



June 15, 2004

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

RE: The FACT Act Disposal Rule, R-411007

To Whom It May Concern:

This comment letter is submitted on behalf of the Consumer Bankers Association (“CBA”) in response to the proposed rule (“Proposed Rule”) issued by the Federal Trade Commission (“FTC”) regarding the proper disposal of consumer information. CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery. CBA was founded in 1919 and provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets.

We thank the FTC for the opportunity to comment on the Proposed Rule.

Baseline Requirement of the Proposed Rule

The FTC has issued the Proposed Rule pursuant to Section 216 of the Fair and Accurate Credit Transactions Act (“FACT Act”). According to the FACT Act, the FTC must issue regulations requiring “any person that maintains or otherwise possesses consumer information... derived from consumer reports for a business purpose to properly dispose of any such information or compilation.” The FACT Act also provides that this requirement is not to be construed “to require a person to maintain or destroy any record” or “to alter or affect any requirement imposed under any other provision of law.”

The basic requirement in Part 682.3(a) of the Proposed Rule is that a person “must properly dispose of [consumer] information” by taking certain precautions. In the Supplementary Information to the Proposed Rule, the FTC appears to clarify that the Proposed Rule would not require a person to destroy a record. Rather, the Proposed Rule would operate “by ensuring that

records containing sensitive information are appropriately redacted or destroyed before being discarded” and that “covered entities, when disposing of consumer information, [must] take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.” We applaud the FTC for including this clarification. We urge the FTC to clarify Part 682.3(a) of the final rule (“Final Rule”) itself that the requirements apply only when a person is in the process of disposing of consumer information—not that the person must dispose of such information.

Definitions

The Proposed Rule defines “consumer information” to mean “any record about an individual, whether in paper, electronic, or other form, that is a consumer report or is derived from a consumer report.” This definition is critical because the Proposed Rule is applicable only when a person is disposing of “consumer information.”

We caution the FTC about defining “consumer information” in such a manner that the Final Rule must be applied to all information about individuals. In particular, the definition would appear to apply, regardless of whether the entity disposing of the information knows the information was at one time, as some distant point, “derived” from a consumer report. Fear of violating the Final Rule, and incurring the resulting liability from potential private rights of action, may result in covered persons applying the Final Rule to all types of information, not just that which is derived from consumer reports. This was clearly not the intent of Congress, and we ask the FTC to limit the scope of the definition to information which the person knows was derived from a consumer report.

CBA commends the FTC for clarifying that the definition would not apply to anonymous information, since such information would not be a record “about an individual.” We believe that this is the correct interpretation, and we urge the FTC to include it as an example of what would not be “consumer information” in the text of the Final Rule.

The Proposed Rule also states that “‘disposing’ or ‘disposal’ includes” certain activities. We believe that the FTC has properly provided for what it means to dispose of consumer information, and we urge the FTC to state what the term “means,” not just includes. CBA believes it is only fair to specify what activities will be subject to the Final Rule by definition. We also urge the FTC to include in the Final Rule an example clarifying that the sale, donation, or transfer of consumer information would not be considered “disposal,” as is explained in the Supplementary Information.

Applicability to “Financial Institutions”

The Proposed Rule applies to any person over which the FTC has jurisdiction who, for a business purpose, maintains or otherwise possesses consumer information. The FTC asks whether there are any persons or classes of persons covered by the Proposed Rule that should be exempted. CBA urges the FTC to exempt financial institutions that are subject to the FTC’s Standards for Safeguarding Customer Information (“Safeguarding Rule”) from coverage under the Final Rule. The Safeguarding Rule requires any financial institution subject to the FTC’s

jurisdiction to protect nonpublic personal information about its customers or the customers of any other financial institution, including in connection with the disposal of such information. We believe that these requirements would therefore apply to virtually any “consumer information” a financial institution would have. In order to avoid imposing duplicative requirements on such financial institutions, and the unnecessary liability that would follow, we urge the FTC to exempt them from the requirements of the Final Rule.

Reasonable Measures to Protect Consumer Information

Under the Proposed Rule, a covered person must take “reasonable measures to protect against unauthorized access to or use of [consumer] information in connection with its disposal.” We applaud the FTC for proposing a requirement that will allow each person to assess the relevant risks and to take “reasonable measures” to dispose of consumer information properly in light of those risks. CBA also commends the FTC for recognizing, in the Supplementary Information, that such measures will not guarantee perfect destruction of consumer information in every instance. We ask the FTC to retain these provisions in the Final Rule.

Effective Date

The FTC proposes to make the Final Rule effective within three months of publishing it in the Federal Register. CBA respectfully suggests that three months is not sufficient time for many persons to become aware of, and understand, the new requirements. Furthermore, more diverse entities will need more than three months to apply the Final Rule to their sophisticated operations. We ask that covered persons have one year to comply with the Final Rule.

Once again, CBA thanks the FTC for the opportunity to comment on the Proposed Rule. If you have any questions in connection with our comments, or if we may provide any additional information, please do not hesitate to contact me at msullivan@cbanet.org or 703-276-3874.

Very Truly Yours,

Marcia Z. Sullivan
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