

June 14, 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

Ladies and Gentlemen:

On behalf on the more than 1 million members of the National Association of REALTORS® (NAR or REALTORS®), the Institute for Real Estate Management (IREM or the Institute), and the CCIM Institute, I am pleased to offer comments to the Commission regarding the FACT Act Disposal Rule. The National Association of REALTORS®¹, "The Voice for Real Estate," is America's largest trade association, representing 1 million members, including NAR's five commercial real estate institutes, its societies and councils. REALTORS® are involved in all aspects of the residential and commercial real estate industries. NAR members belong to one or more of some 1,700 local associations or boards and 54 state and territory associations of REALTORS®.

IREM, an affiliate of the National Association of REALTORS®, is an association of professional property and asset managers who meet strict criteria in the areas of education, experience, and a commitment to a code of ethics. The 16,000 IREM members manage all types of investment real estate. The Institute educates real estate managers, certifies the competence and professionalism of individuals and organizations engaged in the management of real estate, serves as an advocate on issues affecting the real estate management industry, and enhances its members' professional competence to better meet the needs of their clients.

The CCIM Institute is also an affiliate of the National Association of REALTORS®. The CCIM Institute confers the Certified Commercial Investment Member (CCIM) designation. The Institute stresses education, networking and ethical practice. Over 7,500 commercial real estate professionals currently hold the CCIM designation and work in 1,000 markets.

These joint comments on the proposed disposal regulation are based on a sampling of a cross-section of NAR, IREM and CCIM members that engage in the various aspects of commercial and residential real estate activities. We undertook the sampling to seek current and representative practices relating to the use and disposal of records that use or are a compilation of consumer credit report information.

■ **Small Business Impact**

As the proposed rule indicates, numerous small businesses across nearly every industry will be subject to the rule once finalized. This situation will certainly occur in the real estate industry, but there is no typical real estate firm. It is true there are large, independent and franchised real estate firms that operate with hundreds of real estate agents in several markets. These large firms may also have affiliated relationships with mortgage lending or mortgage brokerage companies.

However, the real estate industry remains dominated by smaller firms. Recent research by the National Association of REALTORS® confirms that despite ample evidence of consolidation within the industry, a large share of real estate firms are single office operations. Roughly two thirds of firms report that they derive the largest share of their revenue from residential real estate, while commercial brokerage is the chief activity of eight percent of firms. Larger firms often hold a business interest in one or more non-brokerage real estate related activities, such as property management, appraisal and property development.

Overwhelmingly, residential real estate firms have sales forces that are made up entirely of independent contractors. Five percent of firms report a mix of both independent contractors and employees. The typical REALTOR® is affiliated with an independently owned, non-franchise firm. On average, a REALTOR® will complete 13 residential transaction sides per year and have a gross personal income of a little more than \$52,000 from that work. Thus, while the rule would most affect the larger firms in the real estate business, its impact on small firms and even individual contractors with their correspondingly smaller resources should not be ignored.

■ **REALTORS® Affected by the Disposal Rule**

The Commission's proposed rule requires that "reasonable measures" be taken by persons or businesses that acquire or compile information based on consumer credit report information. The proposed rule is to protect against unauthorized access to or use of consumer information when that consumer information, whether in paper, electronic or other form, is discarded or otherwise disposed of. The objective of the proposed rule, to provide assurance that consumer records cannot be practicably read or reconstructed, is certainly compatible with REALTOR® concerns about the appropriate use of consumer credit information.

The proposed rule does not require new standards of practice for firms and individuals to dispose of sensitive consumer information, nor does it impose any recordkeeping requirement concerns for REALTORS®.

REALTORS®² conducting business in commercial and residential real estate are most likely to acquire consumer credit report information in the course of acting as commercial real estate brokers, property managers or landlords, through affiliated mortgage lending companies, and as a

mortgage broker. A relatively small number of REALTORS® -- just four percent -- are mortgage brokers. One percent of REALTORS® own a mortgage lending firm. Real estate firms may also acquire consumer credit report information in the same business capacities as an individual REALTOR®, though the number of incidences will be considerably larger.

The NAR-IREM-CCIM Institute joint survey of members revealed some important observations that reflect the relevancy of the proposed rule. Residential real estate companies do not commonly acquire or compile consumer credit report information. The records that are retained are normally in accordance with state real estate transactions laws, federal income tax, and other legal requirements. Overwhelmingly, disposal of records under this rule would not be an issue for residential real estate professionals and firms.

Commercial realty firms involved in real estate brokerage and property and asset managers do routinely acquire and use credit report information. Records retention and disposal practices are typically in place and should meet the “reasonable measures” criteria of the proposed rule.

Real estate company-affiliated mortgage lending companies acquire consumer credit report information and maintain them under rigid document handling procedures. Real estate company-affiliated mortgage lending company files are secure and separate from the real estate company. Companies responding to our inquiries indicated that third party document storage was often used and professional shredding companies disposed of the records.

REALTORS® and other small businesses could benefit from an example in the regulation that would further reinforce the fact that proposed rule is not imposing a new compliance requirement. The rule should include an example making it expressly clear that a business that shredded the affected paper records is presumed to be complying with the rule as it affects those paper records.

■ Conclusion

The proposed rule neither requires new standards of practice for firms and individuals who have already recognized a need to protect sensitive consumer information nor does it impose any recordkeeping requirement for REALTORS®. The proposed rule declares that it shall not be construed to require action to maintain or destroy any consumer record that is not imposed under other law, or to alter or affect any requirement imposed under any other provision of law to maintain or destroy records. As such, the NAR and its commenting affiliates believe the proposed rule is reasonable and practical.

As noted in the comments published with the proposed rule, the impact on small businesses is difficult to measure at this point. Small firms with a few agents/managers compete in the same markets as large firms with hundreds of agents/managers. Although no entity would be impacted by the rule until there was action involving the disposal of certain files with consumer credit information there would be a number of

commercial real estate firms, affiliated mortgage lending or mortgage brokerage firms and REALTORS® subject to the proposed rule. The Commission should monitor the impact of the rule on small business entities to assure it does not create an undue burden on those entities.

Appropriately, on its face the regulation is flexible and precautionary. The proposed rule does not imposed new requirements that should dramatically impact a real estate company. The Commission is to be complimented on the proposed regulation.

Sincerely,

A handwritten signature in cursive script that reads "Walter S. McDonald".

Walt McDonald
President

1 The term REALTOR® is a registered collective membership mark that identifies a real estate professional who is a member of the NATIONAL ASSOCIATION of REALTORS® and subscribes to its strict Code of Ethics.

2 The most recent survey of REALTORS® regarding business specialty was revealing. The primary business specialty for more than four-fifths of all REALTORS® is residential brokerage. Eighty-four percent of sales agents and 81 percent of brokers described residential brokerage as their principal focus. Nineteen percent of REALTORS® are primarily involved in real estate activities other than residential brokerage, with the most cited activities being property management, appraisal and commercial brokerage. In addition to their primary activities, roughly 20 percent of all REALTORS® are involved in commercial brokerage and another 17 percent are active in relocation as a secondary real estate activity.