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June 15, 2004

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room 159-H (Annex H)
600 Pennsylvania Ave., NW
Washington, DC 20580

Re: The FACT Act Disposal Rule, R-411007

Dear Mr. Clark:

Experian Information Solutions, Inc. ("Experian") respectfully submits its comments on the Federal Trade Commission's ("Commission") Proposed Rule on the proper disposal of consumer information pursuant to section 216 of The Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), which added section 628 to the Fair Credit Reporting Act ("FCRA").

Experian fully supports the Congressional purpose underlying the Disposal Rule that the Commission identifies as "reduce[ing] the risk of consumer fraud and related harms, including identity theft, created by improper disposal of consumer information."¹

Given the Commission's definition of "consumer information" in the Proposed Rule (discussed more fully below), Experian is vitally interested in the outcome of the rulemaking process relating to the Disposal Rule and therefore supports the comments that the Consumer Data Industry Association has provided to the Commission.

In the interest of furthering the identified purpose of the Disposal Rule, while also avoiding the imposition of conflicting or duplicative obligations upon those persons that may be subject to the Disposal Rule and to other regulatory provisions covering the same subject matter, Experian also provides its separate comments.

¹ Proposed Rule § 682.2(a).

1. The Standard: The Commission’s Flexible Approach is the Right Approach.

Although Experian believes that the Proposed Rule requires revision (as explained below) in order to achieve its Congressionally defined objectives, Experian supports the Commission’s decision to make the disposal obligation a flexible one requiring only “reasonable measures” based upon: 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.²

As the Commission’s explains, “the proposed Rule does not require covered persons to ensure *perfect* destruction of consumer information in every instance....”³ Experian believes this risk-based approach is essential to the proper functioning of the disposal process and that it rightly permits covered persons to tailor their disposal programs to their specific business models.

2. The Scope of the Proposed Rule: The Commission Reaches Beyond What Congress Intended.

Section 216 of FACTA requires the Commission and the Banking Agencies to:

[I]ssue final regulations requiring *any person that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived from consumer reports* for a business purpose to properly dispose of any such information or compilation.”⁴

Experian respectfully submits that the wording of section 216 makes clear that, in its grant of rulemaking authority to the Commission, Congress specifically intended that the Disposal Rule *not apply* to CRAs. This is clear from the construction of section 216 itself, as well as by virtue of the fact that CRAs are already governed by the Commission’s Safeguards Rule.

Section 216 identifies the intended target of the Disposal Rule as any person that maintains or possess consumer information or any compilation of consumer information that is *derived from consumer reports*. Experian believes that it was the intention of Congress that the Disposal Rule apply to those *otherwise unregulated* persons who receive consumer reports. The language of section 216 is clear, the initial trigger for any

² Proposed Rule § 682.3(a); 69 Fed. Reg. 21389.

³ 69 Fed. Reg. 21389 (emphasis added).

⁴ FCRA § 628(a); 15 U.S.C. § 1681w(a) (emphasis added).

Disposal Rule compliance obligation is that the person have *received a consumer report* in the first instance. As the producers of consumer reports, CRAs obviously are not covered by FACTA § 216.

A. Proposed Rule § 682.1(b): The Commission’s definition of “consumer information” improperly expands the coverage of the Disposal Rule.

The Commission defines “consumer information” as “any record about an individual, whether in paper, electronic, or other form, *that is a consumer report* or is derived from a consumer report.” (Emphasis added).

The Commission’s definition is far broader than the Congressionally defined scope of the Disposal Rule. The Commission explains this expansion, writing that:

The Commission believes a broad definition of the term, which includes all types of records *that are consumer reports*, or contain consumer information derived from consumer reports, will best effectuate the purpose of the Act.⁵

Experian believes the opposite is true. In proposing the amendment that became FACTA § 216, Senator Nelson explained that:

[M]ost companies are required to adopt rules to ensure the proper disposal of a consumer's private financial records. I learned last year, before comprehensive privacy regulations took effect, that some companies do not have protocols in place outlining the proper way to dispose of private consumer information when it is no longer needed. Last year, thousands of files containing sensitive customer records were discarded in a dumpster. If the wrong person came across these files, he or she would have had everything necessary to commit numerous crimes, including identity theft.

Since this incident, the company has acted to correct its privacy policies and the Federal Trade Commission issued its *safeguards rule*. *The rule applies to credit reporting agencies and financial institutions that maintain consumer records and also contains guidance for businesses, which includes the storage and proper*

⁵ 69 Fed. Reg. 21389 (emphasis added).

disposal of records.

Although check-cashing businesses, ATM operators, real estate appraisers, and even couriers are covered by the safeguards rule, rental property companies that assess the creditworthiness of tenants and businesses that maintain consumer accounts, such as cell phone companies and utilities, are not covered by the rule.

Improper disposal of a credit report could compromise driver's license information, Social Security numbers, employment history and even bank account numbers. *My amendment will close the loophole and further protect credit information by requiring the Federal Trade Commission to issue regulations regarding the proper disposal of consumer credit information.*⁶

It is clear that Senator Nelson knew that the Commission's Safeguards Rule applied to consumer reporting agencies and that the purpose underlying FACTA section 216 was to reach those companies that were *not covered* by the Safeguards Rule. Through its overbroad definition of "consumer information," the Commission reaches too far and certainly beyond the point intended by Congress.

B. Proposed Rule § 682.3(a): The unwarranted effect of the expanded definition of "consumer information."

The text Proposed Rule 682.3(a) closely tracks the text of FACTA § 216. Both the Proposed Rule and FACTA § 216 establish two criteria to determine whether a person is subject to the Disposal Rule:

- (1) Whether the person maintains or otherwise possesses consumer information or any compilation of consumer information derived from consumer reports; and
- (2) Whether possession or maintenance of consumer information is for a business purpose.

However, because the Commission has defined "consumer information" to mean more than was intended in FACTA § 216, the effect of the "standard" imposed by the Commission is to overreach and to impose a new disposal obligation upon CRAs, a group that Congress understood to be covered by the Commission's existing Safeguards Rule.

⁶ 149 Cong. Rec. S13863-02, 13999 (S. Nelson) (emphasis added).

Experian urges the Commission to revise the Final Rule so that it actually tracks the language of FACTA § 216 and accomplishes the Congressional purpose of applying a Disposal Rule to those persons not currently covered by the Commission’s Safeguards Rule; that is, the definition of “consumer information” should be revised to make clear that it does not apply to CRAs, the originators of the consumer reports from which the consumer information must be derived in order to be subject to the Disposal Rule.

3. FACTA § 216: The Commission Should Expressly Exempt Consumer Reporting Agencies from Coverage of the Disposal Rule.

FACTA § 216 permits the Commission to exempt “any person or class of persons from application” of the Disposal Rule.⁷ As a financial institution, Experian is already subject to the Commission’s Safeguards Rule and is required to implement an Information Security Program (“ISP”) that includes:

[A]dministrative, technical, or physical safeguards you use to access, collect, distribute, process, protect, store, use, transmit, *dispose of*, or otherwise handle *customer information*.⁸

In the Supplementary Information accompanying the Proposed Rule, the Commission requested comment on whether such exemptions should be extended.

Experian believes that such an exemption to the Disposal Rule should be extended to those persons who must comply with the Commission’s Safeguards Rule. Absent such an exemption, Experian believes that persons subject to both the Disposal Rule and the Safeguards Rule will incur burdensome and duplicative compliance obligations.

As the Commission is aware, the Safeguards Rule is a comprehensive data security regime, only one part of which relates to the disposal of information.⁹ With its specific ISP content requirements, the Safeguards Rule is broader and more protective than is the Proposed Rule. Under the Safeguards Rule, covered persons must also establish appropriate safeguards to protect against unauthorized access to or use of covered records, insure their security and confidentiality, and protect against any anticipated threats or hazards to the security or integrity of such records.¹⁰

⁷ FCRA § 628(a)(3); 15 U.S.C. § 1681(a)(3).

⁸ 16 C.F.R. § 314.2(c) (emphasis added).

⁹ 16 C.F.R. § 314.2(c).

¹⁰ 16 C.F.R. § 314.3(b).

The data held by the CRAs largely consists of “*customer* information,” as defined in the Safeguards Rule. Therefore, there is no reason to adopt an expansive definition of “*consumer* information” within the Disposal Rule, at least as to CRAs.

If the Commission will not provide the above-described exemption, Experian believes that the Proposed Rule should be revised to ensure that no private right of action is created for the alleged violation of the Safeguards Rule through the promulgation of the Disposal Rule. Neither GLBA nor the Safeguards Rule provide for such a right of action. Consumers should not be permitted to allege virtually identical claims in the guise of a lawsuit against CRAs under the Disposal Rule that they would be precluded from alleging under the Safeguards Rule.

4. Proposed Rule § 682.3(b): The Examples as a Safe Harbor.

In the Supplementary Information accompanying the Proposed Rule, the Commission invited comments concerning the “merits of the examples included in this notice.”¹¹

Experian believes that the examples, while helpful as written, would be of greater assistance if the Final Rule made clear that compliance with the procedures identified in the examples is deemed compliance with the Disposal Rule.

5. Proposed Rule § 682.5: The Effective Date.

The Proposed Rule indicates that the Final Rule will become effective 3 months after it is published in the Federal Register.

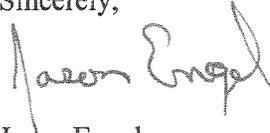
As the examples in Proposed Rule § 682.3(b) make clear, many entities will have to implement policies and procedures relating to the burning, pulverizing, or shredding of documents. Other entities will contract with another party to fulfill the consumer information disposal function. As part of this contracting process, these entities will have to identify competent and reliable third-party contractors, negotiate the terms of the disposal agreement, and monitor the contractors to ensure compliance. For those entities that have not had to comply with the Commission’s Safeguards Rule, Experian believes that 3 months is an insufficient time to implement a compliant disposal program.

Experian believes that an effective date that is 6 months from the date of publication of the Final Rule would provide a more reasonable period during which complying parties could develop and implement their consumer information disposal programs.

¹¹ 69 Fed. Reg. 21390.

Because the Disposal Rule, as written, will impose unnecessary duplicative disposal obligations upon CRAs, Experian hopes that due consideration will be given to its comments as a consumer reporting agency that maintains millions of records that might be subject to the Disposal Rule.

Sincerely,

A handwritten signature in black ink that reads "Jason Engel". The signature is written in a cursive style with a large, stylized initial "J".

Jason Engel
Vice President &
Assistant General Counsel