January 8, 2004

By Electronic Delivery

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Attention: Docket No. R-1172

Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Attention: Project No. P044804

Re: Interim Rules for the FACT Act

Ladies and Gentlemen:

This comment letter is submitted on behalf of Wells Fargo & Company ("Wells Fargo") in response to the joint Interim Final Rules ("Interim Rule") promulgated by the Board of Governors of the Federal Reserve and the Federal Trade Commission (collectively, the "Agencies"). The Interim Rule established the effective dates for those provisions of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act") that determine the relationship between state law and the Fair Credit Reporting Act ("FCRA") and for those provisions that authorize agency rulemakings or other implementing agency action. Wells Fargo supports the Agencies' determination that December 31, 2003 is the appropriate effective date for section 711(3) of the FACT Act. Section 711(3) removes the sunset on the existing FCRA preemption provisions. Wells Fargo also supports the Agencies' determination that December 31, 2003 is the appropriate effective date for the provisions of the FACT Act authorizing rulemakings or other agency implementing actions that do not include a specified effective date. Wells Fargo appreciates the opportunity to comment on this very important matter.

Wells Fargo is a diversified financial services company which includes national banks, a mortgage company, a consumer finance company, securities brokerage, investment advisors and insurance agencies.

Preventing the Sunset of the Existing FCRA Preemption Provisions is Essential

The Interim Rule establishes December 31, 2003 as the effective date for section 711 of the FACT Act, pursuant to the Act's directive requiring the Agencies to prescribe joint regulations establishing effective dates for the provisions of the Act for which no effective date is specified. Section 711(3) of the FACT Act permanently reauthorizes the existing FCRA preemption provisions scheduled to sunset on January 1, 2004. The Agencies adopted the Interim Rule without advance notice or public comment because the Agencies believed that "[d]elaying final action on these provisions of the FACT Act would undermine the purpose of these provisions and is likely to provoke substantial confusion about the applicability of some state laws in areas that Congress has determined should be governed by uniform nationwide standards.

Wells Fargo strongly supports the Agencies' determination that December 31, 2003 is the appropriate effective date for section 711(3) in order to prevent the sunset of the existing FCRA preemption provisions. Any delay in final action that would allow the existing FCRA preemption provisions to sunset, even briefly, would be antithetical to the clear intent of Congress. The legislative history of the FACT Act demonstrates clearly that Congress intended to remove the sunset provision applicable to the existing FCRA preemption provisions and to permanently reauthorize these preemption provisions. Wells Fargo believes that these existing preemption provisions help to preserve and strengthen efficient national credit markets. Moreover, given the close proximity between the enactment of the FACT Act and the impending sunset date for the existing FCRA preemption provisions, it would be impractical for the Agencies to provide a notice and comment period before establishing the effective date for this section. Accordingly, the Interim Rule, which establishes December 31, 2003 as the effective date for the existing FCRA preemption provisions scheduled to sunset on January 1, 2004, is clearly appropriate.

A Uniform National Standard for Other Preemption Provisions is Also Important

The Interim Rule also establishes December 31, 2003 as the effective date for the provisions of the FACT Act designed to prevent or mitigate the effects of identity theft, as set forth in section 711(2), and for the additional preemption provisions in sections 151(a)(2), 212(e), 214(c) and 311(b) of the Act. Wells Fargo also believes that the potential uncertainty that could arise concerning when existing state laws, and states laws that will soon become effective, are preempted underscores the importance of establishing a clear effective date for these provisions as well.

Existing State Laws Present Multiple Compliance Requirements

Several states currently have existing laws that address subject matters covered, and conduct required, by the FACT Act. For instance, section 15l(a)(1) of the FACT Act requires a business entity to provide victims of identity theft with records of transactions that the consumer alleges to be the result of identity theft in certain instances. California, Louisiana and Washington also currently have statutes addressing the subject matter covered by Section

l51(a)(1). These state laws provide identity theft victims with a statutory right to receive application and transactional information from an entity that conducted an unauthorized an unauthorized transaction based upon information derived from identity theft. Section 112 of the FACT Act provides consumers with the right to include a fraud alert on their consumer report. Yet, California, Louisiana and Texas currently have statutes addressing the conduct required by section 112. These state laws provide consumers with a statutory right to require that a security alert be included in their consumer reports in order to notify users of these reports that the consumer may have been a victim of identity theft. Section 152 of the FACT Act allows consumers to block the reporting of information that resulted from identity theft, while Connecticut and Washington currently have statutes addressing the conduct required by section 152. These state laws provide consumers with a statutory right to prevent consumer reporting agencies from reporting any information on a consumer report that was the result of identity theft. Wells Fargo believes that institutions, which currently are in compliance with these state statutes, will either continue to comply with these statutes until the institutions implement compliance with the new provisions of the FACT Act that supersede these state requirements, or will begin to comply with the corresponding FACT Act provisions as soon as they are able to do so, provided that state law does not effectively prevent early compliance.

Future State Laws Also Will Present Multiple Compliance Requirements

Additional state statutes have or shortly will become effective and regulate subject matters covered, and conduct required, by the FACT Act. These state statutes will impose a significant compliance burden on institutions if the institutions must prepare and implement compliance procedures to comply with the state statutes, while at the same time establishing business procedures that will bring their procedures into compliance with the uniform national standards established by the FACT Act.

For example, effective January 1, 2004, California Senate Bill 602 requires a credit card issuer who receives a request for a replacement card that is associated in time with a change of address to send a notification of this change of address to the cardholder's previous address. This state law requirement addresses conduct that will be governed in detail by section 114 of the FACT Act concerning "red flag" guidelines. Furthermore, California Senate Bill 25, operative on July 1, 2004, will impose obligations on any user of a consumer report that contains a security alert to verify the consumer's identity before engaging in certain transactions. This state law requirement addresses conduct governed by section 112 of the FACT Act concerning fraud alerts. Moreover, effective January 1, 2005, California Senate Bill 27 will require a business that discloses customer-related information to an affiliate for direct marketing purposes to provide the customer, upon request, with detailed information regarding the affiliate and the information disclosed. This state law requirement addresses subject matter covered by both the existing FCRA affiliate sharing provision and section 214(c) of the FACT Act concerning the use of information from affiliates for marketing solicitation purposes. Also, effective January 1, 2004, Illinois House Bill 2188 requires credit card issuers to take steps to verify an applicant's change of address request if the card issuer receives an application with an address different from the

address in the consumer report obtained in connection with that application. This state law requirement addresses conduct that will be required under the FACT Act's "red flag" guidelines.

These state statutes will unnecessarily create substantial compliance burdens for institutions. While institutions prepare to comply with the FACT Act's uniform national standards, they also will be required to prepare and implement procedures to comply with the varied state standards. Furthermore, other states may enact additional statutory requirements that would impose an even greater compliance burden on institutions. Thus, the date on which the FACT Act preemptions will begin to preempt state laws is critical to financial institutions that must prepare their business procedures to comply with federal and/or state laws.

A comparison of the requirements of the FACT Act's "red flag" guidelines and California Senate Bill 602 demonstrates the difficulties that arise when an institution is required to prepare regulatory compliance procedures for two different standards simultaneously. Effective January 1, 2004, California Senate Bill 602 requires issuers of credit cards, who receive change of address requests within 60 days before or after a request has been made for a replacement card, to send a change of address notification to the cardholder's previous address of record. The FACT Act requires federal agencies to prescribe regulations applicable to issuers of credit cards and debit cards to ensure that a card issuer who receives a request for an additional or replacement card for an existing account, within a short time after receiving notification of a change of address for the same account (the statute specifies that this period must be at least 30 days), will follow reasonable policies and procedures to ensure that the additional or replacement card is not issued to an identity thief.

To comply with both the federal and California requirements concerning requests for additional cards, the card issuers must develop different compliance procedures. For example, in order to comply with the California law, card issuers must establish business procedures that would identify additional card requests that come either *before* or *after* the receipt of a change of address request; and these procedures must be implemented while those same card issuers prepare procedures to comply with the federal requirement that will only require the request for an additional card to come within 30 days *after* the change of address notification. Therefore, in order to meet the California law, card issuers cannot focus their monitoring only on those instances where an additional card is requested within 30 days after a change of address request has been received—the procedure that must be used to comply with the federal requirement. Instead , the card issuer must implement a procedure to search for past requests for additional cards as well. Such an additional procedure will not be necessary when the federal preemption is in force. Furthermore, card issuers must implement a specific statutory procedure to notify consumers of the change of address request, in order to comply with the California law. The federal standard, however, is more flexible; the card issuer will be able to use "other means of assessing the validity of the change of address," without providing such notification to the consumer. Moreover, an institution that must prepare and implement compliance procedures with multiple standards will incur unnecessary costs, a result that Congress sought to prevent by preempting state laws regulating subject matters covered and conduct required by the FACT Act.

Alternatively, an institution confronted with different state requirements before the federal law comes into effect may, in some instances, attempt to implement the most stringent state standard, in order to minimize compliance costs and errors through the application of a single compliance program and to provide uniform procedures for all customers. This approach may be particularly attractive where the most stringent state is large and also encompasses a substantial customer base. In effect, the state standard would then become the de facto national standard until federal preemption takes effect. This result clearly would be inconsistent with the intent of Congress in passing the FACT Act to establish the identity theft requirements of the FACT Act as a uniform national standard for specific subject matters covered, and conduct required, by the Act. Even this efficiency may not be available, however, where state laws are so incompatible with each other as to preclude a single uniform compliance program.

Preemption of Marketing Solicitations Based on Affiliate Information and Risk-Based Pricing Notices

Wells Fargo believes that December 31, 2003 is clearly the appropriate effective date for the preemptions provided by the FACT Act for the new requirements concerning marketing solicitations based on affiliate information (section 2l4(c)) and risk-based pricing notices (section 311(b)). These sections of the FACT Act expand upon existing FCRA requirements that currently preempt state laws. Wells Fargo believes that the subject matter covered by these two provisions is covered by the existing FCRA preemptions on affiliate sharing and adverse action notice and that the new FACT Act preemptions were added merely for clarity. Accordingly, Wells Fargo believes that because the extension of the existing FCRA preemptions took effect on December 31, 2003, these sections clarifying the existing FCRA preemption provisions also must preempt state laws effective December 31, 2003.

Agency Rulemaking or Implementing Action Provisions

The Interim Rule establishes December 31, 2003 as the effective date for those provisions of the FACT Act that authorize agency rulemakings or authorize other implementing agency action but do not include an effective date (collectively, "Rule Writing Provisions"). The Agencies adopted the Interim Rule without advance public notice or comment because the Agencies believed that "[e]stablishing an early effective date for these regulatory provisions would allow the agencies to begin immediately to perform their responsibilities under the FACT Act. The Agencies state that establishing the effective date for the Rule Writing Provisions has no effect on the substantive provisions that will be implemented by the agency action. Wells Fargo supports the Agencies' determination that December 31, 2003 is the appropriate effective date for the Rule Writing Provisions. As most provisions of the FACT Act must become effective within one year of enactment, it is necessary for the agencies to begin the rule-writing process immediately. Accordingly, the Interim Rule that establishes December 31, 2003 as the effective date for the Rule Writing Provisions, without advance public notice or comment, is clearly appropriate.

In promulgating the Interim Rule, the Agencies also note that for those provisions of the FACT Act that require an agency to issue a regulation or take other implementing action, within a certain period following enactment, that "no joint regulations under section 3 of the FACT Act are required to make these provisions effective. This determination is based on the Agencies' belief that Congress specified "the date of enactment as the lawful effective date because that is the predicate for mandating that an agency action be performed within a specified period of time after the date of enactment." Wells Fargo supports this determination. Wells Fargo believes the Agencies' decision that there is no need to establish an effective date for these provisions is appropriate.

In conclusion, Wells Fargo believes that December 31, 2003 is the appropriate effective date for section 711(3) of the FACT Act, which removes the sunset on the existing FCRA preemption provisions, for the additional preemption provisions added by the FACT Act for marketing solicitations based on affiliate information (section 214(c)) and risk-based pricing notices (section 311(b)), and for the Rule Writing Provisions. Wells Fargo also believes that the potential uncertainty and unnecessary compliance burden that could arise concerning when existing state laws, and state laws that will soon become effective, are preempted underscores the importance of the Agencies establishing appropriate effective dates for preemption of state laws for the corresponding federal provisions. Wells Fargo appreciates the opportunity to comment on this important topic. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact me, at (415) 396-0940.

Sincerely,

/s/ PETER L. MC CORKELL

Peter L. McCorkell
Senior Counsel