

**Comments of the
Software & Information Industry Association**

Re: The Fact Act Disposal Rule, R-411007

June 15, 2004

The Software & Information Industry Association (SIIA) appreciates this opportunity to comment on the above referenced Notice of Proposed Rulemaking (NPRM) on the proper disposal of consumer information derived from a credit report. We look forward to working with the Federal Trade Commission (FTC) and other relevant agencies as this project moves forward.

As the principal trade association of the software code and information content industry, the more than 600 members of SIIA develop and market software and electronic content for business, education, consumers and the Internet. SIIA's members are software companies, ebusinesses, and information service companies, as well as many electronic commerce companies. Our membership consists of some of the largest and oldest technology enterprises in the world as well as many smaller and newer companies.

SIIA and its member companies bring a unique perspective to the FTC's request as leading innovators of software and digital content over the Internet and through the leadership role we have played in promoting effective privacy protections for many years. We were one of the earliest industry leaders to recognize the importance of adopting effective privacy policies and privacy enhancing technological tools. Since these early steps, SIIA has, through technical assistance and privacy seminars, worked with hundreds of companies to develop, write and implement effective, consumer-friendly privacy policies.

In the U.S., we actively engage with the FTC in its implementation and enforcement of key legislation addressing the protection of personal privacy, including its Section 5 policies in this area, the Children's On-Line Privacy Protection Act (COPPA), and Gramm-Leach-Bliley Act (GLB Act), including the Safeguards Rule. We agree with the FTC's assessment that entities subject to the "Disposal Rule" may well be different than those subject to the Safeguards Rule and that different types of information are regulated herein.

In this regard, we support the FTC's efforts to adopt a rule "to prevent unauthorized disclosure of consumer information and to reduce the risk of fraud or related crimes, including identity theft, by ensuring that records containing sensitive financial or personal information are appropriately redacted or destroyed before being discarded."¹ In so doing, we commend the FTC for recognizing that "that there are few foolproof methods of record destruction [and that] [a]ccordingly, the proposed Rule does

¹ Notice of Proposed Rulemaking (hereinafter referred to as "NPRM"), "Introduction."

not require covered persons to ensure perfect destruction of consumer information in every instance.”² We also commend the FTC for acknowledging that, in determining what measures are “reasonable” under the Rule, entities covered by the proposed Rule would take into account the “sensitivity of the consumer information, the nature and size of the entity’s operations, the costs and benefits of different disposal methods, and relevant technological changes.”³ As a result, we appreciate the FTC’s desire to implement a “flexible standard for disposal in the proposed Rule [that] would allow covered persons to make decisions appropriate to their particular circumstances and should minimize the disruption of existing practices to the extent that they already provide appropriate protections for consumers” and also in order “to minimize the burden of compliance for smaller entities.”⁴

In stating our general support for the Proposed Rule, we want to bring to the attention of the FTC some issues that need to be clarified, both to avoid potential confusion on the part of consumers and businesses and to ensure that the proposed Disposal Rule works in harmony, as envisioned by the FTC, with the Safeguards Rule, 16 CFR part 315, implementing section 501(b) of the GLBA.⁵

First, it is not clear from the Proposed Rule, or the discussion provided by the FTC, that the disposal is mandatory. It is our understanding that the proposed Disposal Rule is only setting standards in the event that an entity *chooses* to dispose of such information and that the proposal needs to clarify that it is not creating a new mandate. We urge that the Final Rule specify that disposal may occur at such time as the business deems the consumer information, as defined by FACTA, no longer necessary or legally required, provided that such person maintains adequate policies and practices prior to disposal to protect it from unauthorized access.

Second, “reasonable measures” are not actually defined in the NPRM; instead, illustrative examples are provided. We note that although the commentary makes it clear that the examples are intended to be illustrative, it is not clear from the language of the Proposed Rule itself how to treat disposal in other circumstances not specifically enumerated.

In this regard, the NPRM raises significant questions as to how consumer information maintained or received in electronic form should be treated, and in particular, what disposal procedures apply to backup or archival copies of this information. In the ordinary course of business, it is virtually impossible to ensure that all traces of every backup or archival record of electronic information is removed or disposed of, as the FTC proposes to define “disposal.” For example, it would be virtually impossible to ensure

² NPRM, “Proposed Section 682.3: Proper Disposal of Consumer Information.”

³ *Ibid.*

⁴ *Ibid.*

⁵ See FTC discussion of harmonization, NPRM, “Proposed Section 682.3: Proper Disposal of Consumer Information.”

compliance with or enforce a requirement that every possible email message that might contain consumer information be erased or deleted. It becomes even more cumbersome when the type of consumer information is factored into the analysis. We thus ask the FTC to consider a standard that deals with electronic information but does not impose a burden on what is reasonable pursuant to an entity's normal operating and security procedures.

Again, we appreciate the opportunity to provide comment on this important rulemaking and stand ready to work with the FTC to craft a workable rule. If you have any further questions, please do not hesitate to contact Mark Bohannon, General Counsel & SVP Public Policy at mbohannon@siia.net or (202) 789-4471.