is derived from personally-identifiable financial information that is not publicly-available."[5] Similarly, "information derived from consumer reports" could be defined to mean "information that is part of a list, description, or other grouping of consumers that is derived from consumer report information and that is not publicly-available."[6]

  - Information about decisions made on the basis of consumer reports should not be considered "information derived from consumer reports." The final rule should clarify that information about decisions made on the basis of consumer information does not constitute information "derived from" consumer reports. For example, if an insurer uses consumer information to determine what premium to charge or what company to place the insured in, the premium and company should not be considered to have been "derived from" a consumer report, even if the consumer report was the sole basis for a decision.

[5] 65 Fed. Reg. 33658 (May 24, 2000).

[6] The words "personally-identifiable" are omitted from the proposed FCRA definition because, as discussed, information that is not personally-identifiable is already considered to be beyond the scope of the rule.

- "Credit Header" information should not be considered "information derived from consumer reports." The final rule should clarify that credit header data is not covered by the disposal rule. Section 628 only applies to consumer reports and the information derived there-from. It is well established that credit header information does not constitute a consumer report. The exclusion of credit header data also helps to mitigate the problem of disposing of information from multiple sources (discussed below), since name, address and other credit header data are among the information most likely to come from multiple sources and be replicated in databases and other electronic recordkeeping systems.

- The concept of "combined information" in the proposed rule is overly broad. The FTC states in the overview to the proposed rule that information "derived from consumer reports" includes "information from a consumer report that has been combined with other types of information."[7] This statement, at minimum, should be clarified to exclude from the scope of the disposal rule non-consumer report information that can be separated from the consumer information. For example, the fact that an employer "combines" a consumer report obtained for employment purposes with an employment application and other materials in a personnel file should not subject the application and other materials to the requirements of the disposal rule. If the consumer report subsequently is removed from the file and disposed of in accordance with the rule, the remaining information should not be subject to the disposal rule despite the fact that it at one time may have been "combined" with the consumer report. Likewise, the fact that a consumer report user houses information from consumer reports that it obtains in the same database as other information should not subject the other information to the disposal rule unless this is necessary for proper disposal of the consumer report information.

- Information from multiple sources should not be covered by the disposal rule. We suggest that the FTC revise the final rule to clarify that information obtained from sources other than consumer reports is not subject to the disposal rule simply because that same information was also obtained in a consumer report. For example, if a company is informed by a consumer (on an application or otherwise) that he or she has filed for bankruptcy, this information and/or documents should not be subject to the disposal rule as a result of the fact that the bankruptcy also appears in a consumer report the company obtained.

[7] 69 Fed. Reg. 21389 (April 20, 2004).

E. Compliance with the examples provided in the final rule should be deemed to be compliance with the rule. The final rule should make it explicit, however, that the examples provided in the rule are not exhaustive.

The final rule should include language making it explicit in the rule itself that an entity that complies with a disposal method described in the examples included in the rule will be deemed to be in compliance with the disposal rule. The FTC essentially has expressed this view in the overview.[8] We believe, however, that an explicit statement in the Rule itself is preferable for purposes of emphasis and clarity.

The final rule also should emphasize—in the rule itself rather than the overview—that means of disposal cited in the proposed rule's examples include, but are not limited to, those presented. We believe that this flexibility is essential given the disposal rule will apply to such a wide range of entities.[9]

F. Compliance with more prescriptive state laws as deemed compliance.

Section 682.4(b) provides that the disposal rule shall not alter or affect any other legal requirements regarding the maintenance or destruction of consumer information. The final rule should also include in the final rule a provision which deems disposal of consumer information in compliance with state laws which specify a means of records disposal or destruction to comply with the disposal rule.

Some jurisdictions already have disposal requirements for personal information. Georgia Code § 10-15-2, for example, provides that:

> a business may not discard a record containing personal information unless it:
> (1) Shreds the customer´s record before discarding the record;
> (2) Erases the personal information contained in the customer´s record before discarding the record;
> (3) Modifies the customer´s record to make the personal information unreadable before discarding the record; or
> (4) Takes actions that it reasonably believes will ensure that no unauthorized person will have access to the personal information contained in the customer´s record for the period between the record´s disposal and the record´s destruction.

We believe that compliance with this statute would satisfy an entity's obligations under the proposed rule; however, we suggest that the FTC deem compliance with such statutes to constitute compliance with the disposal rule.

[8] 69 Fed. Reg. 21390 (April 20, 2004).
[9] *Id.*

G. The final rule should clarify the degree of due diligence necessary to use a professional disposal company and limit the liability of those that rely on such firms to dispose of consumer information.

The FTC should make clear that a user that, in good-faith, out-sources the disposal of records to a record disposal company shall not be liable for a violation of the rule in event that the disposal company fails to properly dispose of the records. The only exception should be if the user has actual knowledge that the disposal company is not meeting its obligations and fails to take reasonable corrective action. This approach shifts—rather than eliminates—potential redress for consumers, as it would still allow actions against the disposal firm, which is directly regulated under the proposed rule. This approach also provides additional incentive for entities to use professional services to dispose of consumer information.

We also suggest that the Commission clarify the example in § 682.3(b)(3), which provides for the outsourcing of records disposal to firms that specialize in that function. We support the apparent goal of the example; namely to ensure that only legitimate and responsible disposal services are employed to dispose of consumer information. We suggest, however, that the FTC revise the example slightly to make it clear that any one of the referenced due diligence steps would be sufficient and that it is not necessary to undertake all of the steps referenced.

H. Disposal using "traditional garbage collectors" as a means of disposal should be clarified and predicated on suitable steps to render information unreadable prior to disposal.

Section 682.3(b)(4) provides that "traditional garbage collectors" would be in compliance with the rule by "disposing of garbage in accordance with standard procedures." This statement appears to merely be a limitation on the potential liability of garbage collectors, whom the FTC seeks to directly regulate under the proposed rule. The provision might be read, however, to imply that use of traditional garbage collectors that dispose of garbage in accordance with standard procedures is an acceptable means of disposal. This would be inconsistent with the remainder of the proposed rule and we suggest that the FTC clarify its meaning with respect to this provision in the final rule as we do not believe that merely disposing of a consumer report in the garbage, to be picked up by a traditional garbage collectors is an adequate means of disposal. At a minimum, in our view, customer information disposed of through traditional garbage collectors should be shredded, erased, or otherwise rendered unreadable first. Otherwise "dumpster divers," garbage company employees, or those that happen upon garbage containing consumer information that falls off a truck could recover consumer information.

I. Entities should be given six months, rather than three, to come into compliance with the final rule.

The FTC should provide a six month implementation period rather than the three months allowed under the proposed rule. The disposal rule will apply to a large number of users of consumer reports, many of whom may be wholly unaware that they now have an affirmative legal obligation to dispose of consumer reports in accordance with the Rule. As such, report users, many of whom are small entities and/or infrequent report purchasers, will need to be educated about the new rules.

Respectfully submitted,

KENT E. MAST
General Counsel
Equifax Information Services LLC