



January 5, 2005

Federal Trade Commission  
Office of the Secretary  
Room H-159 (Annex S)  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20850

Re: FACTA Credit Score Disclosure Fee, Project No. R411004

The Consumer Data Industry Association (“CDIA”) respectfully submits these comments on the Federal Trade Commission’s (“Commission’s”) advance notice of proposed rulemaking (“ANPR”) regarding the fee that consumer reporting agencies may charge for credit score disclosures made to consumers under the Fair Credit Reporting Act (“FCRA”).<sup>1</sup>

As amended by Section 212(b) of the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”), FCRA section 609(f) requires consumer reporting agencies to make available upon request a consumer’s credit score and certain other information. Section 609(f)(8) provides that a consumer reporting agency may charge a “fair and reasonable fee” as determined by the Commission for the disclosures. The Commission’s ANPR discusses several possible approaches for the Commission’s determination with respect to a “fair and reasonable fee” and requests comments on all aspects of the determination it will make.

CDIA is an international trade association representing the consumer reporting industry. CDIA’s members include the nationwide consumer reporting agencies,<sup>2</sup> the nationwide specialty consumer reporting agencies,<sup>3</sup> as well as many smaller consumer reporting agencies. All of CDIA’s consumer reporting agency members are required to

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<sup>1</sup> 69 Fed. Reg. 64698 *et seq.* (Nov. 8, 2004).

<sup>2</sup> *See* FCRA § 603(p); 15 U.S.C. § 1681a(p).

<sup>3</sup> *See* FCRA § 603(w); 15 U.S.C. § 1681a(w).

make the FCRA section 609(f) credit score disclosures upon request and will, therefore, be significantly affected by the Commission's determination as to a "fair and reasonable fee" for such disclosures.

As the Commission anticipated in the ANPR, section 609(f) became effective on December 1, 2004 without regard to whether the Commission had made a determination with respect to a "fair and reasonable fee" or had given guidance on how a determination will be made. As a result, since that date, consumer reporting agencies have been required to make the credit score disclosures required under section 609(f) and have been permitted to charge a fee for doing so, as long as that fee is "fair and reasonable." The Commission stated that its enforcement of the "fair and reasonable" requirement will be "by reference to the extant market in credit scores. Thus, at present the Commission may question any fee that significantly exceeds the current market rates for credit scores, which are currently in the range of \$4 to \$8."<sup>4</sup> CDIA supports a market-based approach to the Commission's enforcement policy and believes that this approach should also serve as the basis for the Commission's determination as to what constitutes a "fair and reasonable fee."

The Commission's ANPR invites comment on the approaches and factors that should be considered in its fee determination, as well as comment on the "underlying premises that it should employ in considering various approaches and factors."<sup>5</sup>

As the Commission observed, the FCRA credit score disclosure requirements and the Commission's fee determination apply only to consumer reporting agencies, but there are many other credit score sellers that are not consumer reporting agencies and would not be subject to the Commission's fee determination.<sup>6</sup> The Commission also observed that there appears to be an "extensive and dynamic market for credit score products," where diverse new scoring products are currently developed and introduced.<sup>7</sup> CDIA believes that these factors should guide the Commission because they influence the merits of the possible approaches in making the required determination.

The Commission suggested that one approach would be to establish "a single mandatory price that regulated entities must charge for a score disclosure."<sup>8</sup> CDIA believes that, while such an approach would provide certainty, it would also have adverse consequences in a competitive market where only *some* of the competitors would be subject to the fixed price. As the Commission said, "[i]n a market such as this—with both regulated sellers (consumer reporting agencies who distribute mortgage scores or

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<sup>4</sup> 69 Fed. Reg. at 64701.

<sup>5</sup> 69 Fed. Reg. at 64699.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

develop their own scoring models) and unregulated sellers (non-consumer reporting agencies and consumer reporting agencies that do not sell mortgage scores or develop proprietary scores)—a fixed price may place regulated sellers at a competitive disadvantage to unregulated sellers.”<sup>9</sup> Moreover, depending upon whether the fee were set too high or too low, the result could be either higher fees for consumers than would have been set in a competitive market or discouraging competition on other terms of the transaction.

CDIA also agrees with the Commission’s observations with respect to a related approach of setting a maximum fee. Although this approach is somewhat preferable to a mandatory fee because it would allow regulated entities to compete on price up to a certain amount, it shares many of the disadvantages of a mandatory fee as a result of the disruption of the competitive market and the fact that only some of the credit score sellers would be affected by the cap. The Commission suggests that some of the drawbacks of a mandatory fee could be addressed by adjusting the price periodically according to the consumer price index or other external measure and, it offers a number of ways that this could be done. However, none of these methods address the fundamental problem that, in a highly competitive market, *only* the regulated credit score sellers would be subject to the maximum fee.

CDIA strongly supports the Commission’s suggestion that a fair and reasonable fee determination be based on “the charges produced by a competitive market.”<sup>10</sup> As the Commission observed:

A market-based approach is attractive because a competitive market generally provides the most rational, responsive, and efficient form of pricing. Typically, the market is able to produce and account for relevant factors: prices, quality, service, costs, encouragement of investment, and promotion of competition. The government often sets cost-based fees in the public utility context, because regulators often have no competitive market to which they can refer. In the case of direct-to-consumer credit scores, however, there currently exists a market with many buyers and sellers on which the Commission might base a determination.<sup>11</sup>

CDIA believes that a determination based upon a market approach is one that is instructed by the factors described above: (1) a vibrant, competitive and evolving market and (2) a fee determination that affects only some of the many competitors in that market. Because of these factors, there is every reason to believe that the fees being charged consumers for credit scores today are fair and reasonable, that there is active price

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<sup>9</sup> *Id.*

<sup>10</sup> Fed. Reg. at 64700.

<sup>11</sup> *Id.*

competition, and that the market is producing appropriate pricing incentives. *For these reasons, CDIA believes that a market-based fee determination is both appropriate and feasible.*

The Commission specifically seeks comment on an appropriate methodology for determining a fair and reasonable fee under a market-based approach. Under one possible method, the Commission would determine a fee that fluctuates based on the market. As the Commission said:

A determination that reflects a dynamic, competitive market might include a set or maximum fee based on a calculated weighted mean figure. This approach could require the fee to be readjusted as the weighted mean price for credit scores rises and falls. If the Commission adopted such an approach, it would need to specify whether the Commission itself would make such market-based readjustments, or whether affected parties would be required to determine and apply readjustments based on a Commission-supplied formula.<sup>12</sup>

While CDIA supports a market-based fee determination, it does not agree that the fee based upon this determination should be based on a “set or maximum fee based on a calculated weighted mean figure.”<sup>13</sup> The Commission’s survey of the market found that the regulated entities currently charge between \$5 and \$8 for credit score disclosures in the states of Colorado and California.<sup>14</sup> If the Commission were to set a fee based upon a “calculated weighted mean figure,” that determination would have the same effect as setting a price, or a maximum fee, for only the regulated entities in this competitive market, and it would have all the disadvantages as these approaches as discussed above.

The Commission requests comments on both the current state of the direct-to-consumer market for credit scores and anticipated changes in the market. In particular, the Commission observes that changes in the market could result from the fact that the nationwide consumer reporting agencies may choose to market scores to consumers through the centralized source: “The centralized source may increase demand for scores by promoting consumer awareness of score availability, and might further competition among the nationwide consumer reporting agencies that sell scores through the centralized source. On the other hand, the centralized source might provide a competitive advantage to these consumer reporting agencies vis-a-vis other sellers of scores due to the ‘captive’ audience of consumers that it supplies.”<sup>15</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 69 Fed. Reg. at 64701.

CDIA notes that the Commission's observations as to possible future events apply only to the nationwide consumer reporting agencies; the Commission's credit score fee determination applies to *all* consumer reporting agencies. Moreover, these observations reflect that the direct-to-consumer market for credit scores may change; that is true for any active competitive consumer market. It is impossible to predict what the changes will be. A market-based approach to a fee determination will necessarily require the Commission to continue to observe the market for credit scores. However, much of this observation will occur in any event through the Commission's ongoing enforcement responsibilities as to the regulated entities under the FCRA.

CDIA believes that a fee determination based upon the Commission's ongoing observations as to the total direct-to-consumer market for credit scores (including both regulated and unregulated) will "preserve for consumers the benefits of competition in both the regulated and unregulated market, while protecting consumers from the non-competitive prices that might occur in these markets in the event that competition deteriorates."<sup>16</sup> This approach should serve the Commission's goals of a fee that is fair to consumers; provides regulated entities with a sufficient level of certainty; encourages regulated entities to compete on price, quality, and service; encourages innovation and cost-cutting; avoids unduly interfering with the unregulated market for credit scores; and does not involve a lengthy rate-making proceeding or reliance upon proprietary cost or revenue data.<sup>17</sup>

***For these reasons, CDIA believes that the fair and appropriate method for the Commission's determination is a market-based approach, and urges the Commission to adopt this approach. Specifically, CDIA urges the Commission to state that fees established by the competitive direct-to-consumer market for credit score disclosures are per se "fair and reasonable fees" for consumer reporting agencies to charge consumers when making the section 609(f) credit score disclosures and that no further action is required by the Commission at present. The Commission's determination could also state that the range of fees described by the Commission in the ANPR are an example of what constitutes per se "fair and reasonable fees" currently determined by that market.***

***If the Commission does state that the fees described in the ANPR are per se "fair and reasonable fees" it should make clear that this statement is based upon its own assessment of the current market-based fees, but that fees determined by a consumer reporting agency based upon its assessment of the direct-to-consumer market for credit scores would be per se fair and reasonable. Further, if the Commission provides for a safe harbor with respect to the current range of fair and reasonable fees, it should also provide that the range may be adjusted in accordance with increases in the consumer price index.***

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<sup>16</sup> *Id.*

<sup>17</sup> See the Commission's statement of objectives for the fee determination, 69 Fed. Reg. at 64701.

The Commission proposes that the final rule would take effect 30 days after it is issued. CDIA believes that the appropriateness of any effective date depends upon the Commission's approach with respect to determining a fair and reasonable fee for credit scores. If the Commission relies upon the market-based fee, as CDIA urges, then consumer reporting agencies should not need any significant time to comply. However, if the Commission were to adopt an approach that would require significant changes in the programs, marketing, and business models of the regulated consumer reporting agencies, a 30-day effective date would be much too short. For that reasons, if the Commission were to adopt anything other than the market-based fee determination, CDIA believes that the Commission would have to provide for a correspondingly appropriate effective date. At this point, it is impossible to predict what the effective date should be under those circumstances.

CDIA also responds to the Commission's specific questions in the ANPR:

**1. The Commission believes that the current market in direct-to-consumer scores is competitive and healthy—there appears to be price dispersion, innovation, and a variety of products and sellers. Is this an accurate characterization of the market? If so, why? If not, why?**

Based upon its members' experience, CDIA agrees with the Commission's observation that the direct-to-consumer market *is* competitive and healthy. As a result, consumers can currently receive credit score disclosures and information about their credit scores through a variety of products, which are offered by non-regulated, as well as regulated, sellers. CDIA understands that these products include:

- a single credit report and single consumer reporting agency score;
- a single credit report and single FICO credit score;
- credit reports from the three nationwide consumer reporting companies, along with a single credit score based on a credit report from one of the nationwide consumer reporting agencies;
- credit reports from the three consumer reporting agencies and credit scores based on the credit reports from each of the nationwide consumer reporting agencies;
- monitoring services that track credit file changes and also credit score changes on one nationwide consumer reporting agency, as well as on all three nationwide consumer reporting agencies.

Some of these products include explanations about scores and the factors that can affect a credit score, steps consumers can take to raise their credit scores, including various "what if" scenarios (i.e., if the consumer took certain steps what impact would that have on their credit score.). Consumers may purchase these products on a one-time

basis, multiple times, on a monthly basis, and a year long subscription basis. Some of these products are available only on the Internet; others are available online or offline.

Each of these products is offered by a variety of companies at a variety of prices. Some are offered without charge to customers as part of a total package. Other examples include:

- a single credit report and a score that this is proprietary to one of the national consumer reporting agencies (“proprietary score”)for \$9.95, \$13.95, \$14.95 and \$14.99;
- a single credit report and a FICO score for \$12.95 or \$14.95;
- three credit reports and one proprietary score for \$29.95, \$34.95, \$34.99, and \$39.95;
- three credit reports and one FICO credit score for \$39.95;
- three credit reports and three credit scores for \$38.85, \$39.90, \$44.95, and \$44.99;
- various monitoring services, some of which include credit scores, are available for \$1.95, \$4.95, \$9.95, and \$9.99 per month, \$10.95 per quarter, \$49.95, \$99.95, and \$149.99 per year.

These are not all of the products and prices that are available in the market, but are illustrative of the innovation, prices, and variety of products that are available in the current direct-to-consumer market place.

**The Commission believes that one nationwide consumer reporting agency—TransUnion—sells stand-alone credit scores to consumers for \$4.95 in states that mandate free file disclosures. Three nationwide consumer reporting agencies sell stand-alone scores in California and Colorado for prices ranging from \$4.95 to \$8. Is this accurate? Are these the only circumstances under which consumers can obtain stand-alone credit scores?**

CDIA understands from Trans Union that it does not sell stand alone credit scores either directly or through its affiliates. In the states where consumers may obtain their free annual file disclosures under the FACT Act, consumers may purchase their credit scores when they request their file disclosures. CDIA understands that currently, Equifax sells stand-alone FICO scores to consumers nationwide for \$6.95; Experian sells its stand-alone credit scores to consumers for \$5.00 and Trans Union’s maximum charge to consumers for a credit score is \$5.95.

**The Commission believes that most scores are sold as part of a package or are bundled with a consumer report and other information or services. Is this accurate? What is the range of prices for these products? By what method should the score component of a package or bundle or goods and services be valued?**

As the above discussion of the range of products should indicate, most scores are currently offered in connection with credit reports and/or credit file monitoring products.

CDIA believes it is not possible to determine the value of a credit score, whether it is part of a bundled package, sold with a credit report or offered on a stand-alone basis. When the score is sold as part of a credit report package, one might be inclined to calculate the value of the credit score by subtracting the price of the credit report based on the dollar amount that the FCRA permits consumer reporting agencies to charge for file disclosures (\$9.50 as of January 1, 2005). However, that calculation would assume, without a factual basis, that the portion of the charge for the consumer report is the maximum amount permitted by law. That calculation would also ignore the fact that there are costs to the consumer reporting agency associated with credit score and file disclosures. These costs include providing the FCRA summary of rights, as well as hiring, training and maintaining personnel to handle consumer inquiries and disputes. The difficulty in determining the value of a credit score is even greater when the score is part of a bundled package, including a file monitoring product. Even if all of the components of the bundled product are also offered as stand-alone products (therefore allowing market prices to be assigned to each component), it is not correct to subtract those fees from the price of the bundled product and assume that the remainder is the value attributable to the stand alone score.

**2. The Commission recognizes that its determination under FCRA Section 609(f) will apply only to a portion of the market—consumer reporting agencies that distribute “mortgage” scores or develop their own credit scores—and only to two scoring products currently offered to consumers—“mortgage” scores and “educational” scores. How many consumer reporting agencies would be subject to this requirement? What percentage of the credit score market would be regulated, and what percentage unregulated?**

As the Commission notes, only a portion the market will be regulated. Although the percentage of the regulated credit score market can be expected to grow as a result of the FCRA requirements, no one can predict what the relative percentages of regulated and unregulated credit score providers will be. In addition, changes in the products that are currently being offered to consumers along with credit scores could affect the relative percentages.

**3. The Commission is aware that many non-consumer reporting agencies offer scores and related products to consumers. What is the relevant market for purposes of the Commission determination? What would be the competitive effects of the imposition of a maximum price requirement that applies only to a part of the market for scores? Would a maximum price requirement in the limited market for**



**“statutory” scores (i.e., mortgage or educational scores provided by consumer reporting agencies) have effects on the broader, unregulated market for scores?**

The relevant market is the market for all direct-to-consumer products that include a credit score. The participants, therefore, include both regulated and unregulated sellers. If the FTC were impose a maximum credit score price on only the regulated sellers, the effect would limit the price that these sellers could receive for their products. If the price were set too low, it could place regulated sellers at a competitive disadvantage vis-a-vis unregulated sellers. It could also limit innovation and competition in other parts of the transaction. A price set too high could result in consumers paying a higher price than they would absent the Commission’s intervention. As long as the direct-to-consumer market remains vibrant and competitive, any rate setting would necessarily result in market disruption, particularly if the rates apply only to certain sellers in the market.

**4. It is the Commission’s understanding that many consumer reporting agencies do not currently provide scores directly to consumers, but do so through non-consumer reporting agency subsidiaries. Will consumer reporting agencies choose to fulfill the statutory requirement in FCRA Section 609 through non-consumer reporting agency subsidiaries?**

CDIA believes that consumer reporting agencies may choose to make the required credit score disclosures themselves, through agreement with affiliated non-consumer reporting agency companies, or through other consumer reporting agencies. CDIA does not believe it is possible to predict which method consumer reporting agencies will be most likely to choose in the future.

**5. Consumer reporting agencies can fulfill FCRA Section 609’s requirement by providing consumers with mortgage or educational scores. How will consumer reporting agencies choose to fulfill this requirement and what type of score are they most likely to provide to consumers? Why?**

CDIA believes that consumer reporting agencies will choose to fulfill the section 609(f) requirements based upon the circumstances at the time they disclose the credit score. These include the agency’s determination as to the most appropriate score, their cost to the score developer, the fee that would or could be charged for the credit score and contractual arrangements with developers of credit scores for mortgage purposes.

**6. Among the potential approaches available to the Commission is determining a fee based on the market for scores. In that context, what is the appropriate market to consider: the market for stand-alone mortgage and educational scores sold by consumer reporting agencies, or the market for all credit scores sold by consumer reporting agencies and non-consumer reporting agencies? If a market-based approach is appropriate, are these two markets appropriate reference points? Are there other markets that should be considered? Overall, what is the appropriate**

**market, and what are the factors that the Commission should consider in determining the appropriate market?**

CDIA believes that the appropriate market to consider for determining the market-based fee is the market for all credit scores sold to consumers by consumer reporting agencies and non-consumer reporting agencies. This market includes all the sellers of credit scores to consumers. To only consider the market for only of one group of sellers (consumer reporting agencies or non-consumer reporting agencies) would not be appropriately address the whole market, and would likely allow one group of providers to have an advantage or disadvantage over the other, to the detriment of consumers, in terms of cost, availability of products or services, and competition. When credit report products were coming to the market, non-consumer reporting businesses took into account the amount of fees that consumer reporting agencies could charge for credit file disclosure. Similarly, although credit score disclosure for the most part started in the non-consumer reporting agency direct-to-consumer market, this market must be considered to be part of the market in connection with the “fair and reasonable” fee that consumer reporting agencies can receive from consumers for credit score disclosures under section 609(f).

**7. The Commission welcomes comment on whether other factors, in addition to prices charged in a competitive market, should be taken into account in determining a fair and reasonable fee for required disclosures (e.g., cost data, revenue data, other market conditions). Comments should discuss the pragmatic aspects of each factor advanced for consideration; for example, whether data underlying a given factor are readily available or difficult to obtain.**

As discussed above, CDIA believes that the prices charged in a competitive market should determine what constitutes a fair and reasonable fee. CDIA believes that these prices reflect the cost to the seller, competition in the direct-to-consumer market, the value of the score to consumers as the type of credit score (i.e., mortgage score, a consumer educational score, or another credit score actually used by creditors).

**8. For any determination involving a specified dollar amount for a fair and reasonable fee, should the Commission include within a final determination a mechanism for periodic adjustment of the specified amount? If so, what approach is desirable for such adjustment and what entity or entities should determine the specific adjustment? Should the Commission initiate new assessments of all of the factors underlying its determination at a fixed time interval, or only when a factor changes significantly? Should the Commission’s determination include an “automatic” adjustment keyed to the consumer price index or similar economic index? Should periodic adjustments be required to be both determined and implemented by the regulated entities based on a formula set forth within the Commission’s determination? Are there other bases for periodic adjustment that might be appropriate?**

As discussed above, CDIA does not believe that a specified dollar amount for a fair and reasonable fee is appropriate. If, however, the Commission does make such a determination, the Commission should also provide for a mechanism for periodic adjustment of the amount.

CDIA appreciates the opportunity to comment on this ANPR, which is of great importance to its members.

Sincerely yours,

Stuart K. Pratt  
President