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Via Electronic Delivery

Federal Trade Commission
Office of the Secretary
Constitution Center
400 7th Street, SW, 5th Floor
Suite 5610 (Annex B)
Washington, DC 20024

RE: Military Credit Monitoring Rulemaking, Matter No. R811007

Dear Mr. Clark:

The Consumer Data Industry Association ("CDIA") submits its comments in response to the Federal Trade Commission's ("FTC") Notice of Proposed Rulemaking; Request for Public Comment ("NPR") concerning the FTC's proposed regulations implementing the electronic credit monitoring requirement in Section 302 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (the "Act").

Section 302(d) of the Act and the FTC's proposed regulations impose electronic credit monitoring obligations only upon nationwide consumer reporting agencies ("NCRAs").¹ Because all three of the NCRAs impacted by the requirement are CDIA members, CDIA is uniquely qualified to respond to the FTC's specific requests for comment and the NPR generally.

CDIA appreciates the FTC's receptiveness to its comments and, in particular, appreciates the FTC's recognition throughout the NPR that the proposed requirements: (i) may be inconsistent with or exceed the authority granted to the FTC under the Act; (ii) may be

¹ See Section 302(d) of the Act, amending FCRA § 605(A) [15 U.S.C. § 1681c-1] to impose the free credit monitoring service obligation only upon NCRAs as defined in FCRA § 603(p) [15 U.S.C. § 1681a(p)].

unnecessary; and (iii) may impose undue burdens on the NCRAs which are required to comply with the Act and the proposed regulations.² In addition to submitting these comments, CDIA welcomes the opportunity to work with FTC staff towards a final rule that balances the Congressional directive to provide an additional benefit to active duty military personnel against the unique burdens and costs placed only on the NCRAs.

I. Introduction.

The Consumer Data Industry Association (“CDIA”) is the voice of the consumer reporting industry, representing consumer reporting agencies including the NCRAs, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity, helping ensure fair and safe transactions for consumers, facilitating competition and expanding consumers’ access to financial and other products suited to their unique needs.

CDIA’s members have been complying with federal laws and regulations governing the consumer reporting industry for decades. Those members have, in particular, complied with the Fair Credit Reporting Act (“FCRA”),³ which the Act amends. The FCRA governs the collection, assembly and use of consumer report information and provides the framework for the U.S. credit reporting system. The FCRA also already includes a number of protections for consumers who suspect that they may be victims of identity theft as well as consumer tools to protect against identity theft.⁴

Section 302 of the Act amends FCRA § 605A [15 U.S.C. § 1681c-1] to impose a new obligation only on NCRAs:

A consumer reporting agency described in section 603(p) shall provide a free electronic credit monitoring service that, at a minimum, notifies a consumer of

² See, e.g., 83 Fed. Reg. 57693, 57697 (“The Commission requests comments on whether this restriction is consistent with the authority granted under the Act and necessary to ensure that active duty military consumers are able to enroll easily in the free electronic credit monitoring service.”); *id.*, 83 Fed. Reg. 57693, 57698 (“Does this limitation impose undue burdens on nationwide consumer reporting agencies?”).

³ 15 U.S.C. § 1681, *et seq.*

⁴ See, e.g., 15 U.S.C. §§ 1681c-1, 1681c-2, 1681g(d)&(e), 1681j(d).

material additions or modifications to the file of the consumer at the consumer reporting agency to any consumer who provides to the consumer reporting agency –

- (A) appropriate proof that the consumer is an active duty military consumer; and
- (B) contact information of the consumer.⁵

The Act imposed the following rulemaking obligation on the FTC:

Not later than 1 year after the date of enactment of this subsection, the Federal Trade Commission shall promulgate regulations regarding the requirements of this subsection, which shall at a minimum include –

- (A) a definition of an electronic credit monitoring service and material additions or modifications to the file of a consumer; and
- (B) what constitutes appropriate proof [that the consumer is an active duty military consumer].⁶

In response, the FTC published proposed regulations which:

- Incorporate definitions from other statutes and regulations for the terms: “appropriate proof of identity,” “consumer,” “consumer report,” “credit,” “file,” “firm offer of credit,” “nationwide consumer reporting agency,” and “negative information;”⁷
- Provide new definitions for the terms: “contact information,” “electronic credit monitoring,” “electronic notification,” “free,” and “material additions or modifications;”⁸
- Impose prohibitions found nowhere in the Act on the NCRAs’:
 - Use and disclosure of consumer information;⁹

⁵ See Section 302(d) of the Act (emphasis added).

⁶ *Id.* (emphasis added).

⁷ Proposed § 609.2(a)-(d), (f), (i)-(j), (m)-(n).

⁸ Proposed § 609.2(e), (g)-(h), (k)-(l).

⁹ Proposed § 609.3(d).

- Communication with the consumer;¹⁰
 - Ability to obtain the consumer's agreement to terms and conditions;¹¹ and
- Impose a response requirement found nowhere in the Act concerning the required timing for the NCRAs' disclosure of credit monitoring information to the consumer.¹²

After providing its general comments concerning the requirement to provide a free electronic credit monitoring service, CDIA provides its views concerning the proposed regulation and responds to the FTC's specific requests for comment concerning the proposed regulations.

II. The Requirement to Provide a Free Electronic Credit Monitoring Service.

The FTC recognizes that NCRAs already provide "commercial credit monitoring services" for which NCRAs receive a fee.¹³ The FTC also recognizes that NCRAs have competitors who provide these services (*i.e.*, "other commercial credit monitoring services") which are not subject to Act's requirement that they provide their services to any consumer "for free."¹⁴

CDIA recognizes that Congress has chosen to impose only on NCRAs the obligation to provide, for free, services which those NCRAs have developed, at great cost, over the course of many years, to meet the needs of consumers. The NCRAs have made significant investments to provide credit monitoring services to consumers and have developed different models to provide these monitoring services.

Although CDIA strongly believes service members should have access to these credit monitoring services, and appreciates the governmental endorsement of this product, CDIA also believes the better approach would have been to have the Department of Defense ("DOD") offer such products to service members as employee benefits, as thousands of private companies do across the country. CDIA, for example, contracts with a private company that, for a modest fee, provides credit monitoring to its employees. The DOD

¹⁰ Proposed § 609.3(e).

¹¹ Proposed § 609.3(f).

¹² Proposed § 609.4.

¹³ 83 Fed. Reg. § 57693, 57695.

¹⁴ *Id.*

could have requested proposals from companies to meet any unique DOD needs and would have received a variety of competitive responses. This would have been preferable to a legal requirement compelling private companies to give away their products for free.

Given the unique nature of the requirement imposed by the Act, and the Congressional choice to impose such obligations only on a particular segment of the commercial credit monitoring market, CDIA believes the final rule promulgated by the FTC should seek to reduce the burdens and costs placed on the NCRAs in order to avoid competitive and Constitutional concerns, discussed further in Section IV below.

III. Comments Responding to Specific Requests for Comments.

A. Questions Concerning the Proposed Section 609.2 Definitions.

1. Does the definition of “electronic credit monitoring service” adequately describe the service that the proposed rule should cover? If not, how should the definition be modified?

As the FTC recognizes, the industry has developed commercial credit monitoring services that possess features designed to alert consumers of material changes to their consumer report files. In fact, the proposed regulation defines “electronic credit monitoring service” as a “service through which nationwide consumer reporting agencies provide, at a minimum, electronic notification of material additions or modifications to a consumer's file.” The proposed regulation goes on to further define “electronic notification” and “material additions or modifications to a consumer’s file.”

With respect to the definitions, CDIA notes that the definition of “electronic notification” is broad enough to include a notice that is provided to the consumer through any one of four alternative means: (1) a website; (2) a mobile application; (3) email; or (4) text message. CDIA appreciates the flexibility in the delivery method, which encompasses methods of delivery that currently exist in the marketplace.¹⁵ CDIA is concerned, however, that the proposed definition of “material additions or modifications to a consumer’s file,” discussed below, will require NCRAs to develop new products and services to comply with the proposed regulation.

¹⁵ 83 Fed. Reg. 57693, 57695 (“Other commercial credit monitoring services provide a mobile application through which they notify customers of changes to their consumer reports.”).

2. Does the definition of “material additions or modifications” adequately cover the changes to a consumer’s file that should require notification? If not, what other elements should be added to the definition? Should changes to credit account limits remain in the definition? What benefits to consumers would notifications of account limit changes provide?

CDIA believes the definition of “material additions or modifications” does not adequately cover the changes to the consumer’s file that should require notification.

CDIA is concerned that the proposed definition will require NCRAs to develop new products and services to comply with the proposed regulation. Therefore, CDIA strongly recommends the following modifications to the definition and includes a justification for the suggested changes below:

(l) *Material additions or modifications* means significant changes to a consumer’s file, **such as including:**

- (1) new accounts opened in the consumer’s name;
- (2) inquiries or requests for a consumer report **in connection with the establishment of a new credit plan or extension of credit, other than under an open-end credit plan (as defined in section 103(i)), in the name of the consumer; and**
- ~~(3) changes to a consumer’s name, address, or phone number;~~
- ~~(4) changes to credit account limits; and~~
- ~~(5) negative information;~~

Provided, however, that a nationwide consumer reporting agency shall be deemed in compliance with its obligations under Section 605A(k)(2), 15 U.S.C. §1681c-1, if it makes a commercial credit monitoring service that it offers to consumers for a fee electronically available for free to active duty military consumers.

The FTC identifies CRAs’ commercial credit monitoring services as a point of comparison for the “electronic credit monitoring service” discussed in the proposed regulations.¹⁶ As noted above, given the unique nature of the requirement imposed by the Act, and the

¹⁶ See 83 Fed. Reg. 57693, 57695 (“Currently, the nationwide consumer reporting agencies typically send customers of their commercial credit monitoring services an email alerting them that changes have been made to their files.”)

Congressional choice to impose such obligations only on a particular segment of the commercial credit monitoring market, CDIA believes the final rule promulgated by the FTC should seek to reduce the burdens and costs placed on the NCRAs. Therefore, CDIA strongly recommends the inclusion of a “safe harbor” within the definition of “material additions or modifications” as a means of complying with the regulation.

As the FTC recognizes, the industry has developed commercial credit monitoring services that possess features designed to alert consumers of material changes to their consumer report files. NCRAs should be permitted to provide their commercially available credit monitoring services to active duty military consumers with the notifications that are typically offered through such commercial services. Should the NCRAs enhance those commercial services over time to include other notifications, the active duty military consumers would also receive the benefits of those enhancements. In this way, the NCRAs would not be unnecessarily required to develop a new credit monitoring service solely for active duty military personnel. Such a safe harbor approach also would incentivize the NCRAs to provide their latest commercial services to active duty military consumers, ensuring that those consumers benefit from improvements to those products.

With respect to the particular elements of the proposed definition, CDIA largely supports a number of the items contained in the proposed definition, but believes that several items should be removed or clarified, as explained below.

CDIA agrees that “new accounts opened in the consumer’s name” are the types of changes that should trigger an alert. With respect to “(2) Inquiries or requests for a consumer report,”¹⁷ however, CDIA believes this element of the definition should be revised to more closely focus on those activities that are likely to indicate identity theft. This could be accomplished, for example, by revising the definition to: “(2) Inquiries or requests for a consumer report in connection the establishment of a new credit plan or extension of credit, other than under an open-end credit plan (as defined in section 103(i)), in the name of the consumer.”¹⁸ This suggested revision, which is derived from the language found in 15 U.S.C. § 1681c-1(h)(1)(A), would identify those inquiries that may lead to the establishment of new credit accounts in the name of the consumer.

¹⁷ Proposed § 609.2(l)(2)

¹⁸ See 83 Fed. Reg. 57693, 57695 (“As to inquiries for prescreened lists, while most credit inquiries signal that a consumer is affirmatively seeking credit and may affect their credit scores, inquiries for prescreened lists are made without the consumers’ knowledge or specific consent and do have not affect their credit score.”).

By contrast, changes to consumers' names, addresses, phone numbers and account limits are not uniformly part of the NCRAs' current commercial credit monitoring services and should not be treated as a "material additions or modifications." Notably, changes to account limits are not indicative of identity theft or credit activity on the part of the consumer, but merely reflect a creditor's creditworthiness determination following some account review in connection with an existing account. The opening of "new accounts," which may be indicative of identity theft, is already addressed in proposed § 609.2(l)(1) and (2) (as modified).

Moreover, the "changes to credit account limits" element provides no indication as to when the change is "material." Because attempting to define what dollar amount or percentage of credit limit change is "material" for the many different types of accounts that appear in consumers' files would be a nearly impossible task, the "changes to credit account limits" should be omitted from the definition of "material additions or modifications."¹⁹

With respect to the type of "negative information" that triggers a notification, the proposed regulation incorporates the definition found in 15 U.S.C. § 1681s-2(a)(7)(G)(i) as an element of the definition of "material additions or modifications" to a consumer's file. That definition provides that: "The term 'negative information' means information concerning a customer's delinquencies, late payments, insolvency, or any form of default." The incorporated FCRA definition was originally drafted to inform a furnisher's obligation to provide a one-time negative information notice to a consumer, which notice may be provided to a consumer regardless of whether the furnisher ever furnishes negative information on that consumer.²⁰ Given the different purpose of the negative information notice, this statutory definition does not provide the level of specificity necessary to define when an electronic credit monitoring notice is appropriate.

As noted above, the definition "material additions or modifications" should provide a safe harbor allowing NCRAs to comply with the regulation by providing the notice given in their existing commercial credit monitoring services when derogatory information is posted to the consumer's file. Alternatively, "negative information" for credit monitoring purposes

¹⁹ The safe harbor approach proposed above would ensure that, if any such features are added to the NCRAs' commercial credit monitoring services, then activity duty military personnel would benefit from those additional alerts.

²⁰ See 15 U.S.C. § 1681s-2(a)(7)(A).

should be specifically defined to include “accounts furnished to the nationwide consumer reporting agencies as more than 30 days delinquent, accounts furnished to the nationwide consumer reporting agencies as being included in bankruptcy petition filings, and new public records (such as suits or judgments).” Notably, absent a bankruptcy petition filing, NCRAs have no information about a consumer’s “insolvency” that would allow them to provide an “insolvency” based notice like that suggested by the proposed regulation.

3. Are the exceptions to the electronic credit monitoring notice requirement for prescreening and account review inquiries appropriate?

CDIA believes the exceptions to the notice requirement are adequate provided that proposed § 609.2(l)(2) is revised as noted above, or that a safe harbor is added to the proposed regulation allowing NCRAs to comply with the electronic credit monitoring service notice requirement by making their existing commercial credit monitoring service electronically available to active duty military consumers.

4. The proposed rule requires notice to be given if an inquiry is made for the purpose of collection of an account of the consumer. Do NCRAs have the ability to differentiate between inquiries made for the purposes of account review and collection?

No, and CDIA suggests this requirement be removed. The FCRA requires only that CRAs obtain a permissible purpose certification from their consumer report users and verify the certified permissible purposes.²¹ The permissible purpose used for account review and collection is the same.²² There is no universal way to capture (and thus use for alert purposes) those inquiries that are made for collection purposes.

5. Is the definition of “electronic notification” adequate? Are there other methods of notification that should be included in the definition?

As noted above in response to question 1, the definition of “electronic notification” is appropriate in that it provides the NCRAs with the flexibility to provide delivery through any one of four different electronic means.

²¹ 15 U.S.C. § 1681e(a).

²² 15 U.S.C. § 1681b(a)(3)(A).

- 6. Is the definition of “appropriate proof of identity” necessary? Is the current definition, referencing 12 C.F.R. 1022.123 appropriate? Is there a better approach to determining what constitutes “appropriate proof of identity?” What procedures are consumer reporting agencies currently employing to comply with 12 C.F.R. § 1022.123? Do consumer reporting agencies currently require customers of commercial credit monitoring services to provide proof of identity? If so, what proof of identity is required?**

CDIA is unable to disclose the trade secrets of its consumer reporting agency (“CRA”) members and, therefore, cannot describe in this public comment letter the procedures its members follow to comply with 12 C.F.R. § 1022.123, which are individual to each company.

The definition of “appropriate proof of identity” is not required by the Act’s rulemaking mandate.²³ To the extent the FTC has determined that such a definition is needed to implement the Act’s provisions, however, CDIA supports the reference to an existing identification standard to reduce the implementation burden on its NCRAs members. The regulation identified in the proposal, 12 C.F.R. § 1022.123, tasks the CRAs with developing and implementing risk-based procedures for what information shall constitute appropriate proof of identity.

B. Questions Concerning the Proposed Section 609.3 Requirement to Provide Electronic Credit Monitoring Service.

- 1. The proposed rule states that “appropriate proof of active duty military status” can be verified through: (1) A copy of the consumer’s active duty orders; (2) a copy of a certification of active duty status issued by the Department of Defense; (3) a method or service approved by the Department of Defense; or (4) a certification of active duty status approved by the nationwide consumer reporting agency. Are these methods adequate? Are there other methods of verifying active duty status that should be included? What is the most efficient method for providing nationwide consumer reporting agencies with proof of active duty military status? Is it burdensome for consumers to provide appropriate proof? Is there a way to minimize the burden?**

²³ Section 302(d)(3) of the Act.

Yes, the proposed methods are adequate and CDIA appreciates the flexibility provided in the proposed regulation with respect to the verification of active duty military status. CDIA is concerned, however, that the proposed regulation provides no means of “conclusive” verification of a consumer’s status as an “active duty military consumer,” like that found in the regulations implementing the Military Lending Act, 32 C.F.R. § 232.5(b).

CDIA believes the FTC should work proactively with the DOD before the effective date of the final regulation to implement an automated and electronic verification method whereby the NCRAs may conclusively determine that a consumer is entitled to the electronic credit monitoring service required by the Act. Such a system should also provide a means by which NCRAs can determine the period of time during which a consumer is entitled to the free electronic credit monitoring service. Absent such a process, the NCRAs are left to develop different, and perhaps inconsistent, means of determining the duration of the period during which a consumer is on “active duty” and entitled to the free service. As an alternative, and to address this potential for inconsistent treatment if DOD is unable to provide an automated electronic verification system that may be relied upon for a “conclusive” determination of the consumer’s status as “active duty military consumer,” CDIA believes the regulation should be revised to make clear that the determination of the consumer’s activity duty status is valid only for two-year periods which must be renewed through the means identified in proposed § 609.3(c).

- 2. Proposed § 609.3(d) restricts secondary uses and disclosures of information collected from a consumer requesting to obtain the service required under § 609.3(a). Is this limitation necessary to ensure that consumers seeking to obtain the free electronic credit monitoring service are not forced to provide personal information for unrelated, secondary purposes?**

Please see CDIA’s response to question 3, below, which also addresses this question 2.

- 3. Proposed § 609.3(d) allows nationwide consumer reporting agencies to use and disclose information collected from consumers requesting to obtain the service required under § 609.3(a) only: (1) To provide the free electronic credit monitoring service requested by the consumer; (2) to process a transaction requested by the consumer at the same time as a request for the free electronic credit monitoring service; (3) to comply with specific legal requirements; or (4) to update information already maintained by the nationwide consumer reporting agency for**

the purpose of providing consumer reports, provided that the nationwide consumer reporting agency uses and discloses the updated information subject to the same restrictions that would apply, under any applicable provision of law or regulation, to the information updated or replaced. Are these approved uses appropriate? Are there additional uses that should be permitted?

With respect to questions 2 and 3, CDIA believes such restrictions are unnecessary in light of the FTC's existing authority under section 5 of the Federal Trade Commission Act to address deceptive or unfair acts or practices. In addition, the restrictions are beyond the scope of authority granted to the FTC under Section 302 of the Act.

- 4. Proposed § 609.3(e)(1) bans marketing until after a consumer who has indicated an interest in obtaining the service required under § 609.3(a) has enrolled in the free electronic credit monitoring service. Is this limitation necessary to ensure that active duty military consumers are able easily to obtain their free electronic credit monitoring service? Does this limitation impose undue burdens on nationwide consumer reporting agencies? If so, is there a way to minimize these burdens?**

Please see CDIA's response to question 6, below, which also addresses this question 4.

- 5. Proposed § 609.3(e)(2) prohibits any communications, instructions, or permitted advertising or marketing from interfering with, detracting from, contradicting, or otherwise undermining the purpose of providing a free electronic credit monitoring service to active duty military consumers. Is this prohibition necessary?**

Please see CDIA's response to question 6, immediately below, which also addresses this question 5.

- 6. Section 609.3(e)(3) provides the following examples of prohibited conduct: (1) Any representation that an active duty military consumer must purchase a paid product or service in order to obtain the free electronic credit monitoring service required by § 609.3(a); (2) a false representation that a product or service ancillary to receipt of the free electronic credit monitoring service, such as identity theft insurance, is free; or (3) the offering of an ongoing service without a clear and prominent disclosure that the consumer must cancel the service to avoid being**

charged. Are there more examples of prohibited conduct that should be included in the proposed rule? Should “clearly and prominently” be defined?

Responding to questions 4-6, CDIA believes these prohibitions are unnecessary and recommends that they be excluded from the final rule.

CDIA notes that proposed § 609.3(e) prohibits certain marketing activities, which prohibitions are beyond the scope of the authority granted the FTC in the Act²⁴ and, if left in the final regulation, require significant clarification. For example, the prohibition on marketing includes as its trigger a consumer’s “indicated ... interest” in obtaining the service, but then provides only the consumer’s “clicking on a link for services” as an example of an indicated interest. This definition creates an ambiguity as to the point at what point the marketing restrictions become effective. For example, if a non-active duty military consumer clicks on the link in error and never initiates an order for the electronic credit monitoring service provided for under these regulations, the current proposed language would prohibit the NCRAs from marketing to that consumer because that consumer would never enroll in the service.²⁵

It appears the FTC sought to model the marketing restrictions after the ones set forth in the free annual credit reports rule, as amended. It is CDIA’s understanding that it is the FTC’s intent only to limit the marketing of other products and services during the time when the active duty military consumer is engaged in the process of requesting the services provided for under the proposed regulation. However, unlike the free credit reports provided through annualcreditreport.com, the required electronic credit monitoring service will be offered through the NCRAs’ existing commercial sites, so additional limitations and clarifications of these provisions are necessary to make clear that the prohibition on further marketing exists only while the consumer is in the process of accessing the ability to enroll in the service and only during the enrollment process. NCRAs should not have to speculate about what other consumer actions may “indicate” an interest that prohibits the NCRAs from communicating with a consumer concerning their other products and services. If the FTC does not remove this prohibition in the final rule, then CDIA recommends the following modification to § 609.3(e)(1):

²⁴ See Sec. 302(d)(3) of the Act.

²⁵ See Proposed § 609.3(e) (“Once a consumer has indicated that the consumer is interested in obtaining the service ... such as by clicking on a link for services provided to active duty military consumers, any advertising or marketing for products or services ... must be delayed until after the consumer has enrolled in that service.”).

(e) *Communications surrounding enrollment in electronic credit monitoring service.*

(1) Once a consumer **is in the process of accessing the ability to enroll in** ~~has indicated that the consumer is interested in obtaining~~ the service required under paragraph (a) of this section **and only during the enrollment process, such as by clicking on a link for services provided to active duty military consumers, ...**

7. Proposed § 609.3(f) prohibits asking or requiring an active duty military consumer to agree to terms or conditions in connection with obtaining a free electronic credit monitoring service. Is this prohibition necessary to ensure that active duty military consumers are able easily to obtain their free electronic credit monitoring service? Do consumer reporting agencies currently require customers of commercial credit monitoring services to agree to terms or conditions? If so, does this prohibition impose undue burdens on nationwide consumer reporting agencies? If so, is there a way to minimize these burdens?

CDIA believes this prohibition is unnecessary and recommends it be excluded from the final rule.

CDIA notes that this prohibition is beyond the scope of authority granted the FTC in the Act, and the NPR provides no other legal basis for this unique and unprecedented restriction in the proposed regulations. Further, the prohibition is misguided and ambiguous. For example, is it a violation of this “term and conditions” prohibition to ask the consumer to confirm that the identifying information provided actually belongs to the consumer? Such a question would be a “condition” on providing the service and the regulation even requires the NCRAs to condition providing the service to the consumer upon the consumer first providing: appropriate proof of identity; contact information; and proof that the consumer is an active duty military consumer.²⁶ Similarly, NCRAs and other commercial credit monitoring service providers routinely obtain a consumer’s “written instructions” to comply with the FCRA permissible purpose requirements²⁷ prior to the delivery of the credit monitoring services, and similarly may condition the delivery of text

²⁶ Proposed § 609.3(b).

²⁷ 15 U.S.C. § 1681b(a)(2).

alerts on the consumer's required consent for the delivery of text messages under the Telephone Consumer Protection Act.²⁸

The "terms and conditions" prohibition renders the regulation confusing and internally inconsistent. It should be eliminated from the rule or, at a minimum, revised to state clearly what terms and conditions are prohibited. As written, if read literally, NCRAs would have to violate the terms and conditions prohibition in order to even provide the service.

C. Questions Concerning the Proposed Section 609.4 Requirements Relating to the Timing of Credit Monitoring Services.

- 1. The proposed rule also requires that these notices be provided within 24 hours of any material additions or modifications to a consumer's file. Is this time requirement appropriate?**

CDIA believes this requirement is not appropriate and recommends it be excluded from the final rule. Primarily, CDIA notes that this prohibition is beyond the scope of authority granted the FTC in the Act. However, should the requirement remain in the final rule, CDIA recommends modifying the time period to 48 hours to make it consistent with the NCRA's existing commercial credit monitoring services. Further, consistent with its prior comments, CDIA believes this requirement should be modified to provide a safe harbor permitting NCRAs to comply with the timing requirement by providing the electronic notice within the same period the NCRAs use for their commercial credit monitoring service.

CDIA recommends the following modifications:

§609.4 Timing of electronic credit monitoring service

The notice required in section 609.3(a) must be provided within ~~24~~ **48** hours of any material additions or modifications to a consumer's file.

Provided, however, that a nationwide consumer reporting agency shall be deemed in compliance with this provision if it provides the notice required in section 609.3(a) to active duty military consumers within the same time period it uses for a commercial credit monitoring service that it offers to consumers for a fee.

²⁸ The proposed language is even broad enough to prohibit conditioning the consumer's delivery of the service on the acknowledgment of a Gramm Leach Bliley Act privacy notice.

D. Questions Concerning the Proposed Section 609.5 Defining the Additional Information to be Included in Electronic Credit Monitoring Notices.

- 1. The proposed rule requires that the electronic notifications include a link to the summary of the consumer's rights under the Fair Credit Reporting Act. Will requiring this link provide useful information to consumers or is there different information that would be more useful? Is there a different method of providing this information that would be more effective?**

CDIA generally notes no objection to the overall requirement. CDIA does request that, if this requirement is retained in the final rule, the FTC provide flexibility with the method of delivery. The proposed rule would require the inclusion of the hyperlink in the electronic credit monitoring notices, which notices are defined to include text messages or mobile applications. These types of notifications are space limited. The NCRAs should be permitted to include the hyperlink to the summary of consumer's rights either within the electronic monitoring notice or on any page within the electronic credit monitoring service to which a consumer may be directed from an electronic monitoring notice.

IV. Additional Comments.

Although not specifically raised in the NPR, CDIA is concerned about the ambiguity in the Act's provisions which discuss the relationship between the effective date of the Act and the FTC's rulemaking obligation. The Act provides that the amendment made by section 302 "shall take effect on the date that is 1 year after the date of enactment of the Act."²⁹ The rulemaking provision provides that:

Not later than 1 year after the date of enactment of this subsection [§ 302(d)], the [FTC] shall promulgate regulations regarding the requirements of this subsection, which shall at a minimum include—³⁰

As written, the amendments provide no implementation period for the NCRAs that will be subject to the final regulation. That is, the FTC's final regulations could be issued one year after the Act's enactment and could be immediately effective. If the FTC adopts CDIA's suggestion that a safe harbor provision be included in the regulation which allows the

²⁹ See Section 302(e) of the Act.

³⁰ Section 302(d)(1) (amending 15 U.S.C. § 1681c-1 to add subsection (k)(3)).

NCRAs to comply with the electronic credit monitoring requirement by providing their existing commercial credit monitoring service, the implementation period could be reduced. This is because such a provision would require only that the NCRAs develop a compliant interface solely for active duty military consumers to enroll in the NCRAs' existing commercial services. If, however, the NCRAs are required to develop a different electronic credit monitoring service, unique to active duty military consumers, then the implementation period will need to be at least 1 year from effective date of the final regulations.

As a concluding comment, CDIA notes that it understands and supports the motivation to assist the nation's service members that underlies the Act's electronic credit monitoring provisions. CDIA is, however, concerned that Congress elected to accomplish this objective through the constitutionally questionable means by compelling the NCRAs to provide their private property without just compensation. That the FTC proposed regulations which add further to this burden by restricting the time, manner and content of the NCRAs' commercial speech with the users of their websites is similarly troubling. CDIA welcomes the opportunity to work with the FTC in the rulemaking process to reduce these burdens on its NCRAs members.

V. Conclusion.

CDIA thanks the FTC for the opportunity to share its views on the proposed regulations. Please contact us if you have any questions concerning the above comments or need additional information.

Sincerely,

✓
Eric J. Ellman
Senior Vice President, Public Policy & Legal Affairs