



July 23, 2004

***By Electronic Delivery***

Jennifer J. Johnson  
Secretary  
Board of Governors of the Federal  
Reserve System  
20th Street and Constitution Avenue, NW  
Washington, DC 20551  
Attention: Docket No. R-1199

Robert E. Feldman  
Executive Secretary  
Attention: Comments - RIN 3064-AC77  
Federal Deposit Insurance Corporation  
550 17th Street, NW  
Washington, DC 20429

Office of the Comptroller of the Currency  
250 E Street, SW  
Public Reference Room  
Mail Stop 1-5  
Washington, DC 20219  
Attention: Docket No. 04-13

Regulation Comments  
Chief Counsel's Office  
Office of Thrift Supervision  
1700 G Street, NW  
Washington, DC 20552  
Attention: No. 2004-26

**Re: The FACT Act Disposal Rule, RIN 1550-AB87**

Ladies and Gentlemen:

This comment letter is submitted on behalf of the American Financial Services Association ("AFSA") in response to the joint notice of proposed rulemaking ("Proposed Rule") and request for public comment by the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Office of the Comptroller of the Currency and the Office of Thrift Supervision (collectively, the "Agencies").<sup>1</sup> The Proposed Rule would implement section 216 the Fair and Accurate Credit Transactions Act ("FACTA") which adds section 628 to the FCRA and requires the Agencies to issue regulations with respect to the proper disposal of consumer information.<sup>2</sup>

AFSA is the national trade association for approximately 400 finance companies and other consumer and commercial lenders operating over 10,000 offices. The credit products offered by AFSA's members include personal loans, first and second mortgage loans, home equity lines of credit, credit card accounts, retail sales financing and credit

<sup>1</sup> 69 Fed. Reg. 31913 (June 8, 2004).

<sup>2</sup> FCRA § 628 is codified at 15 U.S.C. § 1681w.

insurance. AFSA's members include financial institutions regulated by one or more of the Agencies. AFSA's members rely upon consumer reports obtained from consumer reporting agencies and will be subject to the Final Rule developed through this proceeding.

Section 628 of the FCRA "is designed to protect a consumer against the risks associated with unauthorized access to information about the consumer contained in a consumer report, such as fraud and related crimes including identity theft."<sup>3</sup> To this end, section 628 requires the Agencies, the Federal Trade Commission, the National Credit Union Administration and the Securities and Exchange Commission to prescribe consistent and comparable regulations that require "any person that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived from consumer reports . . . to properly dispose of any such information or compilation."<sup>4</sup> Section 628 also directs the agencies to ensure that these regulations are consistent with the requirements and regulations issued under the Gramm-Leach-Bliley Act ("GLBA") and other federal law.<sup>5</sup>

The Proposed Rule would amend the Interagency Guidelines Establishing Standards for Safeguarding Customer Information which the Agencies issued in order to implement the GLBA requirements for safeguarding customer information (the "Interagency Guidelines" or the "Guidelines").<sup>6</sup> The Guidelines establish the standards for developing and implementing administrative, technical and physical safeguards to protect the security, confidentiality, and integrity of customer information. The Agencies propose to amend the Interagency Guidelines to apply to "consumer information," as well as to the "customer information" currently covered by the Guidelines. The Final Rule would require financial institutions within the Agencies' respective jurisdictions to dispose of consumer information in accordance with the amended Guidelines. AFSA believes that this approach is consistent with the legislative intent in applying the Section 628 requirements to financial institutions that already have in place procedures for safeguarding their customer information. By amending the Guidelines in this manner, the Agencies will enable financial institutions to adhere to consistent procedures, thus assuring compliance without undue operational burden. For these reasons, AFSA strongly supports the Agencies' proposal to require that "consumer information" be disposed of in a manner consistent with the disposal of "customer information" under the Interagency Guidelines.

AFSA believes also that certain changes should be made to the proposed amendments to the Interagency Guidelines in order to clarify the types of information and circumstances to which the disposal standards apply and to provide sufficient time to comply with the Final Rule when adopted.

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<sup>3</sup> 69 Fed. Reg. 31,913, 31,914 (June 8, 2004).

<sup>4</sup> FCRA §§ 628(a)(1).

<sup>5</sup> FCRA § 628(a)(2)(B).

<sup>6</sup> See 66 Fed. Reg. 8633 (Feb. 1, 2001).

## COMMENTS ON SPECIFIC SECTIONS

### 1. The Definitions.

#### A. “Consumer Information”

The Proposed Rule provides that “consumer information” means “any record about an individual ... that is a consumer report or is *derived* from a consumer report.”<sup>7</sup> AFSA believes that the use of the word “derived” in this definition may be read to imply a broader scope for the disposal rules than is intended by the Agencies or is authorized by FCRA § 628.

In the Supplementary Information, the Agencies suggest that consumer information “derived” from a consumer report means information that is shared among corporate affiliates and that would be a consumer report except that it comes within the FCRA exception for affiliate sharing.<sup>8</sup> AFSA agrees with the Agencies’ interpretation and urges the Agencies to incorporate their interpretation in the Final Rule’s amendments to the Interagency Guidelines. The Final Rule’s amendments regarding the definition of “consumer information” should also make clear that purely identifying information is not “consumer information” merely because it is contained in the credit header portion of a consumer report.

Similarly, AFSA believes that, to the extent the Final Rule will apply to “derived” information, it should state that the consumer report user must know that the information in its possession has been derived from a consumer report before such information is subject to the disposal requirement. AFSA is concerned that, absent this knowledge requirement, consumer report users will be left to guess whether any or all information contained in a consumer’s file is “derived” from a consumer report.

Finally, although the Agencies acknowledge in the Supplementary Information that information derived from a consumer report that does *not identify* a particular consumer is *not* subject to the disposal rules, AFSA believes this exclusion should be explicitly stated in the Rule itself to eliminate any uncertainty as to whether such information must be monitored by consumer report users for disposal purposes.

Based on the above concerns, AFSA believes the proposed amendments to the Interagency Guidelines should be revised by adding the following examples and exclusions to the definition of “consumer information”:

“Consumer information” includes information that is excluded from the FCRA’s definition of “consumer report” by operation of Section 603(d)(2)(A)(ii) or 603(d)(2)(A)(iii). The term does not include:

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<sup>7</sup> 69 Fed. Reg. 31,919 – 31,922 (emphasis added).

<sup>8</sup> 69 Fed. Reg. 31,915. *See* FCRA § 603(d)(2)(A); 15 U.S.C. § 1681a(d)(2)(A).

- (1) information that includes only the names and/or addresses of consumers, without consumer report information;
- (2) information that the person does not know is a consumer report or taken from a consumer report; or
- (3) information that does not identify a particular consumer.

*B. Definition of “dispose” or “disposal”*

The Proposed Rule’s amendments to the Guidelines do not define the terms “dispose” or “disposal.” AFSA believes these terms should be defined to avoid any confusion as to the circumstances to which the Proposed Rule applies. Failure to define these terms may create an issue as to whether the sale, donation, or transfer of consumer information is the “disposal” of such information. Such an interpretation is inconsistent with FCRA § 628, which requires the Agencies to issue regulations governing the proper disposal of consumer information. FCRA § 628 says nothing about the sale, donation, or transfer of such information. AFSA believes the Proposed Rule should be revised by adding the following definition to the Guidelines:

As used in this part, “dispose” or “disposal” means the discarding or abandonment of consumer information or of any medium, including computer equipment, upon which consumer information is stored.

**2. Effective Dates**

*A. Effective Date for Measures Relating to the Disposal of Consumer Information*

The Proposed Rule indicates that the Final Rule will become effective 90 days after the date it is published in the Federal Register.

AFSA believes that 3 months is an insufficient time to implement a compliant disposal program. While entities subject to the Proposed Rule are currently subject to the Interagency Guidelines, the Guidelines do not currently apply to the disposal of “consumer information.” The process of locating and tracking all “consumer information” maintained by entities subject to the Proposed Rule will be extremely challenging and time-consuming. Additionally, entities will need to develop policies to insure that all “consumer information” maintained is properly tracked. In some cases, third-party contractors will need to be hired to assist in establishing and maintaining these processes. It will take time for entities subject to the Proposed Rule to identify competent

and reliable third-party contractors, negotiate the terms of the agreement, and monitor the contractors to ensure compliance.

AFSA 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.

*B. Exception for Existing Contracts with Service Providers*

The Proposed Rule also provides that notwithstanding the effective date discussed above, an entities existing contracts “with its service providers with regard to any service involving the disposal of consumer information must comply with these guidelines by” a date that is one year after the publication of the Final Rule in the Federal Register.

AFSA believes one year is an insufficient time to amend existing contracts. It will take entities subject to the disposal rule a significant amount of time to identify all the contracts that may be impacted by the disposal rule. Once all relevant contracts are identified, it will take the entities substantial time to negotiate new terms and amend the contracts.

AFSA believes an effective date that is 18 months from the date of publication of the Final Rule in the Federal Register would provide a more reasonable period during which complying parties could identify all of the relevant contracts and renegotiate the terms of the contracts.

**CONCLUSION**

Because the Proposed Rule will directly impact AFSA’s members, AFSA hopes that due consideration will be given to its comments as the trade association representing hundreds of creditors who extend credit and loans to millions of American consumers.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert E. McKew", with a long horizontal flourish extending to the right.

Robert E. McKew  
Senior Vice President and General Counsel  
American Financial Services Association