Comment #: 28

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Federal Trade Commission
Office of the Secretary
Room 159-H (Annex C)
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: FACTA Interim Final Rule Prohibiting Circumvention, Project No. P044804

Dear Mr. Clark:

Experian Information Solutions, Inc. ("Experian") respectfully submits the following comments on the Federal Trade Commission's ("Commission") Interim Final Rule ("Interim Rule") to implement Section 211(b) of the Fair and Accurate Credit Transactions Act of 2003, 15 U.S.C. 1681y ("FACTA"). The Commission requested comments on the Interim Rule by public announcement dated February 18, 2004.

Experian has been identified as a company with a business that operates as a nationwide consumer reporting agency as defined under Section 603(p) of the Fair Credit Reporting Act ("FCRA"). Experian therefore has a vital interest in the Interim Rule.

The President signed FACTA into law in December 2003, and the Commission was charged with implementing a Rule to prohibit nationwide consumer reporting agencies from circumventing the Act's provisions. FACTA does not prohibit circumvention directly. Congress instead provided the Commission with broad authority to craft an appropriate Rule to prevent all circumvention, and this Rule will be the sole source of guidance on all matters related to the prevention of circumvention. In order to provide meaningful guidance to subject parties, and to avoid a potentially disparate crazy quilt of judicial interpretation of the Act, there should be no ambiguity as to the key terms and meaning of the Rule. Experian recognizes the challenging task faced by the Commission in drafting this Rule, and is writing to provide the Commission with some practical considerations from the perspective of implementing the intent of the Act without hampering businesses' ability to foster a healthy credit economy. Specifically, the Commission must consider the Rule's effect on the every day operation of nationwide consumer reporting agencies and avoid ambiguities that will have a harmful effect on companies' ability to undertake legitimate business decisions.

As a general matter, Experian's urges the Commission to ensure that the Final Rule establishes and secures a level playing field for all current and future stakeholders, and we applaud the initial effort in this regard. It would be contrary to the intent of Congress and counter to the best

interests of a competitive credit economy to impose all of the regulatory requirements found in the FCRA, and increased by FACTA, on Section 603(p) nationwide consumer reporting agencies, but allow other entities to grow organically into competitive businesses without those same obligations. As urged more generally below, further definition and detail in the final rule and its examples is necessary to assure this result.

The Commission should also avoid imposing a chill on legitimate business decisions not undertaken with any intent to circumvent the Rule. Experian is a member of the Consumer Data Industry Association ("CDIA") and supports the comments submitted on behalf of the consumer credit reporting information industry by CDIA. We include the essential points for the Commission's consideration below.

SUGGESTIONS FOR FINAL RULE SECTION 603.2(a)

Elements of Circumvention

The Interim Rule implements Section 211(b) of FACTA, which requires the Commission to promulgate a Rule to prevent a consumer reporting agency from "circumventing or evading" treatment as a nationwide consumer reporting agency regulated under the FCRA. The terms "circumventing" and "evading" are not defined in FACTA and the Interim Rule currently provides no interpretive guidance. Section 603.2(a) does not indicate that intent is a factor in determining whether an entity's actions violate the Act's provisions. Without more clarity on the intent requirement intended by the Act, the Interim Rule can be broadly interpreted to affect any divestiture or sale, or even failure to acquire, a business unit by a nationwide consumer reporting agency, even if the intent behind the covered action was a legitimate business reason. This ambiguity muddies industry's understanding of its obligations, and casts an unintended chill on a subject entity's ability to make day-to-day business decisions or to reorganize or restructure its operations in response to fluid market conditions.

In providing clarity to these terms and to the section, the Commission should look to the plain meaning of the words. The word "circumvent" means "to overcome by clever maneuvering," and "evading" is defined as "to escape or avoid by cunning or deceit." Both of these words, carefully selected by Congress, require application of specific, indeed clever, thought to purposeful action. Based on the plain meaning of these terms, there can be no violation of Section 211(b) if there is not a willful intent to evade and a decision specifically made to avoid the conduct required by the Act. Congress clearly was concerned about manipulation of corporate structure through deliberate or intentional acts. Additionally, the Interim Rule omits any discussion of a "necessary" requirement in Section 211(b). FACTA instructs the Commission to prohibit a consumer reporting agency from circumventing or evading treatment as a nationwide consumer reporting agency for purposes of the Title. The statutory language makes clear the circumvention or evasion must be for the purpose of avoiding being subject to the requirements of the FCRA as a Section 603(p) agency. If a nationwide consumer reporting agency takes action for any other reason, such as a legitimate business reason, then there can be no circumvention or evasion in violation of the Rule. Finally, the Final Rule should also make clear that it applies only to transactions entered into by consumer reporting agencies.

Based on above, to guide companies regarding to scope and applicability of the prohibitions in Section 603.2(a), the Final Rule should clearly outline that for proscribed circumvention to exist,

each of four specific elements must be present. These elements include: (1) an intentional act (2) by a consumer reporting agency (3) in a transaction or series of transactions (4) for which there is no valid business purpose other than to evade the Rule.

Procedure of Review for Proposed Transactions

The Interim Rule does not provide any safe harbor procedures for consumer reporting agencies seeking clarity on whether a proposed transaction would violate the Rule. To avoid uncertainty or potentially conflicting judicial interpretation, the Final Rule should provide for a formal procedure under which an existing or prospective consumer reporting agency could elect to submit a written request to the Commission for a determination of whether any proposed transaction or decision, if followed by a cessation of treatment of the business as a nationwide consumer reporting agency, would be considered a "circumvention" of those obligations under section 603.2(a). Similar to its process for pre-merger antitrust filings under the Hart-Scott-Rodino Act, the Commission should review proposed transactions for pre-clearance and provide companies a safe harbor option. If the Commission did not respond within a specified time period to a petition on a proposed transaction, it would be presumed that the transaction would not violate the Rule. If the Commission did respond with an opinion, its responses will offer valuable guidance to consumer reporting agencies that may need to reorganize and restructure their operations for legitimate business reasons and still comply with Section 603.2(a). This recourse would give needed assurance to a consumer reporting agency that a reorganization, divestiture or other covered transaction, followed by a cessation of treatment as a nationwide consumer reporting agency, would not violate the Rule. It would further serve to prevent actions that circumvent or evade the Rule before such actions occur; and would assist the courts in determining compliance with the FCRA and the Final Rule.

Interoperability with Other Laws

The Interim Rule does not clarify the interoperability of the Rule with other laws. The Final Rule should be expanded to make clear that it does not alter, impact or in any manner modify current legal standards, Federal or state, that would be applicable to the determination of the elements of compliance, and that the Rule does not intend to create any new type of legal standard. The Final Rule also should expressly state that it does not interfere with or supersede the operation of other Federal and state laws. For example, the Final Rule should enumerate the circumstances when it will yield to federal bankruptcy laws with respect to transactions covered under Section 603.2(a), so as not to interfere with the ability of a nationwide consumer reporting agency to file for protection under such laws. It would be an inappropriate unintended effect of the Act if the Rule were somehow read to prevent a nationwide consumer reporting agency from legitimately filing for bankruptcy merely because the remaining entity would be liquidated or would no longer be a nationwide consumer reporting agency. Similarly, the Final Rule should make clear that applicable state law, such as the business judgment rule, may provide a valid reason for a covered action which results in a cessation of treatment as a nationwide consumer reporting agency to be excluded from the prohibition under Section 603.2(a). A nationwide consumer reporting agency should be able to divest a business unit if compliance with a particular state's licensing or substantive laws so dictates.

Limitations on Liability

Interim Rule Section 603.3 provides that a person is deemed to be in compliance with the rule if the person complies with all the obligations imposed upon consumer reporting agencies that compile and maintain files on consumers on a nationwide basis under the FCRA, even if that person is in violation § 603.2. 69 Fed. Reg. at 8536. This provision is essential to implement the Congressional purpose underlying FCRA Section 629. The Final Rule should explain that a consumer reporting agency's potential liability would be based upon an allegation that the consumer reporting agency is a nationwide consumer reporting agency under the FCRA but fails to comply with the requirements for such agencies. In an action based upon the alleged failure to comply with the FCRA's obligations for nationwide consumer reporting agencies, there could be an issue as to whether the agency should be treated as a nationwide consumer reporting agency for purposes of the act, and thus an issue as to whether the consumer reporting agency structured its organization or maintained files for the purpose of circumventing or evading treatment as a nationwide consumer reporting agency. However, there would be no independent basis for liability under the rule. The Final Rule should make this clear.

SUGGESTIONS FOR FINAL RULE SECTION 603.2(b)

Experian welcomes the Commission's efforts to provide guidance as to the application of the Rule through the use specific examples. However, as illustrated in the comments submitted by the CDIA, the four examples provided, in fact, lack sufficient detail and merely raise more questions than they answer. Experian endorses the similar clarification noted in the comments submitted by CDIA. For instance, in Example 1 describes a scenario where an entity restructures its public records operations, but does not discuss whether the parent company continues to provide consumer reports employing both public record and credit account information. Experian recommends clarifying the Example to note that if the parent entity does not employ the public records of the affiliate company in its consumer reports, it is not circumventing the Rule.

Example 3 is also ambiguous. The Example states, with little additional guidance, that where a new consumer reporting agency forms with two affiliated agencies, one that assembles and maintains credit account information and another that maintains public record information, the failure to comply with the obligations of a nationwide consumer reporting agency is a circumvention of the Rule. The Example fails to discuss the intent of the entity, and whether the organizational decision was guided by a legitimate business purpose or intentional evasion of Section 603.2(a). It is also unclear whether a new entrant to the market may set up its operations in any manner other than that of a nationwide consumer reporting agency. It appears that a new consumer reporting agency that enters the market as something less than a nationwide consumer reporting agency may face liability under Section 603.2(a), whether or not the decision to enter the market in the more limited capacity was taken solely to avoid the obligations imposed on nationwide consumer reporting agencies. Of course, as noted above, the treatment of new entrants must parallel the treatment of existing nationwide consumer reporting agencies.

Finally, Example 4 creates an exception to the general prohibition on organizational restructuring that would remove the entity from Section 603(p), where the transaction (sale of the public record information business) is a "bona fide, arms-length transaction" with an unaffiliated

company. However, there is no explanation of which of the elements in the Example must be present, or specifically why the Example is not a prohibited divestiture.

Moreover, four examples are simply not sufficient. To provide additional focus, the Commission should expand the examples included in the Interim Rule, and provide additional examples to address other remaining concerns. Experian endorses those specific examples in the comments submitted by the CDIA. The Commission should include examples clarifying the following points:

- ***Information and Business Segregation***. Certain consumer reporting agencies may invest in or control other businesses that may provide different consumer reports for different purposes. The Final Rule should by example illustrate that there is no affirmative obligation or duty on such consumer reporting agency to change or restructure its business to have all of its businesses be considered a Section 603(p) agency.

- ***Legitimate Business Purpose***. The Final Rule should clarify the intent of the Act that when a company undertakes a reorganization or transaction that removes it from consideration as a nationwide consumer reporting agency for a legitimate business purpose, the company is not in violation of the circumvention prohibitions. This is true whether the decision relates to internal reorganization, or relationships with third parties. As long as there is a valid business purpose for the decisions that are made and the transactions that are pursued, those decisions and transactions are not prohibited, even if a result of those decisions or transactions is that an entity may cease being a nationwide consumer reporting agency, or not ever be treated as an entity with the duties of a nationwide consumer reporting agency under the FCRA.

- ***No Duty to Acquire Business.*** A consumer reporting agency is not required to enter into a transaction even if the reason for not entering into the transaction is that it does not wish to become a Section 603(p) nationwide consumer reporting agency. The Final Rule should not require entities to enter into transactions solely for the purpose of avoiding liability under Section 603.2(a), and should clarify that a company is not required to buy assets or businesses if it does not wish to.

SUGGESTIONS FOR FINAL RULE SECTION 603.3

The Interim Rule provides a limited exception from liability under Section 603.2(a) if the subject company otherwise complies with the obligations imposed on nationwide consumer reporting agencies by the FCRA. As discussed above, the Final Rule should expand this exception to create a safe harbor that a transaction or decision will not constitute a violation of Section 603.2(a) where an entity has voluntarily pre-notified the Commission of a proposed transaction or decision and (1) the Commission approved the transaction or decision; or (2) the Commission did not disapprove the transaction or decision within the time period prescribed by the Commission's determination process.

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Thank you for providing Experian with this opportunity to comment on the purpose and effect of the proposed Interim Rule to implement Section 211(b) of FACTA. Experian prides itself on diligent and complete compliance with all provisions of the FCRA, and encourages the Commission to carefully consider the practical analysis of the Interim Rule contained in these comments. We look forward to working with the Commission to craft a Final Rule that reasonably implements the intent of the Act, but also provides clarity and greater guidance to the industry on the scope and applicability of FACTA's circumvention prohibitions.

Sincerely,

Jason Engel
Vice President &
Assistant General Counsel