



August 16, 2004

Donald S. Clark  
Secretary  
Federal Trade Commission  
Office of the Secretary  
Room H-159 (Annex S)  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20850

Re: FACTA Notices, Matter No. R411013

Dear Mr. Clark:

The Consumer Data Industry Association (“CDIA”) respectfully submits the following comments on the Federal Trade Commission’s (“Commission”) proposed Summaries of Rights and Notices of Duties under the Fair Credit Reporting Act (“FCRA”).<sup>1</sup>

The Commission proposes a new summary of rights under the FCRA and revisions to an existing summary of rights and two existing notices of duties under the FCRA. The new summary is the summary of rights of identity theft victims required by the recently enacted Fair and Accurate Credit Transactions Act of 2003 (FACT Act), which amended the FCRA.<sup>2</sup> The Commission issued the existing summary and two notices in 1997 and now proposes revisions because of extensive changes made to the FCRA in the FACT Act. The proposed revisions provide a general summary of consumer rights under the FCRA,<sup>3</sup> a notice of responsibilities under the FCRA of persons that furnish information to consumer reporting agencies,<sup>4</sup> and a notice of responsibilities under the FCRA for users of consumer reports.<sup>5</sup>

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<sup>1</sup> 69 Fed. Reg. 42616 *et seq.* (July 16, 2004).

<sup>2</sup> *See* FCRA § 609(d); 15 U.S.C. §1681g(d).

<sup>3</sup> *See* FCRA § 609(c); 15 U.S.C. §1681g(c).

<sup>4</sup> *See* FCRA § 607(d)(1)(A); 15 U.S.C. §1681e(d)(1)(A).

<sup>5</sup> *See* FCRA § 607(d)(1)(B); 15 U.S.C. §1681e(d)(1)(B).

CDIA is an international trade association representing the consumer reporting industry. CDIA's members include the nationwide consumer reporting agencies,<sup>6</sup> the nationwide specialty consumer reporting agencies,<sup>7</sup> as well as many smaller consumer reporting agencies. *All* of CDIA's consumer reporting agency members are required to distribute these summaries and notices. Consumers and industry members look to the summaries and notices for information as to their respective rights and responsibilities. Because these summaries and notices will affect all consumer reporting agencies in their dealings with consumers and with industry furnishers and users of consumer report information, CDIA's members have a significant interest in the content of these notices.

## Summary

As a result of the new obligations under the FACT Act, consumer reporting agencies are in continual discussions with data furnishers and users of consumer reports with their respective compliance obligations under the FCRA. These discussions reveal that industry members are well aware of the new requirements. Accordingly, CDIA does not believe it is necessary, as the Commission suggests, to *require* that consumer reporting agencies redisclose the notices to current furnishers and users, although they may choose to do so voluntarily. CDIA believes that the FCRA does not support such a requirement and that Congress did not authorize the Commission to impose it. Moreover, CDIA is also concerned that the Commission's analysis and conclusions under the Regulatory Flexibility Act understate the burden on the consumer reporting industry with respect to the proposed requirement that consumer reporting agencies redisclose the notices to all current furnishers and users. For these reasons, CDIA asks the Commission to make clear that there is *no requirement* to disclose the revised notices to current furnishers and users, as long as they have previously received disclosures that were in effect at the time they received them.

CDIA appreciates the difficulty in summarizing the intricate provisions of the FCRA that create the rights and duties described in the summaries and notices. CDIA believes that the summaries and notices generally reflect the applicable provisions. CDIA also believes that it is imperative that the summaries and notices precisely describe the provisions they summarize because consumers and industry will look to them. Moreover, if the summaries and notices are not consistent with the statutory provisions, courts may not give them proper deference. For these reasons, CDIA offers a number of suggested changes to the summaries and notices, as described below.

## Requirement to Provide Revised Notices to Current Furnishers and Users

FCRA § 607(d) requires the Commission to issue a notice setting forth the duties of furnishers of information to consumer reporting agencies, and a notice outlining the duties of users of consumer reports. This section also requires consumer reporting

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<sup>6</sup> See FCRA § 603(p); 15 U.S.C. § 1681a(p).

<sup>7</sup> See FCRA § 603(w); 15 U.S.C. § 1681a(w).

agencies to provide these notices to furnishers and users. As the Commission observed, the FACT Act did not amend Section 607(d). Nonetheless, the Commission believes that, because of the significant changes made to furnisher and user duties by the FACT Act, the existing furnisher and user notices are obsolete. The Commission, therefore, seeks to update the notices. While Congress did not specifically authorize the Commission to revise the notices, its doing so is consistent with the legislative purpose that the notices communicate the duties of furnishers and users under this law. CDIA agrees that it is appropriate for the Commission to publish revised notices that accurately reflect the current furnisher and user duties.

The Commission also states that it “believes that the changes made by the FACT Act to the FCRA are so substantial that consumer reporting agencies must distribute the revised user and furnisher notices to all current users and furnishers, as well as to all entities that become users or furnishers in the future.”<sup>8</sup> CDIA respectfully urges the Commission to reconsider this requirement. As a result of the FACT Act amendments, CDIA members are working with data furnishers and users to implement procedures and systems that will assure compliance with their respective obligations. Based on this experience, CDIA members believe that furnishers and users are very knowledgeable about their responsibilities under the FCRA, including their new obligations under the FACT Act amendments. Moreover, consumer reporting agencies have already sent the FCRA-mandated notices to furnishers and users. If any current users or data furnishers request copies of the notices, consumer reporting agencies will provide them, as they have in the past. There is no need to impose a requirement on consumer reporting agencies to redisclose the notices to all current users and data furnishers, and doing so would be redundant and burdensome.

While CDIA members may voluntarily distribute the revised notices to current and furnishers, there is no statutory basis for a legal requirement that they do so. As the Commission recognizes, the FCRA requires that consumer reporting agencies provide the notices of furnisher and user duties only once.<sup>9</sup> The law requires only that the notices that consumer reporting agencies provide pursuant to Section 607(d) be “substantially similar” to the notices prescribed by the Commission.<sup>10</sup> Consumer reporting agencies have met this requirement since 1997 and will meet this requirement in the future because their notices have been, and continue to be, “substantially similar” to the Commission’s prescribed notices. Once the revised notices are in effect, consumer reporting agencies will continue to provide furnishers and users with notices that are “substantially similar” to those prescribed by the Commission. The FCRA requires nothing more.

CDIA respectfully suggests that, to the extent that the Commission proposes to impose a *redisclosure* requirement for consumer reporting agencies with respect to furnishers and users to whom the agencies have already provided notices under Section 607(d), the Commission engages in unauthorized rulemaking. Congress authorized the

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<sup>8</sup> *Id.*

<sup>9</sup> 69 Fed. Reg at 42618.

<sup>10</sup> FCRA § 607(d); 15 U.S.C. § 1681e(d).

Commission to prescribe the content of the summaries and notices. The statute alone determines the circumstances under which the notices should be given. The attempted rulemaking is particularly troublesome, because the proposed requirement is not supported by the plain language of the FCRA and would create retroactive requirements where Congress clearly intended only prospective application. For all these reasons, CDIA urges the Commission to make clear that consumer reporting agencies comply with their FCRA § 607(d) obligations when they provide notices to furnishers and users that are substantially similar to the Commission’s prescribed notices that are in effect at the time the notices are given.

### Regulatory Flexibility Analysis

In the Supplementary Information, the Commission opined that the proposal will not “increase in any significant way the burdens already imposed on consumer reporting agencies by the requirements” for the general summaries of consumer rights and the furnisher and user summaries.<sup>11</sup> For this reason, the Commission’s Regulatory Flexibility Act analysis serves as the FTC’s certification to the Small Business Administration of “no impact” on small entities.<sup>12</sup> The Commission states, “[a]s is discussed below, the Commission believes that the nationwide and nationwide specialty CRAs will be responsible for much of the distribution of the summaries and notices.”<sup>13</sup> However, that discussion relates only to the summaries of consumers’ rights or the rights of identity theft victims. The Commission does not discuss the impact on small businesses of its proposed requirement that consumer reporting agencies redisclose the revised notices of obligations to all current users and furnishers. CDIA believes that such a requirement would have a substantial impact on small entities and that such an impact is an additional reason why the Commission should not impose the redisclosure requirement.

### Legal Effect of the Summaries and Notices

The Commission’s authority to prescribe the content of the notices to users and furnishers and the summaries of consumers’ rights appears in the text of the FCRA itself. The FCRA provides that the Commission:

- (1) “shall prepare a model summary of rights of consumers under this title;”<sup>14</sup>
- (2) “shall prepare a model summary of rights under this title with respect to the procedures for remedying the effects of fraud or identity theft;”<sup>15</sup> and
- (3) “shall prescribe the content of notices [to users and furnishers].”<sup>16</sup>

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<sup>11</sup> 69 Fed. Reg. at 42619.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> FCRA § 609(c)(1)(A); 15 U.S.C. § 1681g(c)(1)(A).

<sup>15</sup> FCRA § 609(d)(1); 15 U.S.C. § 1681g(d)(1).

The FACT Act does not require the Commission to engage in a rulemaking proceeding to prescribe the content of the summaries and notices. These publications are, therefore, different from “rules” that the Commission must publish for comment under the Administrative Procedures Act.<sup>17</sup> The Commission’s proposal is consistent with this result because it states under “Legal effect,” “The issuance of the summaries and notices set forth below carries out the directive in the statute that the FTC prescribe these summaries and notices.”<sup>18</sup> Because they do not have the legal effect of rules, but do encompass the Commission’s understanding of the applicable FCRA provisions, the notices and summaries are akin to agency interpretations or guidelines.

The U.S. Supreme Court has held that such interpretations or guidelines do not have the force of law and “do not warrant *Chevron*-style deference” as they might if they were published following “a formal adjudication or notice-and-comment rulemaking.”<sup>19</sup> Rather, the judicial approach “has been to tailor deference to variety.”<sup>20</sup>

This acceptance of the range of statutory variation has led the [U.S. Supreme] Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect *Chevron* deference.<sup>21</sup>

Federal courts applying the Supreme Court’s flexible deference approach have concluded that:

[C]ourts do not face a choice between *Chevron* deference and no deference at all. Administrative decisions not subject to *Chevron* deference may be entitled to a lesser degree of deference; the agency position should be followed *to the extent persuasive*. [citations omitted].<sup>22</sup>

According to the Supreme Court:

The fair measure of deference to an agency administering its own statute has been understood to vary with the circumstances, and the courts have looked to the agency’s care, its consistency, formality, and relative expertise and to the persuasiveness of the agency’s position.

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The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later

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<sup>16</sup> FCRA § 607(d)(2); 15 U.S.C. § 1681e(d)(2).

<sup>17</sup> 5 U.S.C. § 511 *et seq.*

<sup>18</sup> 69 Fed. Reg. at 42621.

<sup>19</sup> *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 1662 (2000);

<sup>20</sup> *U.S. v. Mead Corp.*, 533 U.S. 218, 236, 121 S.Ct. 2164, 2176 (2001).

<sup>21</sup> *Id.*, at 236-37, 121 S.Ct. at 2176.

<sup>22</sup> *Scharpf v. AIG Marketing, Inc.*, 242 F.Supp.2d 455, 465 (W.D.Ky. 2003) (emphasis added).

