

July 22, 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 (Supplemental Initial Regulatory Flexibility Analysis for Notice of Proposed Rulemaking)

Ladies and Gentlemen:

On behalf on the more than 1 million members of the NATIONAL ASSOCIATION OF REALTORS® (NAR), the Institute for Real Estate Management (IREM), and the Certified Commercial Investment Member (CCIM) Institute, I am pleased to offer comments to the Commission on the FACT Act Disposal Rule (Supplemental Initial Regulatory Flexibility Analysis). The NATIONAL ASSOCIATION OF REALTORS®, “The Voice for Real Estate,” is America’s largest trade association, representing more than 1 million members, including NAR’s five commercial real estate institutes, its societies, and its 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 NAR affiliate, is an association of professional property and asset managers who meet strict criteria in the areas of education, experience, and 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 real estate management, advocates 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 NAR affiliate. The CCIM Institute confers the 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.

The Commission’s proposed consumer information disposal rule would require that persons or businesses that acquire, or compile information based on, consumer credit report information must “properly dispose of such information by taking reasonable measures” to protect against unauthorized access to or use of the information. In our June 14, 2004, comment on the proposed rule, we complimented the Commission on proposing a reasonable and practical regulation.

On July 8, 2004, the Commission published a Supplemental Initial Regulatory Flexibility Analysis for the

proposed disposal regulation to help commenters assess the impact of the proposed rule on small businesses. In response to the Commission's supplemental analysis, NAR has reanalyzed the proposal and offers several essentially technical suggestions for its improvement. While our proposed clarifications would particularly benefit small businesses, all those subject to the rule would benefit.

Clarify "Reasonable Measures." We urge you to clarify § 682.3(b) to provide greater certainty about what constitutes "reasonable measures" for the proper disposal of consumer information. Minimizing possible different interpretations will reduce costs to small businesses by avoiding the need for them to contract for costly legal or other expert advice.

- A covered person who disposes of consumer information in accordance with one of the examples should be presumed to be in compliance with the regulation. This would permit individuals and businesses to structure their disposal programs with more confidence that they are consistent with the rule. For example, the § 682.3(b) lead-in to the examples could be revised along the following lines:

"The Commission will presume a person to have taken reasonable measures to protect against unauthorized access to or use of consumer information in connection with disposal of the information if the person takes one of the following measures:"

This or a comparable clarification is particularly needed because the preamble to the July 8, 2004, publication throws doubt on how much a person or business may rely on the examples. The preamble states that certain steps "are likely to be appropriate for many" and that "shredding or burning paper records . . . will generally be appropriate." These preamble statements, which do not track the proposed regulation, could raise doubts about the extent to which the Commission will consider disposing of the consumer information in accordance with the examples as meeting the requirements of the regulations.

- Whether or not you reword the lead-in as we suggest, it should not include the word "would." By stating that reasonable measures "would" include the specified examples, the regulation may be read to imply that some additional condition must be met. We can think of no need for including "would." It is clear without it that these are examples that count as reasonable measures for disposing of consumer information only if the person subject to the regulation actually follows them.
- The first two examples include the following standard for measuring whether the destruction is sufficient: "so that the information cannot practicably be read or reconstructed." Since with enough time and money experts can reconstruct shredded paper and even recover electronic media that have been damaged or erased, we suggest that you revise the standard so burning, pulverizing, or shredding of papers and destruction or erasure of electronic media are sufficient if the consumer information cannot reasonably be read or reconstructed.
- The first example includes shredding of papers as a reasonable measure. Shredders vary in quality and the resulting strips vary in width. If you adopt our recommended alternative language for section 682.3(b), you may wish to require, as a condition for qualifying for the presumption, the use

of a cross-cut shredder to promote confidence in this alternative.

Consistency Among Agency Regulations. Section 628 of the Fair Credit Reporting Act requires the Commission, the Federal banking agencies (FBAs), the National Credit Union Administration, and the Securities and Exchange Commission to work together so “to the extent possible” the regulations are consistent and comparable. We have two suggestions:

- We recommend that you work with the FBAs to eliminate unnecessary differences between the Commission and FBA rules. For example, the FTC regulation requires those subject to the regulation take “**reasonable** measures” to dispose of consumer information, but the FBA interagency guidelines require “**appropriate** measures.” The FTC regulations, but not the FBA guidelines, include examples of “reasonable measures.” While NAR prefers the FTC approach, consistency is the main concern because it will reduce costs on small businesses and others subject to the regulations to the extent they are covered by both regulations. If there is a reason why it is not possible to include examples or why FTC should require “reasonable measures” but the FBAs should require “appropriate standards,” we request that you include an explanation in the preamble to the final rule.
- There appears to be overlap in coverage between the regulations of the Commission and those of the FBAs. A service provider of both a real estate firm subject to the FTC regulations and of an entity subject to the FBA regulations appears to be subject to both sets of requirements. If you accept our recommendation to make the standards the same, this will make little practical difference. But it would be best, if the law permits, to design the regulations so only one applies to any one entity or person.

Conclusion

NAR reaffirms its earlier comment that the proposed rule is reasonable and practical, but we urge you to clarify it to minimize burdens on all those subject to the rule, especially small businesses. Thank you for the opportunity to submit additional comments on the proposed rule.

Sincerely,



Joe Ventrone
Managing Director, Regulatory and Industry Relations

