



October 20, 2004

*Via Electronic Filing*

Mr. Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, DC 20549-0609

**Re: Proposed Rule: Disposal of Consumer Report Information; Release Nos. 34-50361; IA-2293; IC-26596; File No. S7-33-04**

Dear Mr. Katz:

The Investment Counsel Association of America<sup>1</sup> appreciates the opportunity to comment on the Commission's proposed amendments to the safeguard rule<sup>2</sup> under Regulation S-P<sup>3</sup> that implement the provision in the Fair and Accurate Credit Transactions Act of 2003 (FACT Act)<sup>4</sup> requiring proper disposal of consumer report information and records.<sup>5</sup>

The proposal would require that registered investment advisers<sup>6</sup> properly dispose of consumer report information or any compilation of consumer report information for a business purpose by taking reasonable measures to protect against the unauthorized access to

---

<sup>1</sup> The Investment Counsel Association of America, Inc. is a not-for-profit organization that represents the interests of SEC-registered investment advisory firms. Founded in 1937, the ICAA's membership today consists of about 350 federally registered advisory firms that collectively manage in excess of \$4 trillion for a wide variety of individual and institutional clients. Additional information about the ICAA is available on our web site: [www.icaa.org](http://www.icaa.org).

<sup>2</sup> 17 C.F.R. § 248.30.

<sup>3</sup> 17 C.F.R. §§ 248.1 - 248.30 (implementing Title V of the Gramm-Leach-Bliley Act of 1999, 15 U.S.C. 6801-6831).

<sup>4</sup> Pub. L. No. 108-159, § 214, 117 Stat. 1952 (2003). The FACT Act amended the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681-1681x.

<sup>5</sup> *Proposed Rule: Disposal of Consumer Report Information*, SEC Rel. Nos. 34-50361; IA-2293; IC-26596; File No. S7-33-04 (Sept. 14, 2004) (Proposal).

<sup>6</sup> In addition to registered advisers, the proposed amendments would apply to brokers and dealers (other than notice-registered broker-dealers), investment companies, and registered transfer agents.

or use of the information in connection with its disposal (the disposal rule).<sup>7</sup> The proposal also would require that the policies and procedures that protect customer information under Regulation S-P's safeguarding rule (the safeguard rule) be in writing.<sup>8</sup>

The ICAA supports the Commission's effort to implement rules in compliance with the FACT Act to protect consumer report information and customer information. However, we write to request that the Commission: (1) revise the proposed definition of "consumer report information" in the disposal rule; (2) refrain from proposing to amend the safeguard rule to require specific elements, such as those elements required by the Federal Trade Commission's safeguard rule (FTC rule);<sup>9</sup> and (3) adopt a compliance date of 180 days for the proposed amendments.

#### 1. Proposed Definition of "Consumer Report Information"

The Commission proposed to define "consumer report information" to mean "any record about an individual, whether in paper, electronic or other form, that is a consumer report or is derived from a consumer report."<sup>10</sup> The Commission seeks comment about the proposed definition, including whether it should be further clarified.<sup>11</sup>

We believe the definition could be written more precisely to confirm that "information that is derived from consumer reports but does not identify any particular individual would not be covered under the proposed rule."<sup>12</sup> As the Commission noted in the Proposal, "[l]imiting 'consumer report information' to *information that identifies particular individuals* is consistent with current law relating to the scope of the term 'consumer report' under section 603(d) of the FCRA and with the purposes of section 216 of the FACT Act." (emphasis added).<sup>13</sup> While we understand the Commission may have sought to express this concept by including the reference to a record "about an individual," we believe the definition could more clearly achieve consistency with the FCRA. Accordingly, we respectfully request the Commission amend the definition of "consumer report information" to mean "any record ~~about~~ that personally identifies an individual, whether in paper, electronic or other form, that is a consumer report or is derived from a consumer report." The phrase "personally identifies" more clearly indicates that consumer report information must identify a particular individual than does the phrase "about an individual."

---

<sup>7</sup> Proposed 17 C.F.R. § 248.30(b)(2).

<sup>8</sup> Proposed 17 C.F.R. § 248.30(a).

<sup>9</sup> See Proposal at p. 9; *see also*, 16 C.F.R. §§ 314.3(a), 314.4 (FTC rule).

<sup>10</sup> Proposed 17 C.F.R. § 248.30(b)(1)(ii).

<sup>11</sup> Proposal at p. 4.

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

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

## 2. Elements for Safeguard Rule

The Commission requests comment on whether it should propose to amend the safeguard rule to require certain elements.<sup>14</sup> We respectfully submit that an amendment to require specific elements of an adviser's safeguarding program is unnecessary in light of (1) the Commission's proposal that safeguard policies and procedures be written, and (2) the new compliance program rule, rule 206(4)-7 under the Investment Advisers Act of 1940.

First, the Commission is proposing to require that policies and procedures under the safeguard rule must be written.<sup>15</sup> Written policies and procedures will help ensure protection for customer records and information. Documenting policies and procedures should assist those advisers whose policies and procedures are not currently written to satisfy their obligations under the safeguard rule.<sup>16</sup>

Second, the compliance program rule obligated advisers by October 5, 2004 to implement written policies and procedures reasonably designed to prevent violation of the Advisers Act by the adviser or its supervised persons. The SEC has construed this rule to include policies and procedures to safeguard the privacy protection of client records and information under Regulation S-P.<sup>17</sup> Therefore, the written safeguarding policies and procedures advisers implement and maintain will receive the benefit of the compliance program rule.

The compliance program rule requires that an adviser's chief compliance officer administer and enforce the firm's compliance policies and procedures. An adviser's policies and procedures should be designed to prevent violations from occurring, to detect violations that did occur, and to correct these violations promptly.<sup>18</sup> As the Commission noted, this should include testing and assessing the effectiveness of policies and procedures.<sup>19</sup> In addition, the compliance program rule requires advisers to conduct an annual review to

---

<sup>14</sup> Proposal at p. 9.

<sup>15</sup> *Supra* n. 8; Proposal at p. 8. The safeguard rule requires advisers to adopt policies and procedures that address administrative, technical, and physical safeguards for the protection of customer records and information. The policies and procedures must be reasonably designed to: (a) insure the security and confidentiality of customer records and information; (b) protect against any anticipated threats or hazards to the security or integrity of customer records and information; and (c) protect against unauthorized access to or use of customer records or information that could result in substantial harm or inconvenience to any customer. 17 C.F.R. § 248.30.

<sup>16</sup> The Commission notes that its examinations of large organizations found that the organizations already have written safeguard policies and procedures in place that "generally address procedures at several levels, going from an organization-wide policy statement down to detailed procedures addressing particular controls." The Commission further noted that this "comprehensive approach to safeguarding is consistent with widely accepted standards adopted by government and private sector standard-setting bodies and professional literature and generally leads to reasonable policies and procedures." Proposal at p. 8.

<sup>17</sup> See *Final Rule: Compliance Programs of Investment Companies and Investment Advisers*, SEC Rel. Nos. IA-2204; IC-26299; File No. S7-03-03 (Dec. 17, 2003) at n.21 and accompanying text.

<sup>18</sup> *Id.* at p. 5.

<sup>19</sup> *Id.* at n. 15.

evaluate the adequacy and effectiveness of their policies and procedures. This should include considering all policies and procedures, including those regarding safeguarding customer information, in response to any compliance matters, material business changes, or other appropriate circumstances that might suggest a need to revise the policies and procedures.<sup>20</sup> These requirements are comparable to the elements specified in the FTC rule (*e.g.*, designating a responsible employee, assessing risks, testing controls, and evaluating the program).

There is no evidence that any additional regulatory requirements are necessary, nor any basis to believe the safeguard and compliance rules together are insufficient to achieve the objectives sought. Thus, we respectfully request that the Commission refrain from proposing specific, required elements to be included within the adviser's safeguard rule. Rather, the Commission should evaluate the effectiveness of the newly implemented compliance rule, in conjunction with the requirement for written policies and procedures under the safeguard rule, to determine whether the flexibility provided by the compliance rule achieves the Commission's objectives.

### 3. Compliance Date

We noticed the Commission did not propose a date by which compliance with the proposed amendments to Regulation S-P would be required. Advisers need a meaningful opportunity to analyze and evaluate how the disposal rule requirements will be worked into their current compliance program, including evaluating whether and how the rule applies to their current business practices. Therefore, we respectfully request the Commission adopt a compliance date 180 days from the date the adopting release is published in the Federal Register.

\* \* \*

We appreciate your consideration of our comments and would be pleased to provide any additional information. Please do not hesitate to contact the undersigned or ICAA General Counsel Karen Barr to discuss any questions the Commission or its staff may have.

Sincerely,



Monique S. Botkin  
ICAA Counsel

---

<sup>20</sup> *Id.* at p. 10.