April 16, 2004

Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Ave., NW
Washington, D.C. 20580

Re: FACTA Free File Disclosures Proposed Rule, Matter No. R 411005

Introduction

ChoicePoint Inc. appreciates the opportunity to submit comments to the Federal Trade Commission (FTC) regarding the above referenced matter (Proposed Rule), which the FTC published pursuant to its mandate under the Fair and Accurate Credit Transactions Act of 2003 (FACTA). FACTA substantially amended the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et. seq*.

Alpharetta, Georgia - based ChoicePoint Inc. is a leading provider of identification and credential verification services. ChoicePoint's business focuses on four markets: insurance services; preemployment screening; direct marketing services; and public records.

ChoicePoint is committed to personal privacy and the responsible use of information. ChoicePoint collects information available from public records and other

sources in compliance with privacy law and meets or exceeds industry standards governing the collection, use and dissemination of personal information.

ChoicePoint recognizes the challenge faced by the FTC in devising a rule for the free report and streamlined process requirement. ChoicePoint applauds the staff's diligence and hard work under difficult time constraints.

There are many parts of the Proposed Rule which ChoicePoint supports and endorses. For instance, the Proposed Rule requires a streamlined process for accepting requests for the free report and, consistent with FACTA, does not prescribe a process for delivery. As another example, the Proposed Rule permits each 603(w) to make its own identification determination and we believe this, too, is appropriate from both a legal and a policy standpoint.

ChoicePoint's comments to the Proposed Rule focus on six areas in which we urge the FTC to make substantive and important changes before issuing a final rule.

First, we urge the Commission to provide guidance and texture for the definition of the newly minted category of nationwide, specialty consumer reporting agencies in § 603(w) of the FCRA. Without FTC guidance and specificity, many consumer reporting agencies will be left to guess as to whether they have 603(w) status and responsibilities. Guessing wrong could be costly – very costly in an era of class action litigation.

Second, we urge the FTC to provide guidance regarding the extent and scope of a free file disclosure that must be made by a § 603(w). It is clear that the Congress had in mind specific and relatively narrow categories of consumer reporting agency activity when the Congress framed the ambit of the § 603(w) activity. The file disclosure requirement should be similarly specific and narrow.

Third, we urge the FTC to provide a one-year transition period for the streamlined process. As the FTC itself acknowledges, the way in which this requirement will unfold is "inherently uncertain". We believe that the FTC should provide for a one-year transition period, during which there are special rules, as set out below, for extraordinary volume and special rules for staggered availability.

Fourth, we urge the FTC to implement a meaningful standard for extraordinary volume that will permit 603(w)s to obtain relief from the free report requirement whenever this volume of requests is met. The Proposed Rule's standard at 200% of a 90 day rolling average is so high that it is effectively a "train wreck" standard that sets up the 603(w)s – and, therefore, consumers and the FTC – for failure.

Fifth, we believe that FACTA requires the FTC, by rule, to establish a permanent system of staggered availability unless the FTC determines, after a review of the "efficacy" of such system, that no system would, in fact, be efficacious. Specifically, we believe that a permanent system of segmenting the population eligible to request a free report from a 603(w) based upon birth month or birth quarter would be appropriate.

Sixth and finally, we urge the FTC to include in the provisions for the streamlined process restrictions on enforcement through a private right of action, including class actions. These restrictions could and should include an FTC finding that the requirements of the streamlined process have been violated; a reasonability standard for compliance with the streamlined process requirement; and safe harbor provisions for compliance with the streamlined process. The streamlined process is a creature of the forthcoming rule and, thus, its enforcement should be driven and shaped by the forthcoming rule – not by private litigants in class action law suits.

Proposed Rule § 610.1 – Definitions

1. Definition of "Nationwide Specialty Consumer Reporting Agency." Section 610.1(b)(8) of the Proposed Rule adopts the statutory definition of "nationwide specialty consumer reporting agency". FACTA added new § 603(w) of the FCRA which identifies a "nationwide specialty consumer reporting agency" as:

> "a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis relating to—
>
> (1) medical records or payments;
>
> (2) residential or tenant history;
>
> (3) check writing history;
>
> (4) employment history; or

(5) insurance claims."

Neither the Overview accompanying the Proposed Rule nor the Proposed Rule itself provides guidance regarding the definition of a 603(w) agency, which is a new concept. The concept emerged in conference, without the benefit of a legislative hearing record or any other legislative history. In light of this, it is critical that the Proposed Rule provides guidance as to the scope and meaning of this provision.

In particular, the Proposed Rule should address the meaning of the enumerated types of information that potentially trigger 603(w) status.

The language of new § 603(w) indicates that the Congress focused on types of information being compiled and maintained and not on the purpose for which information might be used. For example, § 603(w)(4) uses the term "employment history". An individual's "employment history," as the term is commonly used, consists of information pertaining to an individual's employment by one or more employers, including information such as: name of employer, dates of employment, positions held, salary, sanctions and reason that the employee left the position (if any). Only consumer reporting agencies compiling and maintaining this type of information on a nationwide basis are nationwide specialty consumer reporting agencies under new § 603(w)(4) of the FCRA.

By contrast, information compiled and maintained for use in reports for FCRA-defined "employment purposes," may include types of information other than employment history information, such as criminal history information, civil judgment information, and professional licensing information. Obviously, had the Congress intended to include this type of information within the ambit of § 603(w), they would have written the new section 603(w) very differently to make clear that the categories relate to purpose and use, not to types of records. The Congress clearly did not do so.

The Proposed Rule should also address the scope of the term "residential or tenant history information", clarifying that this provision, like all the provisions in § 603(w), relates to the subject matter of the information compiled and maintained and not to the purpose or use of the compiled information. Residential or tenant history information pertains to a person's history as a tenant (*e.g.*, payment history, damage done to rental units, breach of rental contracts, eviction) and not to any other information that may be included in tenant screening products, such as criminal history information or credit information.

In regard to tenant history information, the Proposed Rule should also make clear that § 603(w) status is not triggered simply because a consumer reporting agency compiles and maintains header information, including a consumer's current and prior addresses. Address information can be important identifying information for purposes of matching information with the consumer to whom that information pertains. The compilation of mere address history information, which does not bear on the seven

factors set forth in FCRA § 603(d), much less residential or tenant history information, should not make a consumer reporting agency into a § 603(w) nationwide specialty consumer reporting agency.

In addition, the Proposed Rule should make clear that a § 603(w) agency must compile and maintain the requisite information on a completely "nationwide" basis. The plain and literal meaning of the statutory language indicates that, in order to be a "nationwide specialty consumer reporting agency", the agency must compile and maintain files in all fifty states. An agency is not "nationwide" if it compiles and maintains files in 45 states or 30 states. FACTA's inclusion, in a different context, of the concept of "substantially nationwide" is consistent with this view and reflects the Congress' intention that "nationwide" means just that – nationwide – not "almost" nationwide or "substantially" nationwide.

Further, the Proposed Rule should define the phrase "compiles and maintains" to indicate that this does not refer to the retention of a report for audit or consumer access purposes but, rather, requires the maintenance of a database for use in producing future reports. The relevant consideration should be whether the information is "maintained" with the intent to use the report in preparation of future consumer reports. The FTC has supported this concept in the related area of file disclosures.

The Proposed Rule should also state expressly that 603(w) status is category specific. Section 603(w) status only attaches to those categories of information identified

in § 603(w)(1)-(5) which the agency compiles and maintains on a nationwide basis. Therefore, for example, a consumer reporting agency that maintains insurance claims information on a nationwide basis, but maintains tenant history or employment history on a less-than-nationwide basis, constitutes a § 603(w) agency only with respect to its insurance claims data.

Similarly, the FTC should clarify that in order to incur the obligations associated with 603(w) status, a consumer reporting agency must compile and maintain files regarding one of the designated types of information (*e.g.*, insurance claims) on a nationwide basis and that the compilation and maintenance of one type of designated information, such as insurance claims, in only twenty-five states and the compilation of employment history information only in the other twenty-five states, does not make a consumer reporting agency a "nationwide specialty consumer reporting agency."

2. Definition of "File disclosure." Section 610.1(b)(7) of the Proposed Rule defines "file disclosure" as, "a disclosure by a consumer reporting agency pursuant to section 609" of the FCRA. The FTC should revise this proposed definition to make clear that in the case of § 603(w) consumer reporting agencies, the free file disclosure pertains only to products in the category or categories of information that qualify the consumer reporting agency as a § 603(w) in the first place (*i.e.*, medical records or payments; residential or tenant history; check writing history; employment history; or insurance claims).

The structure of FCRA § 603(w) evidences clear congressional intent to regulate consumer reporting agencies that deal in only certain specified, specialized types of consumer information—the five types of information explicitly identified in § 603(w). Had the Congress intended to require the free disclosure of other categories of information, such as criminal history information or other public record information, the Congress could have and would have used very different statutory language.

The scope of required free file disclosures has important implications for 603(w) companies, as well as for consumers. ChoicePoint's FCRA-regulated insurance claims database (C.L.U.E.®), for example, consists of claims information collected directly from insurers. This information is maintained in discrete databases separate and apart from information that serves as the feedstock for other ChoicePoint information products, such as employment background checks. When a consumer requests a copy of their C.L.U.E. report, the consumer expects to receive relevant insurance claims information, not random criminal history, civil litigation, or other information that ChoicePoint may maintain in other databases. A blunderbuss approach to file disclosure would be confusing to consumers and expensive and unfair for 603(w)s.

Moreover, interpreting the free file disclosure requirement to apply to any information held by a § 603(w) would make the language in § 603(w) largely meaningless. The Congress imposed a free report requirement only on those agencies (apart from § 603(p) agencies) which compile and maintain on a nationwide basis five types of relatively discrete and specific information. The free file disclosure requirement

must relate to those five types of information. Otherwise, the categorization language is made meaningless and mutates into a broad gauged requirement to make a free disclosure of all information. Surely, if the Congress had intended such a dramatic result, they would have used different and explicit language to achieve this impact.

3. Definition of "Extraordinary Request Volume." Section 610.1(6) of the Proposed Rule sets the threshold for extraordinary request volume at 200% of the daily, rolling 90 day average of requests received. This threshold is far too high to provide meaningful relief. In fact, this threshold effectively guarantees a "train wreck". It requires nationwide specialty consumer reporting agencies to be capable of handling more than twice the number of requests that the historic data indicates are likely to be received before these agencies could receive any relief whatsoever.

The FTC's proposed 200% trigger is not consistent with the requirement in FACTA § 211(a)(2) (codified, in relevant part, as FCRA § 609(a)(1)(C)(ii)), which requires the FTC to consider the "significant demands" that may be imposed by the free report requirement, as well as "appropriate means to ensure that consumer reporting agencies can satisfactorily meet those demands." The proposed 200% threshold is certainly not an "appropriate means" of ensuring that consumer reporting agencies can satisfactorily meet the demands imposed on them.

A more appropriate threshold for extraordinary request volume would be 110%. This standard would require covered consumer reporting agencies to maintain a

reasonable level of excess capacity to handle day-to-day demand surges, while still providing the agencies with meaningful surge protection. This standard would not force § 603 agencies to hire staff and otherwise build an infrastructure that inevitably results in wasteful and costly overcapacity. A 110% standard builds in a prudent capacity for surges without distorting normal marketplace planning and economics.

Proposed Rule § 610.3(a) – Streamlined Process Requirements

ChoicePoint applauds the FTC for permitting each 603(w) to establish its own "streamlined process". Given the heterogeneity among the 603(w)s and FACTA's references to "each" 603(w), we believe that this is the right approach, both as a legal and practical matter.

ChoicePoint also supports the Proposed Rule's requirement that the streamlined process covers accepting file disclosure requests, not the delivery of those disclosures. FACTA § 211(a) requires the FTC to prescribe regulations for a streamlined process, "for consumers to request consumer reports…" (emphasis added).

We also support the Proposed Rule's requirement that the toll-free telephone number provide clear and prominent instructions for requesting disclosures to be made by mail. Any means of disclosure of a free report, other than by mail, carries a risk of misidentification and identification fraud, or requires the use of an inappropriately expensive means of identification verification.

Proposed Rule § 610.3(a)(1)(iii), however, would require a 603(w) agency to post the required toll-free number "clearly and prominently" on "any Web site owned or maintained by the nationwide specialty consumer reporting agency, along with instructions for requesting disclosures by mail and by any additional available request methods."

Application of the requirements of this provision to "any Web site owned or maintained" by the § 603(w) is far too broad. ChoicePoint, for example, owns and/or maintains dozens of Web sites. This includes many business-to-business sites and many sites directed to ChoicePoint's government customers. It also includes many consumer sites which have nothing to do with our C.L.U.E. insurance claims product or, for that matter, even consumer reports. To mandate the posting of information relating to the streamlined source and related procedures on these sites is not only an unnecessary burden on the 603(w)s, it is also potentially confusing to consumers who may mistakenly believe that the streamlined process and attendant rights apply to products and services when, in fact, that is not the case. In addition to consumer confusion, this approach may also stir up artificial demand, thereby frustrating consumers and burdening 603(w)s with inappropriate requests. In turn, this may diminish the ability of the 603(w)s to process genuine inquiries.

§ 610.3(a)(2)(iii)(A) would require 603(w) agencies to "[p]rovide information on the status of the consumer's request while the consumer is in the process of making a request." This provision should be deleted. First, its meaning is unclear. Second, to the extent that it would require a 603(w) to advise a consumer of the status of a consumer report requested and delivered by mail, it is burdensome and unworkable. FACTA nowhere imposes such a requirement. Ironically, requests for consumer reports based on real need (adverse action or fraud), as opposed to mere curiosity, are not subject to any type of "progress report" requirement. It's one thing for the Congress by statute to require a free report. It's quite another thing for the FTC, unilaterally and without express statutory authorization, to impose a new and burdensome "progress report" requirement.

Proposed Rule §610.3(b) – Requirement to Anticipate

Section 610.3(b) of the Proposed Rule requires nationwide specialty consumer reporting agencies to implement reasonable procedures to anticipate, and respond to, the number of consumers who will request, or attempt to request the free annual disclosure. As a part of the anticipation requirement, the Proposed Rule further requires 603(w) agencies to develop contingency plans to predict any variety of man-made and natural disasters.

This requirement should be removed and replaced by a customary "fair and reasonable" provision, which relieves 603(w) agencies of the free report requirement when *force majeure* makes it impossible to deliver reports. It is reasonable to require covered consumer reporting agencies to build adequate capacity. It is unreasonable, however, to require that the streamlined process, which is a vehicle for the provision of what is essentially a curiosity report, be prepared to respond to natural disasters, terrorist attacks, breakdowns in the national telecommunications infrastructure or blackouts, all of which are beyond the control of the consumer reporting agency.

Proposed Rule § 610.3(g) – Extraordinary Request Volume and the Transition Period

The Proposed Rule's transition standard is inadequate and needs to be revised significantly to provide for a staggering of consumer eligibility for the free annual disclosure requirement over a one-year period. A staggered roll-out would help reduce the possibility that § 603(w) agencies will be overwhelmed by consumer requests from throughout the nation. We also suggest that the FTC provide the 603(w)s with options for dealing with "high request volumes", as the Proposed Rule provides for the 603(p) agencies. We believe that the final rule should give the 603(w)s as many options as possible to manage an upcoming level of consumer demand, which the FTC itself recognizes to be "inherently uncertain." 69 Fed. Reg. 13198.

The transition relief proposed by the FTC is simply that 603(w)s "will be excused from [the adequate capacity] requirement during the first three months after the rule is effective when experiencing extraordinary request volume of more than twice the anticipated request volume. After February 28, 2005, extraordinary request volume will be calculated as twice the rolling 90-day average." 69 Fed. Reg. 13200. From this language, it appears that the FTC's intent is that the sole transition relief for 603(w)s is that for the first 90 days of operation, the capacity of the 603(w)s to respond to consumer requests through the streamlined process may be a fixed capacity based on the volume reasonably anticipated prior to the launch of the streamlined process on December 1.

We urge the FTC to revise the Proposed Rule to provide for a one-year transition period, beginning on December 1, 2004. As discussed below, there should be a birth month or birth quarter roll-out of the free report requirement over this one year period.

The FTC states in the Overview that the Proposed Rule, "outlines a transition for the streamlined process that is more limited than that for the centralized source, due to the more limited requirements imposed on nationwide specialty consumer reporting agencies compared to those imposed on nationwide consumer reporting agencies." 69 Fed. Reg. 13200. We believe that this statement is fundamentally incorrect. While the Proposed Rule, in accordance with FACTA, mandates that the 603(p)s operate multiple means of facilitating consumer requests, the core requirement at issue in the Proposed Rule—free file disclosures—is the same for both the 603(w)s and the 603(p)s. Like the 603(p) consumer reporting agencies, it is possible that the 603(w)s will be required to make

significant numbers of disclosures. Further, the 603(w) agencies also potentially face significant demands and costs to comply with follow-up inquiries and reinvestigation requests from consumers.

Furthermore, even if the FTC's statement turns out to be correct, it still would be an inappropriate basis for fashioning a transition rule for the 603(w)s. Congress, in FACTA § 211(a)(2) (codified, in relevant part, as FCRA § 609(a)(1)(C)(ii)), instructed the FTC to consider "the significant demands that may be placed on consumer reporting agencies in providing such consumer reports" and "appropriate means to ensure that consumer reporting agencies can satisfactorily meet those demands, including the efficacy of a system of staggering the availability to consumers of such reports."[1] The relative FCRA burden of a § 603(w) consumer reporting agencies as opposed to a § 603(p) agency is not an identified or appropriate assessment criteria.

As noted above, it is imperative that the FTC implement a system of staggered availability for consumer access to the free annual disclosure. ChoicePoint, by way of example, maintains approximately 257 million loss records in our C.L.U.E. databases. We estimate that these loss records represent approximately 100 million consumers. C.L.U.E. is the leading product of its kind in the nation and is well known to consumers. Media outlets, consumer groups, and some business groups can be expected to publicize the free report requirement, mentioning C.L.U.E. specifically.

[1] Consideration of ease of consumer ability to request free annual disclosures is a third factor to be considered.

Prematurely rushing out the free annual disclosure requirement runs a risk of inadequate capacity. If there is inadequate capacity, consumers likely will be confused, frustrated, and even angry. They may view the free annual disclosure guaranteed by FACTA beginning on December 1 as illusory. Further, if the roll-out scheme collapses in the face of extensive public demand (potentially even on its first day), this will benefit no one – not consumers, not the FTC, and certainly not the § 603(w)s which, undoubtedly, will be subject to media, public, and advocate criticism.

Proposed Rule § 610.3 – Permanent System of Staggered Availability

Staggering, both in a transition period and permanently, would significantly reduce the potential number of consumers that would be eligible to request their reports at any one time. FACTA, as noted above, specifically requires the FTC to consider the efficacy of staggering systems in its evaluation of ways to ensure the ability of § 603(w)s to comply with their new obligations. The overview to the Proposed Rule, however, suggests that the FTC, to the extent it considered such systems at all, only considered them in terms of the FTC's perception of the ease by which consumers could request their reports and not the efficacy of such systems for ensuring the ability of covered consumer reporting agencies to comply with the demands placed upon them.

Furthermore, to the extent the FTC may have considered the issue, the Overview to the Proposed Rule states that "there is no basis for concluding ongoing staggering of the availability of annual file disclosures is necessary." 69 Fed. Reg. 13196. The

standard is not one of "necessity". Rather, FACTA requires the FTC to evaluate staggering as a means "to ensure" that the 603(w)s will be able to comply with the new FACTA free annual disclosure requirement. Staggered availability of free annual reports to consumers will help the 603(w) agencies to spread consumer demand for the free disclosure over the course of the year.

We believe that the staggering system is most efficacious by birth month (or quarter), not geography. A geographical limitation carries too much risk that local media coverage will create artificial demand. By contrast, consumers are well accustomed to managing opportunities and requirements based upon their birth date (drivers' license renewal is a prime example).

Private Right of Action

Demand for the free annual disclosures to be made through the streamlined process established by the Proposed Rule is, as the FTC concluded, "inherently uncertain." 69 Fed. Reg. 13198. Given this level of uncertainty, it is essential that the FTC take steps to ensure that the Proposed Rule does not operate in such a way as to invite needless litigation. To do so, the FTC should include in the Proposed Rule a provision predicating enforcement on FTC findings of a violation of the streamlined process; include a provision permitting substantial or reasonable compliance with the technical aspects of the Proposed Rule (such as the Proposed Rule's streamlined process

requirements and duty to accept or redirect requests); and include a safe harbor for specified compliance strategies.

The streamlined process is a creature of the Proposed Rule. Thus, it is appropriate that enforcement of the Proposed Rule be addressed in the Proposed Rule. Because the whole concept of a free report and specialty nationwide consumer reporting agencies is new, it is appropriate that the Proposed Rule limit the circumstances under which a 603(w) agency is at risk of a private right of action, including class actions.

Conclusion

We appreciate the FTC's consideration of this submission. Where appropriate, ChoicePoint will be pleased to participate in any further aspects of this rule making proceeding.

Very Truly Yours,

ChoicePoint Inc.