From: no-reply@erulemaking.net on 12/28/2007 02:55:02 PM

Subject: Fair Credit Reporting Act Guidelines

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Public Comments on Interagency Notice of Proposed Rulemaking: Procedures To Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act:

Title: Interagency Notice of Proposed Rulemaking: Procedures To Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act
FR Document Number: E7-23549
Legacy Document ID:
RIN: 1557-AC89
Publish Date: 12/13/2007 00:00:00
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General Comment:I am a banker with more than 30 years lending experience, the majority of which has been spent as the senior lender in regional and community banks. For more than 10 years I have worked as a banking consultant assisting banks with lending issues. Our firm has worked with more than 90 client banks in seven states. The following comments are offered for your consideration regarding the proposed Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act.

Under the proposed language regarding accuracy and integrity regulations, the Guidelines Definition Approach in the proposed revision to the FACT Act, as well as in the Interagency Guidelines revision, defines ?accuracy? to mean that ?any information that a furnisher provides to a CRA about an account of other relationship with the consumer reflects without error the terms of and liability for the account or other relationship and the consumer?s performance or other conduct with respect to the account or other relationship.? The term ?without error? is of concern, as banks are targets for litigation. I am familiar with a bank that is accused of forcing a borrower into bankruptcy for the erroneous reporting of

one loan having been one time over 30 days late and another loan erroneously reported as 60 days late. Within days of the first occurrence, the bank identified the error prior to the borrower?s knowledge, notified the credit reporting agencies to correct the error (both by facsimile and by letter), and provided written notification to the borrower. The error was promptly corrected by all credit reporting agencies and the credit reports updated to reflect accurate information. The second reporting error involved a different loan and occurred some time later. That error was not identified by the bank or reported to the bank by the borrower prior to the loan being paid off a few months later. The borrower subsequently filed for bankruptcy and has sued the bank for a substantial sum, claiming these two reporting errors forced him into bankruptcy. While the borrower generally has a clean credit history otherwise, further investigation reveals subprime mortgage lenders made loans on rental properties based upon unverified income that resulted in a Debt/Income Ratio exceeding 100%. The bank has been forced to spend a significant amount defending itself. It should be noted that at the time the errors occurred, the bank had total assets of approximately $30 million and approximately 15 employees.

The words ?without error? are of concern. The purpose of the regulation is to make every effort to eliminate errors in credit reporting. Care should be taken to ensure that the proposed language does not result in a bank being in violation of the law for an honest mistake that is promptly corrected. If community banks cease reporting in order to eliminate the risk of litigation over an honest mistake, credit information used in the credit decision process will be compromised. For these reasons, use of the version that does not contain the words ?without error? is recommended.

HSBC

VIA ELECTRONIC MAIL

February 11, 2008

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Re: Interagency Notice of Proposed Rulemaking
Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the FACT Act

Ladies and Gentlemen:

In response to the interagency notice of proposed rulemaking, HSBC Finance Corporation[1], and HSBC Bank USA, N.A., (collectively "HSBC"), are pleased to offer comment

[1] Among other companies, HSBC Finance Corporation wholly owns HSBC Auto Finance Inc., HSBC Consumer Lending (USA) Inc., Beneficial Company LLC, HSBC Mortgage Services Inc., HSBC Card Services Inc., HSBC Bank Nevada, N.A., and HFC Company LLC.

on the procedures to enhance the accuracy and integrity of information furnished to Consumer Reporting Agencies ("CRAs") under section 312 of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"). HSBC's affiliated companies worldwide serve over 125 million customers and comprise one of the largest financial services organizations in the world. In the United States and Canada, HSBC businesses provide financial products to nearly 60 million customers. With such a broad and expansive customer base, HSBC is a significant furnisher of information to CRAs, providing information on roughly 45 million accounts monthly.

Section 312 of the FACT Act amends section 623 of the Fair Credit Reporting Act ("FCRA"). Section 623 of the FCRA currently sets forth many of the responsibilities of furnishers of information to CRAs. While there are a number of requirements applicable to furnishers under section 623, those addressed by section 312 include (A) accuracy and integrity guidelines and regulations concerning the information furnished, and (B) direct dispute regulations.

The request for comment issued by the Office of the Comptroller of the Currency, the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Trade Commission (collectively, the "Agencies") outlines specific information desired by the Agencies. HSBC appreciates the opportunity to respond to the Agencies' request, and hopes the following information proves useful to the Agencies in their consideration of the proposed rule.

1. HSBC Relies on Credit Reports as a Furnisher and as a User of Credit Reports

HSBC understands and acknowledges the necessity for accurate credit reports of the highest integrity, because HSBC is not only a furnisher of information but also an end user of the finished product, i.e. the credit report. Indeed, HSBC's consumer lending businesses rely upon a credit adjudication system that assumes authentic scoring of applicants based on multiple furnisher trade lines in their consumer credit reports. As a result, HSBC and other lending businesses collectively rely on the accuracy, completeness, and timeliness of the information supplied by every lending institution to the CRAs. Just as consumers benefit from an accurate credit report, so do all lenders. Having reliable credit reports is paramount in the economic success of the financial services industry and the nation's economic health.

2. Credit Reporting Agencies, Furnishers, and Users of Consumer Reports are Independent Entities with Distinct Obligations

HSBC notes generally that it, like other furnishers of information, is only in control of the specific information it furnishes to a CRA, and not other information maintained or collected by the CRAs. CRAs are not affiliated with HSBC or other lenders. Each CRA maintains its own internal rules and policies for the maintenance of customer data. Items that help to shape their operations include FCRA requirements for data retention and identification of a consumer. While most data providers and CRAs work together to establish appropriate reporting protocols and summary reports, in effect, most CRAs are self-defining in how they actually post data. This

results in the effect that each CRA may report the same information in different ways. Also, data may appear differently than originally furnished.

Additionally, HSBC strongly requests the Agencies to avoid making furnishers responsible for the conduct of others in any way. As an example, we would request the Agencies to avoid any references in the final rule to information that is "reported." We are concerned that the Agencies adequately distinguish between "furnished" information (information from furnishers) and "reported" information (the translation of furnished information appearing on a consumer report). We are also concerned about references in the proposal to information that, while accurate as furnished, "may be erroneously reflected" on a consumer report. Certain provisions of the proposed rule would seem to put a furnisher at risk regarding how furnished information (and even unreported information) is ultimately interpreted by a subjective end user. This includes references to how otherwise accurate furnished information (or lack of information) "contributes to an incorrect evaluation" by a user or "bears on creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" in the estimation of a user of consumer reports. These references are not required by Section 312 of FACTA and are not appropriate.

HSBC asks that the Agencies recognize the reasonable limitations on a furnisher of information when drafting final rules. HSBC respectfully requests that the Agencies not create liability for furnishers with respect to either (a) how furnished information is translated by a CRA or (b) how an end user might subjectively evaluate furnished (or unfurnished) information, as reported by a CRA, within its unique credit risk modeling.

3. <u>The Agencies Should Adopt the Guidelines Definition Approach</u>

Initially, the Agencies ask for comment as to whether the term "accuracy" should specifically provide that it includes updating information as necessary to ensure that information furnished is "current." It is not clear that such a clarification is necessary, and we urge the Agencies not to create an expectation that a furnisher have specific furnishing timetable requirements. Many furnishers provide information to CRAs on a periodic basis, such as every 30 days. There is no indication that 30 days is inadequate to protect consumers. If the Agencies were to adopt the "current" requirement, it might imply that a furnisher must provide daily (or even instantaneous) "updates" to any information previously furnished. This would be impossible for many furnishers, given their existing programs and resources, and would be unnecessarily costly and burdensome to other furnishers. We therefore ask the Agencies not to adopt this clarification to the definition.

In response to the question of how the Agencies should define "accuracy" and "integrity," HSBC supports adoption of the Guidelines Definition Approach. HSBC's primary concern with the proposed Regulatory Definition Approach is the proposed definition of "integrity," which would impose upon a furnisher the responsibility to ensure it "does not ***omit any term***, such as a credit limit or opening date, of that account or other relationship, the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user of a consumer report of a consumer's credit worthiness, credit standing, credit capacity, character,

general reputation, personal characteristics, or mode of living."[2] (Emphasis added.) HSBC believes such an ambiguous requirement regarding "any term" would be subject to ongoing and varying interpretation, creating the risk of costly litigation and uncertain regulatory enforcement. Should the Agencies ultimately decide to implement the Regulatory Definition Approach, HSBC respectfully asks the Agencies to itemize the specific credit terms they believe must be reported to achieve "integrity," as opposed to leaving furnishers at the risk of an unclear, uncertain, and debatable standard that is capable of unwarranted manipulation.

HSBC's second concern with the Regulatory Definition Approach is the proposed wording of Appendix E to Part 41, Section I.B.2. This would require a furnisher to have written policies and procedures which "ensure that the information it furnishes about accounts or other relationships with a consumer avoids misleading a consumer report user as to the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." While HSBC and other lenders obviously avoid furnishing misleading information to CRAs, the proposed standard focuses on how a hypothetical end user might subjectively interpret or weigh furnished information (or unfurnished information) and subjects furnishers to the risk of being held responsible for another party's subjective misinterpretation. Indeed, the proposal would require furnishers to "ensure" that furnished information not mislead an end user. HSBC urges the Agencies not to adopt such an impossibly high standard.

Except as otherwise indicated below in Section 4, HSBC believes the Guidelines Definition Approach will provide sufficient objective guidance on the terms "accuracy" and "integrity" and would permit financial institutions the flexibility to interpret these definitions according to their current practices and procedures.

4. Proposed Policies and Procedures Requirements

HSBC has the following comments pertaining to proposals contained in Appendix E to the proposed rule, which would require institutions to develop written policies and procedures to effectuate the Agencies' objective of enhanced accuracy and integrity with respect to furnished data.

A. The Agencies Should Revise Requirements Related to Policies and Procedures to Investigate the "Integrity" of Furnished Data

HSBC is concerned about the proposed requirement in Appendix E, Section I.B.3, which would require a furnisher to have written policies and procedures designed to investigate consumer disputes concerning both accuracy ***and integrity***. As the Agencies note in footnote 17 of the NPRM, however, the definition of "Direct Dispute" is intentionally limited to disputes concerning "accuracy." As further noted by the Agencies, current FCRA provisions require CRAs to resolve only disputes concerning "accuracy and completeness" of furnished data. As a result, it appears inappropriate for the Appendix to require policies governing disputes as to both accuracy and integrity. HSBC requests the Agencies to rephrase this requirement consistent with

[2] § __.41(b).

its approach in the definition of "Direct Dispute" or, alternatively, to provide guidance as to how and when furnishers must investigate consumer disputes concerning "integrity" to meet this requirement.

B. The Agencies Should Clarify that the Proposed Requirement to "Update Information as Necessary" Applies to Periodic, Regular Reporting

Section I.B.4 to Appendix E would require that each furnisher have written policies and procedures which "[e]nsure that it updates information it furnishes ***as necessary*** to reflect the ***current*** status of the consumer's account...."[3] (Emphasis added.) HSBC is concerned that this could be viewed as requiring furnishers to regularly update information based on every type of event that may occur following a charge-off of an account. At the time of charge-off, furnishers typically cease to routinely report information about an account to the CRAs. To our knowledge, most furnishers will, as appropriate, update information provided to CRAs at the time a charge-off is paid in full or a settlement is reached after charge-off. Many furnishers, however, do not report interim changes to a balance based on a payment schedule agreed to as part of recovery efforts, nor do they report a revised status based on bankruptcy proceedings that take place after charge-off. Adding capability to routinely report these kinds of changes would require new computer systems programming. The final rule should make clear that furnishers do not have a duty to report changes to account status once regular reporting ceases, provided that the data reported was accurate at the time it was furnished.

The term "as necessary" might also be interpreted to require financial institutions to conduct interim reviews of the accounts and report the status whenever an account is updated or changed. HSBC recommends that the Agencies clarify the phrase "as necessary." The Agencies should not create a new obligation to report data to CRAs where one does not currently exist. The final rule should recognize that periodic reporting of information to CRAs is appropriate. Alternatively, if the Agencies determine that periodic reporting is somehow insufficient, the Agencies should clearly specify the types of interim review and reporting required.

C. The Agencies Should Not Adopt Specific Record Retention Time Periods

Section IV.C to Appendix E would require a furnisher to have written policies and procedures which ensure it "maintains its own records for a reasonable period of time, not less than any applicable recordkeeping requirement, in order to substantiate the accuracy of any information about consumers it furnishes that is subject to a direct dispute." The proposal solicits comments on whether the guidelines should incorporate a specific record retention requirement to provide for meaningful investigations of direct disputes. HSBC believes that the Agencies should not establish any document retention standards in a final rule. As noted by the Agencies, furnishers are subject to various regulatory document retention periods and otherwise retain discretion over document retention. HSBC believes any document retention mandates concerning the array of account materials related to the furnishing of data would significantly dissuade creditors from furnishing data at all. If furnishers are discouraged from reporting, the thoroughness and consequent value of the credit reporting system could be significantly undermined.

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[3] Appendix E to Part 41, Section I (B)(4) of the proposed regulation.

Related to the topic of document retention is whether and how disputes raised after a reasonable document retention period (whether established by Agencies, or a furnisher's own policies and procedures) are to be resolved. HSBC supports the Agencies' proposed § _.43 (d)(4) requirement that a consumer who directly disputes furnished information must provide sufficient documentation which substantiates the dispute. Presumably, the Agencies are not intending to establish a direct dispute process whereby vague or ambiguous disputes may be raised without any substantiation of alleged errors. Furthermore, HSBC supports the wording of __.43(e)(1)(ii), which would allow a furnisher to treat as frivolous any direct dispute which lacks substantiating documentation reasonably requested by the furnisher.

At the same time, however, HSBC believes that the Agencies could be clearer on the interplay between "reasonable document retention" described in policies and procedures guidance and any detrimental effect of disposing records even after a reasonable amount of time. While underlying documentation remains in the possession of a furnisher for a reasonable duration, less substantiation may be required of a consumer to investigate a claim of inaccurate reporting. However, if a furnisher has retained documentation for the duration either established by federal law or in accordance with a furnisher's reasonably established retention period, a furnisher should not reasonably be required to document the basis for furnished information when it receives unsubstantiated disputes challenging accuracy.

Presumably, a furnisher would be within its rights to insist upon full substantiating documentation from the consumer to investigate an unreasonably delayed dispute, and furnished data would not be presumed inaccurate merely because a reasonable documentation retention period has passed. We suspect credit repair organizations will pay particular attention to these types of presumptions, and they might then advise consumers to delay direct disputes until after customary or mandated documentation retention periods lapse.

D. The Agencies Should Maintain Flexible, Consistent Procedures for Reporting and Interpreting data

Appendix E, Section IV., contains a listing of specific components of policies and procedures. For example, Section IV. B. would require that all furnishers should use "standard data reporting" and procedures for compiling and furnishing data. Like many other creditors, HSBC generally reports on its consumer credit products in the standard Metro 2 format in timely, secure electronic transmissions. Providing data via the approved Metro 2 standardized layout is a good approach to follow as this is accepted and preferred by the major CRAs. This ensures that creditors furnish appropriate data (including customer identification data) to the CRAs and that the CRAs will have the ability to read and post the data. However, not all fields on the Metro 2 form are mandatory. For example, codes relating to whether a person owns or rents a residence are not required. The proposal seems to imply that the form would need to be filled out completely, even though financial institutions currently do not report in fields that are not mandatory or relevant. If these codes or fields were required, financial institutions may have to manually research these fields and even then, it is not certain that financial institutions would be able to acquire all the necessary information. This would be incredibly burdensome on furnishers.

We also note that not all CRAs collect and report the same information. Some specialty CRAs, such as those providing reports relating deposit accounts, do not report in Metro II format and report more limited data. For example, ChexSystems only collects and reports data regarding negative performance on deposit accounts (e.g. overdrafts). The proposed rule governs the accuracy and integrity of information actually furnished to a CRA. The Agencies should make it clear that the proposed rule does not impose a new requirement to furnish data to CRAs that is not currently required.

E. Provisions Regarding Regular Review of Data Provided to CRAs are Insufficient

Appendix E, Sections IV.D. and M., require furnishers to conduct periodic reviews of information provided to CRAs, including periodic evaluations of its own practices as well as "consumer reporting agencies practices of which furnisher is aware." In fact, in order for furnishers to be responsible for the accuracy and integrity of data as it appears on a credit report, furnishers would need to be able to monitor how CRAs interpret and post the data. However, there is currently very limited ability to conduct auditing and monitoring of CRA procedures. Furnishers try to conduct spot checks with the CRAs on how data appears in the consumer file. HSBC does not currently have a formal process to verify random samples or to conduct regular reviews of data provided to CRAs. Many furnishers, including HSBC, obtain metric reports from the CRAs. These reports contain information on, for example, how many records were sent, the distribution of narrative codes, and compliance condition codes. However, the reports do not contain information such as how the data translated onto the report, whether the CRA used the name and address provided (and why or why not), or the reasons the CRA might edit the data provided and translate it into their own proprietary language. Without having audit capabilities at the CRAs, furnishers are unable to confirm that the data submitted is reflected accurately in the credit report.

The Agencies should provide guidance on the frequency necessary to meet regulatory expectations of what is "regular." It would also be helpful if the Agencies provided examples of the type of activity that would constitute "appropriate and effective oversight of relevant service providers" whose activities may affect the accuracy and integrity of furnished data. Finally, HSBC recommends that the Agencies require or urge the CRAs to permit furnishers to audit the data they submit as it appears on the credit report.

5. <u>The Agencies Must Clarify the Direct Dispute Regulations.</u>

HSBC supports the notion that consumers ought to, and indeed must, be provided the right to dispute incorrect or inaccurate information reported to or by the CRAs. Like most creditors, HSBC wants to receive credit reports from CRAs that are true and correct. Consumers, acting as their own advocates, can police and monitor their credit files to ensure correct and accurate information is being reported. If information in a credit file is inaccurate, consumers must have the right to dispute that information.

Recognizing the streamlined approach of dispute handling under the current requirements of the FCRA, the industry has developed a very efficient and effective method of receiving, investigating and responding to consumer disputes received by CRAs.[4] Having this efficient method of responding to disputes allows furnishers to reduce costs associated with extending credit and providing services to consumers. Additionally, having an already existing and effective method of responding to disputes encourages furnishers to continue to utilize the consumer reporting system and to rely upon the information being reported as up-to-date and accurate.

The proposed rule defines "direct dispute" to mean "a dispute submitted directly to a furnisher by a consumer concerning the accuracy of any information contained in a consumer report relating to the consumer."[5] HSBC is concerned that the "direct dispute" definition may broadly include all information provided to the CRA and not simply the information provided to the agency by a specific furnisher. It would be practically difficult for furnishers to address disputes regarding information on a credit report provided by other or unknown sources.

Furnishers should only be required to investigate direct consumer disputes pertaining to information provided to the CRAs by the furnisher. Obviously, furnishers only have control over the specific information they are providing to the CRAs. Any direct dispute submitted by a consumer to a furnisher must pertain only to the information being provided by the furnisher and not the compilation and reporting of that information by the CRA. To the extent a consumer dispute relates to an error by a CRA in compiling and reporting information, furnishers have no ability to resolve that dispute.

In addition, furnishers should not be required to investigate direct disputes that do not relate to the accuracy of information provided by the furnisher. Consumers are increasingly attempting to handle disputes that they have with retail merchants by disputing with furnishers the information provided to the CRAs that relates to the merchant transaction. Be it buyer's remorse, claimed misrepresentation, malfunction of the goods, or some other issue concerning the merchant transaction, consumers are submitting disputes concerning the information being provided by a furnisher to a CRA irrespective of whether or not the information being furnished is accurate. The FCRA and FACT Act do not include within their scope disputes between the consumer and merchant concerning the purchase transaction. Unfair and deceptive trade practices laws, warranty laws, state consumer protection laws, and other similar laws already exist to offer rights and protections to consumers in this regard. Furnishers that are providing accurate and correct information to CRAs should not be required to investigate a consumer dispute that does not pertain to the accuracy of the information provided.

HSBC recommends that the Agencies clarify the definition to provide that a direct dispute may only relate to information furnished from that specific furnisher to a consumer reporting agency.

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[4] The most common method of receiving disputes from CRAs is by way of an electronic transmission known as E-OSCAR. E-OSCAR facilitates communication between furnishers and CRAs concerning consumer disputes. Information concerning the dispute is well organized through E-OSCAR, which allows an effective means of investigating and responding to disputes in a timely manner.

[5] Section 41(e) of the Proposed rule.

Conclusion.

HSBC appreciates the opportunity to comment on the proposed rule. HSBC supports the efforts of the Agencies to develop guidelines pertaining to the accuracy and integrity of information provided to the CRAs. The guidelines should propose that furnishers establish reasonable policies and procedures commensurate with the size and scope of their activities as well as their technological capabilities, to control for the accuracy and integrity of the information they furnish.

If there are any questions concerning this letter, or the Agencies require additional information, do not hesitate to contact Jeff Wood at 847-564-6490 or Patricia Grace at 716-841-5733.

Very truly yours,

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February 11, 2008

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Re: Interagency Notice of Proposed Rulemaking: Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies under Section 312 of the Fair and Accurate Credit Transactions Act

Dear Sir or Madam:

Capital One Financial Corporation ("Capital One") is pleased to submit comments on the federal regulatory agencies' (the "Agencies") Interagency Notice of Proposed

Rulemaking (the "Proposed Rule")[1] on the accuracy and integrity of information furnished to consumer reporting agencies and reinvestigation of consumer disputes under Section 312 of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act").

Capital One Financial Corporation is a financial holding company whose principal subsidiaries, Capital One, N.A., Capital One Bank, and Capital One Auto Finance, Inc., offer a broad spectrum of financial products and services to consumers, small businesses, and commercial clients. As of December 31, 2007, Capital One's subsidiaries collectively had $83 billion in deposits and $151.4 billion in managed loans outstanding, and operated more than 740 retail bank branches. Capital One is a major provider of credit cards, installment loans, mortgage loans and auto loans. Its subsidiaries regularly and in the ordinary course of business furnish information to the three major consumer reporting agencies ("CRAs").

Capital One commends the Agencies for the careful work they have devoted to this important rule. The proposed provisions are generally well aligned with the needs of the credit reporting function as well as with the technical capabilities of the industry's current processes.

1. Accuracy and Integrity

As a preliminary matter, Capital One notes that there are substantial practical reasons for most participants in the credit reporting system to ensure that the information they furnish is correct. First, the information that financial institutions furnish to the CRAs is the same information that the institutions themselves use to conduct business and manage their customers' accounts. Financial institutions must collect, store, and retrieve data accurately if their businesses are to operate successfully. Second, incorrect consumer report information commonly generates customer complaints, which financial institutions must deal with as a business matter regardless of regulatory requirements. For these reasons, financial institutions are aligned with CRAs and the Agencies in their interest in ensuring the accuracy and integrity of that information. Capital One believes that the Agencies' proposed concept of "accuracy," and the Agencies' proposed Guidelines Definition Approach to the concept of "integrity," are sound as matter of concept and in most details.

Capital One encourages adoption of the "Guidelines Definition Approach."

The Agencies have proposed two alternative approaches to defining the terms "accuracy" and "integrity," which they have termed the Regulatory Definition Approach ("Regulatory Approach") and Guidelines Definitions Approach ("Guidelines Approach"). As the Agencies point out, the distinction between the approaches is in the definition of "integrity." In the Regulatory Approach, the Agencies define "integrity" such that furnishers' data would lack the required integrity if it omitted "any term … the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user of

[1] 72 Fed. Reg. 70944 (Dec. 13, 2007).

a consumer report of a consumer's creditworthiness."[2] In other words, under the Regulatory Approach, "integrity" is essentially synonymous with "completeness," notwithstanding that the Agencies have avoided using that term. In contrast, under the Guidelines Approach, data has "integrity" so long as it appropriately identifies the consumer to whom it applies, includes the date to which it pertains and is otherwise accurate and furnished in a form designed to minimize the likelihood that it may be erroneously displayed on a consumer report.[3]

Capital One urges adoption of the Guidelines Approach. The Guidelines definition of "integrity" correctly identifies features that information should have, even if the information is otherwise accurate, in order to be useful in credit reporting. In contrast, the Regulatory Approach would be contrary to legislative history, would alter fundamentally the voluntary nature of reporting under the FCRA, and would create an unworkable and ambiguous standard.

The Regulatory Approach ignores Congress's deliberate selection of the word "integrity" and effectively substitutes for it the word "completeness." FACT Act § 312 requires the Agencies to issue regulations regarding the *accuracy and integrity* of information furnished to the credit bureaus, not *accuracy and completeness.* The formulation "accuracy and completeness" was offered in an alternative version of Section 312 by Senators Shelby and Sarbanes[4] but was not accepted by Congress. Representative Oxley, who had moved the legislation through the House Financial Services Committee, explained: "'Accuracy and integrity' was selected [by Congress] as the relevant standard, rather than 'accuracy and completeness' as used in Sections 313 and 319, to focus on the quality of the information furnished rather than the completeness of the information furnished."[5] The Regulatory Approach is inconsistent with the legislative record, which instead supports the Guidelines Approach.[6]

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[2] Proposed Rule. §___. 41(b).

[3] Appendix E (Appendix A to FTC's Proposed Rule), Section I .B. (Guidelines Approach) 2

[4] 149 Cong. Rec. S13912 (Nov. 4, 2003).

[5] 149 Cong. Rec. E2512, E2516 (Nov. 21, 2003).

[6] The Agencies correctly note that the Congressional Record statements of House Financial Services Committee Chairman Oxley and Senate Banking Committee Ranking Minority Member Sarbanes offer conflicting interpretations of "integrity" – with Rep. Oxley's comments being consistent with the Agencies' Guidelines Appraoch and Sen. Sarbanes' comments, supporting the concept of "completeness" (though he, like the Agencies, avoided use of that word), being consistent with the Regulatory Approach – and the Agencies suggest that those legislator comments are of equal weight and hence support the Agencies' proposal of alternative definitions. 72 Fed. Reg. at 70949-50. But those statements are *not* of equal weight. Rep. Oxley had moved the legislation through the committee of which he was the chairman *in the form in which it was enacted,* and his remarks emphasize the contrast between the language that was enacted and the "completeness" language that Congress did *not* adopt. Sen. Sarbanes, on the other hand, had been a sponsor of that very "completeness" language that Congress had passed over in favor of "integrity," as explained by Chairman Oxley. Sen. Sarbanes' attempt, in his Congressional Record statement, to read into

The Regulatory Approach makes a sweeping change to the structure of the FCRA by substantially impairing the voluntary nature of furnishing. A guiding principle of the FCRA, even as amended by the FACT Act, has been that furnishing data is voluntary, with the important requirement that an entity that elects to furnish must furnish accurate information, and must include a very few specifically required pieces of information (*e.g.* notice of dispute, voluntary closure, date of first delinquency[7]). The Regulatory Approach turns that rule on its head by creating an all-or-nothing regime for data furnishers – without clearly prescribing what that "all" consists of. The result would be a substantial disincentive to reporting anything. For example, some credit grantors may have systems that are not well suited to reporting a data universe that the Agencies would regard as "complete."

Not only does the Regulatory Approach fundamentally change the current structure of the FCRA without legislative authority, it does so without introducing a workable standard in its place. To be workable, the Regulatory Approach would need to state a clear and practical standard so that furnishers and consumers could understand what data fields must be furnished. Instead, the Regulatory Approach mandates furnishing any and all data the absence of which could reasonably contribute to an incorrect evaluation by a user. Users of consumer reports are of diverse types, including financial institutions, landlords, employers, and myriad consumer services businesses, and they may evaluate consumer reports differently. Some users interpret consumer reports through complex automated models, while others employ more subjective judgmental decisioning. Even within the set of users who employ automated models, there are a number of competing models in use, each claiming to be more predictive than the others, based on proprietary methodologies that may weight different variables differently or not at all. The Regulatory Approach provides no guidance, for example, in situations in which some models use a variable that others do not – even assuming that furnishers know what those variables are. Defining the parameters of the information that must be furnished by reference to what the various users of a consumer report might think of different data elements is too ambiguous to be workable.

Definition of Accuracy

Capital One generally supports the proposed definition of accuracy. We suggest one clarification. Under the proposed definition, all information furnished must reflect "without error the terms of and liability for the account or other relationship and the consumer's performance or other conduct with respect to the account or other relationship."[8] We agree that furnishers should be held to such a standard for information the accuracy of which is within their control, such as account performance data. However, furnishers rely on their customers for certain identifying information that may

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the term "integrity" a meaning indistinguishable from his unsuccessful term "completeness" does not have the same weight as Chairman Oxley's explanation of the language that Congress actually adopted.

[7] FCRA § 623(a)(3), (4) & (5).

[8] Proposed Rule, § __.41(a).

establish "liability for the account." Sometimes applicants provide inaccurate information, such as a misspelled name or interposed numerals in an address, and furnishers should not be held strictly accountable for such errors. The Agencies should clarify the definition of accuracy so that it does not apply to information that was erroneous when provided to the furnisher by the customer and was furnished in that same state to a CRA.

Updating Information

The Agencies specifically ask whether the definition of accuracy should include an obligation to update information. We submit that the objective of updating should not be addressed through the definition of "accuracy." The current requirement under the FCRA is that a furnisher must correct and update information when the furnisher determines that the information as furnished was incomplete or inaccurate.[9] So long as the information was correct as of the date it was furnished to the CRA, it is not "inaccurate" even if it does not reflect the current state of the consumer's account. Capital One firmly believes that regular and frequent reporting enhances the reliability of the consumer reporting system, and we support a rule that encourages such practices. For example, Capital One supports inclusion in the mandatory policies and procedures of an objective to update information as necessary to reflect the current status of the customer's account. Regulators could then examine an institution's performance under that objective for its sufficiency. However, a failure to update to current status should not per se be deemed to result in an "inaccuracy."

The rule should distinguish "furnish" from "report," and respect that distinction throughout.

The Proposed Rule should distinguish more systematically between the terms "furnish" and "report." The FACT Act directs the Agencies to establish and maintain guidelines regarding accuracy and integrity for use by entities that "furnish" to consumer reporting agencies and to prescribe related regulations.[10] And the Proposed Rule generally reflects the important distinction between the act of providing information to a CRA ("furnishing"), an act which over which furnishers have control; and the display of that information by the CRA ("reporting"), an act over which furnishers have no control. That distinction is consistent with existing language in the FCRA. However, the actual language used in the Proposed Rule does not always preserve that distinction, and its failure to do so changes the substantive meaning of the rule. For example, in the Regulatory Approach, the Proposed Rule would require that a furnisher ensure that the information it furnishes "[a]ccurately *reports* the terms of those accounts" and "[a]ccurately *reports* the consumer's performance."[11] Likewise, in the Guidelines Approach, the Proposed Rule would require the information that is furnished to be

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[9] FCRA § 623(a)(2).

[10] FCRA § 623(e)(1)(A) & (B).

[11] Appendix E, Section I.B. (Regulatory) 1(b) & (c) (emphasis added).

"[*r*]*eported* with appropriate identifying information," "[*r*]*eported* in a standardized and clearly understandable form and manner," and "[*r*]*eported* with a date specifying the time period for which the information pertains."[12] These provisions were undoubtedly intended to address the accuracy and integrity of the information provided to consumer reporting agencies, and yet could be misconstrued to impose obligations on furnishers to ensure that information they furnish is displayed or reported accurately by the consumer reporting agencies. Thorough adherence to the statutory language would avoid such a misconstruction.

Requirement that policies and procedures be written

Capital One does not believe that the requirement that policies and procedures be written creates undue burden.

Record Retention

Capital One agrees that a furnisher's policies and procedures should provide that the furnisher maintain its own records for a reasonable period of time in order to substantiate accuracy of information subject to dispute. Capital One does not recommend that the rule identify a specific time period; instead, we encourage retaining a flexible approach under which furnishers develop policies based on their own particular information technology architecture, their own data retention standards, and their own assessment of the information required to support reasonable investigations of consumer accuracy disputes. If the Agencies do create a specific record retention period, Capital One cautions against requiring the data to be retained in its original format, which can be prohibitively expensive; retaining information in an archived system should be sufficient.

Establishing and implementing appropriate internal controls regarding accuracy and integrity.

Capital One endorses the importance of internal controls, random sampling, and regular reviews of information provided to consumer reporting agencies, and agrees that they should be a component of furnishers' policies and procedures.[13] Capital One also agrees that an important component of maintaining data integrity is that data to be provided to the consumer reporting agencies "in a form and manner designed to minimize the likelihood that the information, although accurate, may be erroneously reflected in the consumer report."[14] In furtherance of this objective, Capital One urges the agencies to confirm that furnishers have a permissible purpose to obtain a consumer report on a customer or former customer for the limited purpose of ensuring that the furnished information is reporting correctly. The most effective way to validate the accuracy of a

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[12] Appendix E, Section I.B. (Guidelines) 2(i)(A), (B), & (C) (emphasis added).

[13] Appendix E, Section IV. D & M.

[14] Appendix E, Section I. B. 5. (Regulatory Approach), Section I. B. 2. (i) (Guidelines Approach).

furnisher's system is to obtain tradelines, sometimes referred to as a "bullseyes," on a sample of accounts and compare the reported tradelines with the furnisher's own system of record. Of course, to obtain this information, a furnisher must certify to the CRA that it has a permissible purpose. Unfortunately, some consumer advocates and litigants have argued that a furnisher has no permissible purpose to obtain a consumer report on a zero-balance closed account under any circumstance. Since a furnisher's accuracy obligations continue even with respect to zero-balance closed accounts, such an interpretation is an obstacle to implementing appropriate internal controls. The Agencies should take this opportunity to confirm that there is a permissible purpose to request consumer reports for the limited purpose of verifying accuracy.

2. Disputes

As we described in our comments on the Agencies' Advance Notice of Proposed Rulemaking, Capital One voluntarily investigates most direct consumer disputes, and believes that consumers should be able to dispute the accuracy of credit report information directly with the data furnisher in nearly every case in which the dispute relates to information in the report about a relationship with that furnisher. However, to the extent that the rule limits furnishers from exercising discretion over the types of disputes they must address, we provide the following comments.

Definition of direct disputes

Capital One urges a clarification to the definition of "direct dispute." An inquiry should be a "direct dispute" only if it challenges the accuracy of information furnished by the entity to whom the dispute is directed. We believe that this was the intention of the Agencies. However, neither the definition, the general rule, the exceptions, nor the provision on frivolous or irrelevant disputes makes this point explicit.[15] We suggest amending the definition as follows: "*Direct Dispute* means a dispute submitted directly to a furnisher by a consumer concerning the accuracy of any information *furnished by the furnisher* and contained in a consumer report relating the consumer."

Exceptions

Capital One agrees with the several instances identified by the Agencies in which the burdens associated with furnishers' dispute obligations outweigh likely benefits. Capital One urges the Agencies to add one additional exception and to clarify another.

In situations where a consumer disputes information that appears to be in error in one CRA's consumer report, but is reflected accurately at one or more other CRA, a furnisher should be allowed to direct the consumer to first dispute the information with the CRA that has reported the apparent error. Such a fact pattern suggests that the CRA misinterpreted or miscoded the information, rather than that incorrect information was furnished by the furnisher.

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[15] See Proposed Rule §§ __. 41(e), __ 43(a), (b) & (e).

The Agencies have recognized an important exception under which furnishers need not respond to disputes submitted by or on a form prepared by a credit repair organization.[16] This is an important exception because financial institutions receive an overwhelming number of such form letters, often asserting meritless disputes. Unfortunately, it is rarely possible to determine with certainty that the source of these letters is a credit repair organization. For that reason, Capital One urges the Agencies to revise the exception so that it applies when the furnisher "reasonably believes" that the dispute was prepared by or submitted on a form prepared by a credit repair organization.

* * *

Capital One appreciates the opportunity to comment on the Agencies' Notice of Proposed Rulemaking under FACT Act Section 312. If you have any questions about this matter and our comments, please call me at (703) 720-2255.

Sincerely,

Christopher T. Curtis
Associate General Counsel
Policy Affairs Group

[16] Proposed Rule § ___. 46(b)(2).

WISCONSIN BANKERS ASSOCIATION

February 11, 2008

Office of the Comptroller of the Currency
250 E Street, SW., Mail Stop 1-5
Washington, DC 20219
regs.comments@occ.treas.gov
Docket ID OCC-2007-0019

Mr. Robert E. Feldman,
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW.,
Washington, DC 20429
Comments@FDIC.gov
RIN 3064-AC99

Ms. Mary Rupp, Secretary of the Board
National Credit Union Administration
1775 Duke St
Alexandria, VA 22314-3428
regcomments@ncua.gov

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal
Reserve System
20th Street and Constitution Ave. NW.,
Washington, DC 20551
regs.comments@federalreserve.gov
Docket No. R-1300

Regulation Comments,
Chief Counsel's Office,
Office of Thrift Supervision
1700 G. Street NW.,
Washington, DC 20552
www.regulations.gov
Attention: OTS-2007-0022

Federal Trade Commission
Office of the Secretary
Room 159-H (Annex C)
600 Pennsylvania Avenue NW.,
Washington, DC 20580
secure.commentworks.com/ftc-FACTAfurnishers
Attention: RIN 3084-AA94

RE: Proposed Rulemaking Regarding Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transaction Act (FACT Act): Docket ID: OCC-2007-0019; Docket No. R-1300; RIN 3064-AC99; OTS-2007-0022; and RIN 3084-AA94.

Dear Sirs and Madams:

The Wisconsin Bankers Association (WBA) is the largest financial trade association in Wisconsin, representing approximately 300 state and nationally chartered banks, savings and loan associations, and savings banks located in communities throughout the state. WBA appreciates the opportunity to comment on the proposed rule regarding furnishers of information to consumer reporting agencies.

The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), Office of Thrift Supervision (OTS), National Credit Union Administration (NCUA), and Federal Trade

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Commission (FTC) (collectively, the Agencies) have issued a joint proposed rule regarding procedures to enhance the accuracy and integrity of information furnished to consumer reporting agencies (CRAs) under Section 312 of the Fair and Accurate Credit Transaction Act (FACT Act). To assist the Agencies in promulgating the final rules, WBA offers the following comment.

Background

The Fair Credit Reporting Act (FCRA) sets forth standards for the collection, communication, and use of information bearing on a consumer's creditworthiness, credit standing, credit capacity and other credit characteristics. Section 623 of the FCRA describes the responsibilities of persons that furnish information about consumers (furnishers) to CRAs. Section 312 of the FACT Act amended Section 623 by requiring the Agencies to issue guidelines for use by furnishers regarding the accuracy and integrity of the information about consumers that they furnish to CRAs and to prescribe regulations requiring furnishers to establish reasonable policies and procedures for implementing the guidelines.

Section 312 also requires the Agencies to issue regulations identifying the circumstances under which a furnisher must investigate a dispute concerning the accuracy of information provided by a furnisher to a CRA and information contained in a consumer report based on a direct request from the consumer. The proposed rule is meant to satisfy these requirements.

The Agencies have, therefore, issued a proposed rule which contains (1) accuracy and integrity regulations and guidelines; and (2) direct dispute regulations. With respect to the first noted item, the Agencies specifically ask whether the terms "accuracy" and "integrity" should be defined in regulations or in guidelines. The following provides background on this question, as well as the proposed direct dispute regulations.

Accuracy and Integrity Regulatory Approach

Under the regulatory approach "accuracy" would be defined to mean:

> [t]hat any information that a furnisher provides to a CRA about an account or other relationship with the consumer reflects without error the terms and liability for the account or other relationship and the consumer's performance or other conduct with respect to the account or other relationship.

Under this definition, "accuracy" is intended to require that furnishers have reasonable procedures in place to ensure that the information they provide to CRAs is factually correct.

Furthermore, the Agencies propose the term "integrity" to mean:

> [t]hat any information that a furnisher provides to a CRA about an account or other relationship with the consumer does not omit any term, such as a credit limit or opening date, of that account or other relationship, the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user of a consumer report of a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.

In addition to the two key defined terms, the Agencies have also proposed that the

regulatory approach would include guidelines with six objectives that a furnisher's policies and procedures should be designed to achieve. As stated in the proposed rule, the six objectives seek to ensure that: (1) information is furnished accurately; (2) information is furnished with integrity; (3) the furnisher conducts reasonable investigations of consumer disputes about the accuracy and integrity of information in consumer reports and takes appropriate actions based on the outcome of such investigations; (4) information is reported in a form and manner designed to minimize the likelihood that it will be erroneously reflected in the consumer report; (5) information furnished is substantiated by the furnisher's records; and (6) the furnisher updates information it furnishes as necessary to reflect the current status of the consumer's account or other relationship.

Accuracy and Integrity Guideline Approach

As noted earlier, the Agencies have included in the proposed rule an alternative approach which would define the terms "accuracy" and "integrity" in the guidelines—rather than in the regulations. The guidelines would provide that a furnisher should have written policies and procedures reasonably designed to ensure that the information it furnishes about an account or other relationships is accurate. Under the guidelines approach, the definition of "accuracy" is defined the same as proposed in the Regulatory approach.

Under the guideline approach, furnishers would also be required to ensure that the information they furnish about accounts or other relationships with a consumer is furnished with integrity. Under the guideline approach the Agencies have proposed to define "integrity" differently than how the term is defined under the Regulatory approach. The guideline approach would define "integrity" to mean:

> [t]hat any information that a furnisher provides to a CRA about an account or other relationship with a consumer: (1) is reported in a form and manner that is designed to minimize the likelihood that the information, although accurate, may be erroneously reflected in a consumer report; and (2) should be substantiated by the furnisher's own records.

Direct Disputes Regulation

The proposed rule also contains provisions which would implement the requirement under Section 623(a)(8) of the FCRA to identify the circumstances under which a furnisher is required to investigate a dispute concerning the accuracy of information about a consumer contained in a consumer report, based on a direct request by the consumer.

The proposed rule would require a furnisher to investigate a direct dispute if it relates to: (1) the consumer's liability for a credit account or other debt with the furnisher; (2) the consumer's performance or other conduct concerning a credit account or other debt; (3) the consumer's performance or other conduct concerning a credit account or other debt with the furnisher; and (4) any other information contained in a consumer report regarding an account or other relationship with the furnisher on the consumer report. The proposed rule is designed to permit direct disputes in virtually all circumstances involving disputes with respect to the types of information typically provided by the furnisher to a CRA.

The Agencies have also proposed exceptions to the requirements that a furnisher must investigate a direct dispute. The exceptions relate to information where the disputes are more appropriately directed to the CRA, such as information derived from public records. Additionally, a furnisher would not be required to investigate a direct dispute if the dispute is submitted by, prepared by or on behalf of a consumer, or is submitted on a form supplied

to a consumer, by a credit repair organization. Furthermore, the proposed rule would require the furnisher to investigate a direct dispute only if a consumer submits a dispute notice to a furnisher at a specific address of the furnisher, provided by the furnisher, or any business address of the furnisher, if the furnisher has not so specified and provided an address for submitting direct disputes.

A furnisher would only be required to investigate a direct dispute if the consumer provides the furnisher with a direct dispute notice that: (1) identifies the specific information that is being disputed; (2) explains the basis for the dispute; (3) includes all supporting documentation required by the furnisher to substantiate the basis for the dispute; (4) includes name, address and phone number of the consumer; (5) includes sufficient information to identify the account or other relationship that is in dispute; (6) includes the specific information that the consumer is disputing and an explanation of the dispute; and (7) includes all supporting documentation or other information reasonably required by a furnisher to substantiate the dispute, such as a copy of the consumer credit report that contains the allegedly inaccurate information.

The proposed rule also addresses the concern of frivolous or irrelevant disputes. Under the proposed rule, the Agencies have identified that a dispute would be frivolous or irrelevant if the furnisher is not otherwise required to investigate a direct dispute under the proposed rule. Furnishers would be required to notify a consumer of its determination that a dispute is frivolous or irrelevant not later than five days after making that determination.

Analysis

WBA commends the Agencies' efforts to implement a rule which meets the requirements of Section 312 of the FACT Act while providing the flexibility necessary so as to not deter the willingness of furnishers to voluntarily report consumer credit information to a CRA; however, WBA does not believe the current process for which furnishers furnish consumer credit information to a CRA has been abused or is erroneous in nature. Furnishers rely on consumer credit reports for many of their key consumer creditworthy decisions. As such, WBA believes furnishers already have a built-in incentive to continue accurate reporting and resolve disputes in a timely manner. WBA is concerned that the imposition of further burdensome regulatory requirements would have a chilling effect on the willingness of furnishers to report consumer credit information to CRAs on a voluntary basis; a result WBA fears would weaken the effectiveness of consumer credit information contained in a consumer report.

WBA believes the most effective approach to defining "accuracy" and "integrity" is through the guideline approach. This approach will provide furnishers with a structure to assist them in the creation of policy and procedures, including effective and efficient monitoring and audit procedures. WBA believes the guideline approach will still provide the flexibility necessary for furnishers to create policies and procedures which appropriately reflect their own nature, size and scope of their respective business activities.

Additionally, WBA believes the proposed direct dispute requirements to be fair. While WBA anticipates the number of direct dispute inquires to increase, thus causing additional costs and resources to furnishers, we acknowledge that many furnishers already actively research and directly respond to consumers' direct inquires. As such, WBA believes the proposed rule provides further structure and direction on direct dispute procedures for furnishers while imposing limited regulatory burden.

WBA also supports the American Bankers Association's (ABA) concerns that the proposed guidelines be flexible enough so that furnishers are not duplicating costs and efforts as a result of multiple disputes filed by credit repair organizations on behalf of consumers in an effort to overwhelm furnishers. As acknowledged by ABA, this type of activity many times will result in a furnisher removing negative, but accurate, credit information from a consumer report. WBA believes such activities harm the very accuracy and integrity of consumer information the Agencies are trying to protect. WBA agrees with ABA's suggestion that the exception relating to credit report organizations be broadened so that furnishers would not be required to investigate a direct dispute if the furnisher reasonably believes a credit repair organization is involved.

WBA also supports ABA's position that the guidelines need to be flexible enough so furnishers are not required to delete accurate but negative consumer credit information. WBA believes such information, while negative, to be an accurate reflection of a particular consumer's credit history. WBA believes the removal of such negative information jeopardizes the effectiveness of consumer reports and will weaken the system.

Conclusion

WBA believes the current process by which furnishers report consumer credit information to be effective and is concerned that further regulatory requirements will have a chilling effect on the willingness of furnishers to voluntarily report necessary, accurate consumer credit information. WBA recommends the Agencies adopt the proposed accuracy and integrity guideline approach as a means to provide the flexibility furnishers need in order to tailor their policy and procedures around their own business activities. WBA recognizes the Agencies attempts to limit additional regulatory burden when creating its direct dispute regulations and, subject to our comments concerning credit repair organizations and frivolous disputes, generally supports the proposed direct dispute investigations and exceptions; direct dispute notice and the notice contents; and the Agencies' definition of frivolous or irrelevant direct disputes.

Once again, WBA appreciates the opportunity to comment on the proposed rule.

Sincerely,

Kristine Cleven
Assistant Vice President - Legal

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MasterCard
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February 11, 2008

Office of the Comptroller of the Currency
250 E Street, SW, Mail Stop 1-5
Washington, DC 20219
Attention: Docket Number OCC-2007-0019

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1300

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
RIN 3064-AC99

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2007-0022

Ms. Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428
Re: Proposed Rule Part 717

Federal Trade Commission
Office of the Secretary
Room 135 (Annex C)
600 Pennsylvania Avenue, NW
Washington, DC 20580
Re: Project No. R611017

To Whom It May Concern:

MasterCard Worldwide ("MasterCard")[1] submits this comment letter in response to the Interagency Notice of Proposed Rulemaking ("Proposal") published by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Trade Commission (collectively, the "Agencies") in the *Federal Register* on December 13, 2007. MasterCard appreciates the opportunity to offer its comments on the Proposal.

In General

Section 623(e) of the federal Fair Credit Reporting Act ("FCRA") directs the Agencies to establish and maintain guidelines for used by entities that provide information to consumer reporting agencies ("CRAs") ("furnishers") regarding the "accuracy and integrity" of the information furnished and to prescribe regulations requiring each furnisher to establish reasonable policies and procedures for implementing the guidelines ("Accuracy and Integrity Provisions"). Section 623(a)(8)(A) of the FCRA directs the Agencies to identify the circumstances under which a furnisher is required to investigate a dispute concerning the accuracy of information contained in a consumer report on the consumer ("Direct Dispute Provisions"). The Proposal implements these two provisions.

MasterCard applauds the Agencies for issuing a Proposal that is intended to implement key portions of the FCRA in a manner that does not impose inordinate or undue burdens. Like MasterCard, the Agencies recognize that consumers and lenders alike benefit from a robust consumer reporting system. This system is entirely dependent on furnishers voluntarily providing quality information to CRAs—information furnished by the private sector is the lifeblood of the consumer reporting system. It is critical that regulatory and legal burdens do not

[1] MasterCard Worldwide (NYSE:MA) advances global commerce by providing a critical link among financial institutions and millions of businesses, cardholders and merchants worldwide. Through the company's roles as a franchisor, processor and advisor, MasterCard develops and markets secure, convenient and rewarding payment solutions, seamlessly processes more than 16 billion payments each year, and provides industry-leading analysis and consulting services that drive business growth for its banking customers and merchants. With more than one billion cards issued through its family of brands, including MasterCard®, Maestro® and Cirrus®, MasterCard serves consumers and businesses in more than 210 countries and territories, and is a partner to 25,000 of the world's leading financial institutions. With more than 24 million acceptance locations worldwide, no payment card is more widely accepted than MasterCard. For more information go to www.mastercard.com.

dissuade furnishers, large or small, from providing this information, otherwise consumers and lenders will suffer.

In many respects, MasterCard believes the Agencies have proposed reasonable and appropriate methods for implementing the Accuracy and Integrity Provisions and the Direct Dispute Provisions. We believe, however, that the Agencies should clarify and improve certain aspects of the Proposal to make it less burdensome on furnishers without detracting from the Proposal's benefits. If these comments are incorporated in a final rule, we believe it would be less likely that the regulatory and legal burdens associated with furnishing information would discourage furnishers from continuing to furnish information to CRAs.

Accuracy and Integrity Provisions

In General

The Agencies' description of the Accuracy and Integrity Provisions demonstrate that the Agencies do not intend to create significant legal or regulatory compliance burdens. For example, the Agencies state that they "do not believe that the requirement for written policies and procedures [addressing the accuracy and integrity of information furnished] will be unduly burdensome, particularly since, under the guidelines, a furnisher may include any of its existing policies and procedures that are relevant and appropriate." Furthermore, the Agencies estimate it would take a furnisher "a total of 21 hours per institution" to implement the requirement to have a written program addressing the accuracy and integrity of information furnished to CRAs ("Accuracy/Integrity Program"). In other words, it appears the Agencies expect furnishers to rely on their existing policies and procedures to comply with the Proposal, so much so that they estimate that it will take a single employee less than three work days to review the furnisher's program, evaluate and implement improvements, and commit the Accuracy/Integrity Program to writing.

MasterCard agrees with the Agencies that most furnishers should need to make only minor modifications, if any, to their existing practices to develop and implement the Accuracy/Integrity Program. Even if only minor modifications are made to such programs, however, the compliance burdens will be significantly more than 21 hours, especially for furnishers of significant amounts of data from a wide range of business lines. The compliance burdens could increase exponentially depending on how the Agencies amend the Proposal. We discuss these issues in more detail below, but as an example, we note that the suggestion that furnishers audit their furnishing practices prior to designing the Accuracy/Integrity Program could take several employees several days simply to design the audit, much less to perform it and provide an audit report. This could also be a very costly undertaking. We strongly urge the Agencies to consider the impact of their requirements, keeping in mind that the cumulative burden and cost increases quickly.

It would also be critical for the Agencies to communicate clearly and publicly to their respective examiners the expectations the Agencies have regarding the implementation of an Accuracy/Integrity Program. For example, it would be inappropriate for examiners to expect furnishers to have engaged in an implementation process that is inconsistent with the Agencies' views that the final rule will impose very little compliance burden or cost on furnishers.

Regulatory Approach v. Guidelines Approach

The Agencies have proposed two approaches to the Accuracy and Integrity Provisions. One approach, dubbed the Regulatory Approach by the Agencies, would define the terms "accuracy" and "integrity" in the text of the regulation requiring furnishers to have reasonable policies and procedures addressing the accuracy and integrity of the information furnished. The other approach—the Guidelines Approach—would define these terms as part of the guidelines issued by the Agencies for use by furnishers when developing their policies and procedures. As it relates to the format of how the Agencies define "accuracy" and "integrity," MasterCard believes the Agencies should do so in the guidelines as opposed to the text of the regulation itself. We believe such an approach will provide furnishers with the flexibility necessary to develop their programs to comply with the Accuracy and Integrity Provisions. Furthermore, adopting the definitions in the guidelines will reduce the risk that examiners, plaintiffs' attorneys, and others will attempt to allege a violation of the final rule if a furnisher provides any information to a CRA that does not meet one or both definitions.[2]

Definition of "Accuracy"

The Proposal includes substantially similar definitions of "accuracy," regardless of whether the definition appears in the regulation or in the guidelines.[3] Specifically, "accuracy" means that information a furnisher provides a CRA about a relationship with a consumer "reflects without error the terms of and liability for the...relationship and the consumer's performance and other conduct with respect to the...relationship." The Agencies state in the Supplementary Information that the proposed definition "is intended to require that furnishers have reasonable procedures in place to ensure that the information they provide to CRAs is factually correct."

Although MasterCard concurs that furnishers should have policies and procedures reasonably designed to furnish information that is factually correct to CRAs, we caution the Agencies against requiring furnishers to develop an Accuracy/Integrity Program to "*ensure* that the information they provide to CRAs is factually correct." (Emphasis added.) The most a furnisher can do, and the most the Agencies should reasonably expect, is that a furnisher will take reasonable care in relying on account records and other information as necessary when furnishing information to CRAs. Just as a furnisher cannot "ensure" that its own records "reflect without error" all consumers' transactions, such as in the case of identity theft or account fraud, a furnisher can take commercially reasonable steps designed to promote the accuracy of its own database for the sake of its own business operations. We believe that this is probably consistent with the Agencies' expectations for purposes of developing an Accuracy/Integrity Program, and we ask the Agencies to revise the Proposal to reflect such expectations more accurately.

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[2] Although the FCRA specifically precludes private rights of action with respect to the enforcement of the Accuracy and Integrity Provisions, some may attempt to impose unintended liability on furnishers through use of state law claims predicated on alleged violations of the Accuracy and Integrity Provisions.

[3] The Agencies do not state why they must define this term—or "integrity"—for purposes of implementing the Accuracy and Integrity Provisions. It is not clear that this is necessary, and we ask the Agencies to consider deleting the notion that such terms must be defined. If the Agencies retain a definition for "accuracy" they must be mindful of how the term (or similar terms/concepts) are used in the FCRA and how a regulatory definition may affect other workings of the FCRA.

The Agencies ask for comment as to whether the term "accuracy" should specifically provide that it includes updating information as necessary to ensure that information furnished is current. It is not clear that such a clarification is necessary, and we caution the Agencies against creating an expectation that a furnisher have specific furnishing timetable requirements. Many furnishers furnish information to CRAs on a periodic basis, such as every 30 days. If the Agencies were to adopt this provision, it would suggest that a furnisher must provide daily (or even instantaneous) "updates" to any information previously furnished. This would be impossible for many furnishers given their existing programs and available resources, and would be unnecessarily costly and burdensome to other furnishers. We therefore ask the Agencies not to adopt this clarification to the definition.

Definition of "Integrity"

The Proposal contains two different possible definitions for "integrity." The Agencies correctly note that Congress did not define the term "integrity" in the statute, creating some ambiguity regarding its meaning. The Agencies also go into detail about how the legislative history surrounding the term "integrity" is inconclusive. The legislative history may have conflicting accounts with respect to this provision, suggesting a need for the Agencies to review the history in a broader sense. It would seem clear that Congress did not intend for the term "integrity" to be synonymous with the term "completeness," as Congress ultimately rejected the latter term in favor of the former. The conflicting rhetoric of congressional *statements* aside, we respectfully suggest that the congressional *action* on this topic is instructive.

Having said this, we note that one of the alternative definitions proposed by the Agencies essentially embodies the concept that the information furnished by furnishers should be "complete." The Regulatory Approach defines "integrity" to mean that "any information that a furnisher provides to a [CRA] about...[a] relationship does not omit any term, such as a credit limit or opening date, of that account or other relationship, the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user of a consumer report of" certain consumer characteristics, such as creditworthiness. For the reasons we provide below, we ask the Agencies to reject this definition of "integrity."

The scope of information that could be required of a furnisher is immense. The plain language definition suggests that if a furnisher has any information whatsoever that could reasonably affect any user's interpretation of a consumer's creditworthiness, the furnisher must furnish it to a CRA. Although the definition suggests that the information necessary is limited to a "term" of an account or relationship, the example of an account opening date as an account "term" suggests a much broader scope of information than simple account terms. Not only is the scope of information immense, but a furnisher must attempt to determine whether it is information of the type that could be useful to a user in considering a consumer's creditworthiness. Would the interest rate on an account be necessary, as a user may incorrectly evaluate a consumer's creditworthiness if the user is not aware of whether the account in question is obviously a prime or subprime account? What about if the consumer routinely exceeds the credit limit on a credit card, or has bounced multiple checks with the creditor? What if the furnisher was willing to furnish the information but a CRA was unwilling to provide the infrastructure to accept it, such as by not providing appropriate fields on a reporting format? Conversely, simply because a credit scoring company has developed a model that uses a certain

variable, and the model is used by some undefined critical mass of creditors, must all furnishers furnish such variable and all CRAs (or at least those used by such creditors) develop the infrastructure to receive and compile it?

MasterCard believes that the above questions illustrate why Congress abandoned the term and the concept of "completeness" from the furnisher obligations in the FACT Act in the first place. It is impossible to define the concept with any specificity or scope, and it would be unreasonable to expect furnishers to develop a compliance program if they do not know with confidence what information they are expected to furnish, now or in the future. Furthermore, allowing users (or the developers of credit scoring models) to dictate what furnishers must provide to CRAs creates unnecessary risks that some furnishers choose to provide nothing instead of everything a credit score statistician can possibly conjure. Of course, to the extent a furnisher believes it must also report information it considers proprietary from a competitive standpoint, such furnisher may decide to furnish nothing at all rather than reveal competitive datapoints.

Instead of adopting the definition in the Regulatory Approach, we urge the Agencies to adopt a definition similar to that included in the Guidelines Approach. Essentially, information would have "integrity" if it is furnished in a manner designed to avoid errors in its compilation by the CRA (recognizing, however, that not every furnisher will furnish in the same manner or in the same format) and in a manner that is substantiated by the furnisher's account records. This is a much more reasonable approach that gives furnishers more comfort regarding their compliance obligations.

Definition of "Furnisher"

The Agencies have defined a "furnisher" to mean "an entity that furnishes information relating to consumers to one or more [CRAs]" but that an entity is not a furnisher "when it provides information to a [CRA] solely to obtain a consumer report." We believe this definition is overly broad and vague. To be a furnisher, the entity must provide personally identifiable information that is accepted by a CRA to be placed in a consumer's file for purposes of providing consumer reports to third parties. It is not clear why the obligations proposed by the Agencies would be necessary with respect to any other entity.

Reasonable Policies and Procedures

The primary requirement of the Accuracy and Integrity Provisions is for a furnisher to establish and implement "reasonable written policies and procedures regarding the accuracy and integrity" of the information it furnishes to CRAs. Such policies and procedures, according to the Proposal, must be appropriate to the nature, size, complexity, and scope of each furnisher's activities. In developing its Accuracy/Integrity Program, a furnisher must consider the guidelines provided by the Agencies and incorporate them as appropriate. Each furnisher must review its Accuracy/Integrity Program periodically and update it as necessary. MasterCard commends the Agencies for proposing a reasonable and appropriate requirement regarding the adoption of an Accuracy/Integrity Program. We are particularly pleased that the Agencies recognize that not all furnishers will have similar programs, and that there is no "one-size-fits-all" expectation.

Guidelines: Objectives

As we describe above, we believe the Agencies should adopt the objectives in the guidelines as they were proposed under the Guidelines Approach, and incorporate our comments on the definition of the term "accuracy." Generally speaking, we believe the objectives provided in the guidelines are reasonable objectives for furnishers to consider when formulating their Accuracy/Integrity Programs.

One such objective relates to a furnisher ensuring that it conducts "reasonable investigations of consumer disputes" about the accuracy and integrity of information in consumer reports and takes appropriate actions based on the outcome of such investigations. We believe this objective should relate only to the accuracy and integrity of information the furnisher furnishes to a CRA, not any information from any source in a consumer's file at a CRA.

Another objective relates to updating the information furnished "as necessary to reflect the current status of the consumer's account or other relationship." We ask the Agencies to clarify that this objective is not intended to suggest that furnishers provide "real time" (or nearly so) feeds of consumer information to CRAs to meet this objective. Rather, a furnisher could furnish information to CRAs on a periodic basis with current information to meet this objective.

Guidelines: FCRA Requirements

As part of the guidelines the Agencies offer summaries of selected provisions of the FCRA relating to furnisher requirements. We ask the Agencies to delete this portion of the Proposal in the final rule. To the extent the Agencies seek to interpret or clarify the FCRA as it relates to furnishers, we believe it would be more appropriate to do so under a separate rulemaking. To the extent the Agencies seek only to paraphrase or summarize the requirements, we do not believe such assistance is necessary. In fact, the Agencies unintentionally call the substance of some of the FCRA obligations into question by providing high level summaries of the law. For example, Section II.B. of the guidelines says a furnisher has the duty to "[p]rovide notice of a dispute by a consumer about the accuracy or completeness of information furnished to a [CRA]" pursuant to Section 623(a)(3) of the FCRA. Yet, the statutory requirement states only that a furnisher may not furnish such information to a CRA without such notice. In short, little is gained by paraphrasing the extant legal requirements of the FCRA in the guidelines, but the Agencies' paraphrasings could cause confusion over the statutory obligations.

Guidelines: Establishing and Implementing Policies and Procedures

The guidelines provide several suggestions regarding how a furnisher may establish its Accuracy/Integrity Program. Generally speaking, we believe the Agencies have identified a reasonable approach to developing such a Program, such as by reviewing one's own experiences and making modifications that may enhance accuracy or integrity. We ask the Agencies, however, to reconsider some of the more detailed suggestions as to how a furnisher could establish and implement an Accuracy/Integrity Program. For example, the Agencies suggest that a furnisher should audit its existing practices. Although the Proposal does not *mandate* such an audit, it is not unreasonable to expect that an examiner will assume the necessity of audit absent justification otherwise. This could be an extremely costly undertaking which may cause some

furnishers to reconsider whether they want to continue to furnish information to CRAs. Furthermore, as discussed above, the fact that an audit is even suggested as necessary calls into question whether the Agencies intend the Proposal to impose significant regulatory burdens. It is also not clear how a furnisher should solicit feedback from a variety of parties, including consumers, nor why such feedback is even necessary to develop a regulatory compliance program.[4]

Guidelines: Specific Components of Policies and Procedures

The Proposal lists thirteen issues that a furnisher's Accuracy/Integrity Program "should" address. We believe these items are generally appropriate, although we caution the Agencies against suggesting that the Program should "ensure" certain outcomes. Rather, the Accuracy/Integrity Program should be designed to address the issues in an appropriate manner.

As for the specific issues raised, some may believe that they contradict the notion imbedded throughout the Proposal that not all furnishers will furnish using the same format or method. For example, the second component mentioned suggests that all furnishers should *compile* information in a standardized manner, yet it is not clear that the Proposal should address how furnishers compile their data. The second component also suggests that such information should be furnished electronically unless it is simply not "feasible" to furnish the data electronically. This suggests—especially to examiners and others—that electronic furnishing is required unless it is not "feasible".

One issue of significant concern relates to recordkeeping. The Proposal states that an Accuracy/Integrity Program should address how long a furnisher retains records for purposes of disputes. Some furnishers' recordkeeping practices may be driven by a variety of factors, including the need for dispute resolution. However, the adequacy of a furnisher's Program should not be called into question simply because its recordkeeping time periods may not coincide with the potential to receive disputes about such records. Indeed, the law provides several requirements for those circumstances in which a furnisher may be unable to verify the information subject to dispute—all of which are favorable to the consumer disputing the information. MasterCard is particularly concerned that the Agencies are considering whether it would be appropriate to impose certain recordkeeping requirements on furnishers. Not only would such a requirement be extremely burdensome, and have little corresponding consumer benefit, but it has the potential to be a *significant* disincentive to furnishing information to CRAs. We urge the Agencies to avoid any suggestion, much less requirement, that a furnisher must retain records of information furnished to CRAs for any period of time.

The last component mentioned in the Proposal suggests that a furnisher must conduct a periodic evaluation of a CRAs practices and how such practices may affect the accuracy and integrity of information furnished. We ask the Agencies to delete this reference. A furnisher will provide information to a CRA in a manner deemed acceptable by a CRA (otherwise the CRA will not accept the information). How the CRA uses, compiles, or interprets that information is not an issue for the furnisher to address, much less a topic for the furnisher to

[4] To the extent a furnisher has received complaints from consumers regarding specific issues, we assume the furnisher would take such complaints into account when reviewing its own experiences.

investigate or evaluate. For example, if a furnisher furnishes information using the METRO 2 format (or any other format a CRA is willing to accept), it is not clear what else the furnisher should do to respond to, or mitigate, the CRA's practices.

Direct Dispute Provisions

Scope of Regulatory Authority

Section 623(a)(8)(A) of the FCRA directs the Agencies to "jointly prescribe regulations that shall identify *the circumstances* under which a furnisher shall be required to reinvestigate" a direct dispute from a consumer. (Emphasis added.) Section 623(a)(8)(B) directs the Agencies to weigh certain factors when crafting such regulations. Once the Agencies identify the appropriate direct dispute circumstances, subparagraphs (D) through (G) of Section 623(a)(8) apply. These remaining subparagraphs of Section 623(a)(8) are self-effectuating after the Agencies adopt regulations under Section 623(a)(8)(A), and Section 623(a)(8)(A) does not authorize rulemaking for them.[5] Specifically, Section 623(a)(8)(C) states that subparagraphs (D) through (G) "shall apply in *any circumstance* identified under the regulations promulgated under" Section 623(a)(8)(A). (Emphasis added.) In other words, once the Agencies issue the rule, Congress has spoken with regard to the relevant requirements. Therefore, it does not appear that the requirements enumerated in subparagraphs (D) through (G) are "circumstances" for which rulemaking is authorized under Section 623(a)(8)(A).

Direct Dispute Circumstances

The Agencies have determined that a furnisher, in virtually all circumstances, should have obligations under the FCRA relating to direct disputes from consumers. Specifically, the Agencies have stated that Section 623(a)(8) would apply to any direct dispute from a consumer relating to any information contained in a consumer report regarding an account or other relationship with the furnisher that bears on the consumers creditworthiness or other factors listed in the FCRA's definition of a "consumer report." The Agencies have provided exceptions to this requirement, noting that Section 623(a)(8) would not apply if the dispute relates to identifying information, identity of employers, inquiries, public record information, fraud alerts, or to certain disputes generated by credit repair organizations.

Although the net effect of the requirement appears to be that a furnisher would not be required to investigate information it did not actually furnish to a CRA, the Proposal does not state this explicitly. We ask the Agencies to clarify that a furnisher need not conduct an investigation relating to information it did not furnish to a CRA. We also ask the Agencies to clarify that the exception relating to credit repair organizations apply to those circumstances in which the furnisher reasonably believes the dispute was submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to the consumer by a credit repair organization. This clarification is necessary, as a furnisher may not be in a position to *know* that the dispute involves a credit repair organization (*e.g.*, one that is compensated) although the furnisher may reasonably believe that an entity meeting the definition of a credit repair organization was involved in the dispute.

[5] Any rulemaking relating to Section 623(a)(8)(D) through (G) would be pursuant to Section 621, which is different in several respects to Section 623(a)(8)(A).

Mechanics of a Direct Dispute: In General

The remainder of the Direct Dispute Provisions address matters that are governed in portions of the FCRA not subject to rulemaking under Section 623(a)(8)(A). For example, the Direct Dispute Provisions describe information required in a direct dispute from a consumer, which is governed under Section 623(a)(8)(D). The Direct Dispute Provisions also attempt to address issues relating to disputes that are "frivolous or irrelevant," which is governed under Section 623(a)(8)(F). For the reasons described above, we believe these provisions should be addressed in a rulemaking pursuant to authority granted in Section 621, not Section 623(a)(8)(A). Therefore, the final rule should not address these issues. If the Agencies disagree, we offer the comments below on the mechanics of the Direct Dispute Process.

Mechanics of a Direct Dispute: Direct Dispute Address

Section 623(a)(8)(D) of the FCRA states that a consumer who seeks to dispute the accuracy of information directly with a furnisher must "provide a dispute notice directly to such [furnisher] at the address specified by the [furnisher]." This is an important provision in the FCRA, as a furnisher should not be expected to monitor hundreds of addresses, and train every employee who may have contact with a consumer, to receive direct dispute requests. It would be much more efficient for both the furnisher and the consumer if direct disputes were sent to a designated address so the appropriate actions could be taken promptly.

The Proposal states that in any circumstance a consumer may send a direct dispute notice to an address provided to the consumer on a file disclosure.[6] The Agencies, however, state that a consumer may use any "business address" of the furnisher to submit a direct dispute unless the furnisher has specified a particular address—even if the consumer has been given an address as part of a file disclosure. We do not believe this is appropriate. Any legitimate direct dispute will be the result of a consumer reviewing his or her file disclosure (since that must be done to determine that there is information, in fact, to dispute and to provide sufficient information to the furnisher to investigate the dispute). In those circumstances in which a furnisher has not specified another address, such as if the furnisher has not previously communicated with the consumer as may happen in an identity theft situation, the consumer should be required to use the address provided in the file disclosure for the furnisher. The alternative, as embodied in the Proposal, is to require a furnisher to have compliance procedures for every possible business address (which could conceivably include all branch offices anywhere in the country). Yet this would not necessarily result in the most expeditious resolution of the consumer's dispute, if the dispute is investigated at all. Some business addresses are automated to handle only payments, for example, with extraneous material discarded. The Agencies also appear to believe that consumers will know to send the dispute to the correct business entity—the bank instead of the thrift bearing the same corporate name, for example. We believe there was wisdom when Congress required the consumer to send the dispute to a certain address as specified in the statute, and we urge the Agencies to reconsider their decision to modify the requirement.

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[6] The Proposal states to an address "set forth on a consumer report relating to the consumer." We assume the Agencies are referring to an address that appears on a file disclosure provided by a CRA to a consumer, and that they do not intend to limit it to an address a consumer may have found on a consumer report (*i.e.*, a report from a CRA to a third-party user).

Mechanics of Direct Dispute: Contents of a Direct Dispute Notice

Section 623(a)(8)(D) specifies the information a consumer must include in a direct dispute notice. The information in the Proposal is similar to the information specified in the statute. However, the Agencies should require the consumer to indicate that the dispute is one submitted pursuant to Section 623(a)(8) of the FCRA.[7] Absent such a statement by the consumer, it is not clear how a furnisher would know whether a letter from a consumer disputing an issue on an account is actually a direct dispute. This would create significant compliance burdens and discourage furnishers from participating in the system. This is especially troublesome given the fact that the Proposal would allow the consumer to deliver a dispute to one of many addresses. If this approach were retained, all tellers and other bank employees with any contact with the public would need to be trained regarding interpreting letters for purposes of complying with the direct dispute requirements.

Mechanics of Direct Dispute: Frivolous or Irrelevant Disputes

Section 623(a)(8)(F) of the FCRA describes a furnisher's obligations if a direct dispute is frivolous or irrelevant. The statute states that two possible reasons for finding a dispute to be frivolous or irrelevant include: (i) the consumer not providing sufficient information; and (ii) the submission of a duplicate dispute.[8] The Agencies have added a third example that creates significant confusion. Specifically, the Agencies state that an example of a frivolous dispute is one which the "furnisher is not required to investigate...under [the Proposal]." It would seem that if the dispute were of the type that a furnisher were not required to investigate that contacting the consumer for additional information—as is required in the context of a frivolous dispute—would not be necessary or appropriate. In short, it is not clear why the Agencies would even suggest that a furnisher would ever need to go through additional compliance procedures under the FCRA if the dispute itself is not subject to the FCRA.

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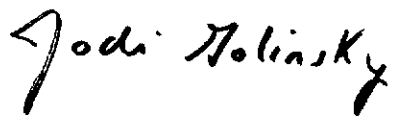
[7] The disclosures that accompany a file disclosure from a CRA would instruct the consumer to reference this portion of the statute in any direct dispute, for example. The Agencies should also consider requiring the consumer to use a specific form to avoid confusion on this point. Such a form could be provided by CRAs and made available on the Internet. The form would also promote expeditious investigations by reducing the likelihood that legitimate disputes are returned to the consumer for additional information.

[8] It is important to note that the statute does not *require* a furnisher to treat either type of dispute as frivolous, thereby requiring the furnisher to recontact the consumer for additional information. They are only examples of when a furnisher may reasonably treat the dispute as frivolous.

Once again, we appreciate the opportunity to comment on the Proposal. If you have any questions concerning our comments, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to call me at (914) 249-5978 or our counsel at Sidley Austin LLP in connection with this matter, Michael F. McEneney at (202) 736-8368 or Karl F. Kaufmann at (202) 736-8133.

Sincerely,



Jodi Golinsky
Vice President &
Regulatory and Public Policy Counsel

cc: Michael F. McEneney, Esq.
Karl F. Kaufmann, Esq.

National Retail Federation
The Voice of Retail Worldwide

COMMENTS OF THE
NATIONAL RETAIL FEDERATION

Concerning Procedures to Enhance the
Accuracy and Integrity of Information Furnished to
Consumer Reporting Agencies

DEPARTMENT OF THE TREASURY
Office of the Comptroller of the Currency
12 CFR Part 41
[Docket ID OCC–2007–0019]
RIN 1557–AC89

FEDERAL RESERVE SYSTEM
12 CFR Part 222
[Docket No. R–1300]

FEDERAL DEPOSIT INSURANCE CORPORATION
12 CFR Part 334
RIN 3064–AC99

DEPARTMENT OF THE TREASURY
Office of Thrift Supervision
12 CFR Part 571
[Docket No. OTS–2007–0022]
RIN 1550–AC01

NATIONAL CREDIT UNION ADMINISTRATION
12 CFR Part 717

FEDERAL TRADE COMMISSION
16 CFR Part 660
RIN 3084–AA94

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The National Retail Federation ("NRF") is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail establishments, more than 24 million employees - about one in five American workers - and 2006 sales of $4.7 trillion. Many of NRF's members make credit available to their customers directly, through financial services affiliates, and through third party credit providers. Typically, these are open-end (revolving) credit lines. Some NRF members furnish information concerning their experiences with customers to consumer reporting agencies, versions of which may be incorporated into consumer reports.

In response to Congressional directives contained the in the Fair and Accurate Credit Transactions Act ("FACT Act"), in a March 2006 Advance Notice of Proposed Rulemaking ("ANPR") the denominated agencies ("Agencies") sought preliminary answers to questions regarding planned accuracy and integrity guidelines. They also sought guidance on weighing various factors in assessing the potential for empowering individuals to lodge objections to the contents of consumer reports with furnishers ("direct disputes"), as an alternative to filing disputes under the existing Fair Credit Reporting Act ("FCRA") procedures.

The facial simplicity of the FCRA belies the complexity of the activities it governs. Consequently, the issues assigned to the Agencies by Congress are not easily amenable to simple emendation and response. They entail the operations of a virtually organic system: the method by which consumer credit and other benefits are allocated in an extraordinarily heterogeneous business and social environment. It involves a wide array of actors and intermediaries on both the consumer and business sides. That the consumer reporting system has grown over time to incorporate and accommodate differing sized furnishers and users, with greatly varying incentives and degrees of commitment to participating in, and maintaining, the system's scope and integrity, are quite consequential considerations.

Attempting to modify significant components of the credit process, while ignoring systemic effects, invites serious repercussions. Accordingly, Congress provided the Agencies with very specific guidance, in terms of words and standards to be followed in amending this important law. While the agencies appear to have generally followed this guidance, with sensitivity to the underlying activity regulated, in some instances the analysis appears to have gone a bit astray.

Direct Disputes

After much member discussion and deliberation, NRF filed ANPR comments intended to provide an overview of the very serious matters Congress asked the Agencies to consider. Especially with respect to the issue of direct disputes, NRF highlighted important distinctions among the types of information involved, the consequences of allowing direct disputes in certain instances, and the interplay with the statutory factors the Agencies must weigh before they could determine under which circumstances (if any) direct disputes were warranted.

We recognize the many demands on Agency resources this process entails. Nevertheless, after reviewing filed responses, NRF is disappointed that several carefully nuanced comments, by it and others, delineating the historic operation of the consumer credit reporting system, and the many adverse consequences of imposing new mandates on here-to-fore *voluntary* behavior, are not addressed in the Notice of Proposed Rulemaking ("NPR").[1]

As you know, Congress set forth very specific instructions by which regulators are to engage in statutory analysis in this area. As explained in the NPR, section 623(a)(8) of the FACT Act requires that the Agencies weigh *four factors* in determining under which circumstances direct disputes are warranted:

1. The benefits to consumers and the costs to furnishers and the credit reporting system;
2. The impact on the overall accuracy and integrity of consumer reports of any direct dispute requirement;
3. Whether direct contact by the consumer with the furnisher would likely result in the most expeditious resolution of disputes; ***and***
4. The potential impact on the credit reporting process ***if*** credit repair organizations are able to circumvent the provisions in subparagraph G of section 623(a)(8). (*emphasis supplied*).

However, in their assessment, at section .43(a), while the Agencies purport to address the first three points, the analysis is conspicuously silent as to the statutorily required weighing of the fourth[2]. Instead of weighing the very important consequences of the fourth and final factor, the Agencies seem to skip over the analysis and simply fill the void with section .43(b), stating that the proposed rule "excepts from the investigation requirement any direct dispute if the notice of dispute

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[1] The NPR's only vaguely relevant substantive responses, that "The [regulator] **encourages** voluntary furnishing of information to consumer reporting agencies" and "The Agencies ***encourage*** furnishers to continue voluntary investigations..." (emphasis supplied), completely ignores the question of whether entities will in fact continue to furnish in the first instance. Nor does the NPR provide any basis to demonstrate why a regional retailer or utility company should choose to subject itself to a potential barrage of legally enforceable Agency sanctioned disputes. It is almost oxymoronic to tout the Agencies' espousal of encouragement to undertake voluntary action while simultaneously imposing voluminous new requirements on those who do. Unfortunately, wishing does not make it so.

It is disappointing that the Agencies propose these new rules without attempting to address the issues raised so pointedly in the responses to the ANPR. Regardless, in answer to the newly propounded questions, we raise those points again in this filing. A copy of the relevant text of NRF's response to the ANPR is attached and is explicitly incorporated herein by reference as Additional Comments to this rulemaking.

[2] "The Agencies are proposing this approach in light of the considerations set forth in the statute to be weighed by the Agencies, including the benefits to consumers, the impact on the overall accuracy and integrity of consumer reports, and whether direct disputes would lead to the most expeditious resolutions of consumer disputes."

Rather than complete the analysis by weighing the fourth factor along with the other three, as the statute specifically requires, or even acknowledge the horrendous burdens credit repair organizations already place on the current system, the Agencies instead proceed to an unrelated discussion of targeted approaches. (Also rejected based on further truncated readings of the factors.)

is submitted by...a [defined] credit repair organization." In the view of many NRF members, such an "exception" neither completes the analysis nor offers much protection from spurious or abusive disputes.

As the Agencies are aware, credit repair is one of the most difficult problems facing consumer reporting agencies. Their inability to effectively identify and block the hundreds of thousands of credit repair organization attacks on their highly sophisticated systems speaks volumes to the fact that furnishers will have the exact same (if not greater) difficulties. Further, the Agencies' proposed rules subject furnishers to *legal sanctions* should they assess erroneously. The fact that the Agencies have seemingly side-stepped their Congressional mandate to weigh the potential impact on the credit reporting process if credit repair organizations are able to circumvent the provisions in subparagraph G of section 623(a)(8) is very troubling. Therefore, before proceeding to final rulemaking, and imposing new mandates on voluntary, yet vital participants in the credit reporting system, we ask that the Agencies further articulate their analysis and weighing of *all* of the required factors, including the impact of credit repair.

It may well be that, after having weighed all of the criteria; the Agencies will discern a limited number of situations under which the fourth factor reasonably can be avoided. For example, the Agencies may determine that in true identity thefts, the presence of law enforcement as an adjunct to the complainant, makes it highly unlikely that spurious credit repair organizations would either be needed or choose to expose themselves to law enforcement's presence. In such cases a weighing of the factors might support direct disputes. NRF is not unalterably opposed to the direct dispute concept. Rather, we believe they should be reserved for those situations that clearly meet the tests Congress enacted[3], so as neither to turn longstanding FCRA processes on their head nor to advance rules based on unachievable assumptions.

Accuracy and Integrity

It is clear that the Agencies have attempted to consider many of the Congressional concerns in their analysis of accuracy and integrity. But we do not think it necessary to define these terms. The concept of "accuracy" has existed in the FCRA for decades, and the evolved law has expressed its meaning within a credit reporting environment, Attempting to codify that now, or create from whole cloth a definition of integrity (especially before the courts have considered the question and when there is disagreement among senior members of Congress) is unnecessary.

At this point in time a conceptual understanding would be sufficient. From that context, a fundamental question to be addressed is: What is the meaning of "accuracy and integrity" in a consumer reporting context? The answer may not be the same as an academic reading of the phrase might suggest, or as set forth in the Agency proposals. As was noted, the consumer reporting system contains a large number of voluntary actors with differing incentives. These have been harnessed over

[3] Including an assessment of the impact of direct disputes on the "integrity" of consumer reporting process, as was outlined in NRF comments on the ANPR, highlighted in the second Congressional factor, but nowhere discussed in the NPR.

time to create a mechanism for allocating scarce resources, such as credit, not on a perfect basis, but on the best basis which the system has, to date, been capable.

Information placed into the system by some actors is quite extensive. Information provided by others is more akin to "one off" data. Users of reports have developed mechanisms (personal review, scoring models, etc.) for assessing the relative likelihood of customer performance based on reports and other factors. They use and weigh different information in reports based on their particular needs and experience and the data available. But none of this is perfect. It cannot be. Not least because users are attempting to make predictions about behavior based on available data from the past. The very act of predicting inherently limits the precision of the conclusions that can be drawn. The selection of underlying criteria, and the fact that not all of the same information is ever likely to available for all persons (due to the voluntary nature of reporting and disparate consumer behavior), further constrains consumer reports' usefulness.

So what does this suggest? For one thing it indicates that in discussing integrity, one classic definition of integral (essential for completion of the whole) cannot be achieved in so disparate and voluntary an environment. While one could attempt to force furnishers to each provide identical categories of information about every consumer with whom they deal, the likelihood that many would simply choose not to report, rather than assume significantly greater and more regimented burdens, makes it just as likely that the resulting less diverse reports would be less useful for predictions than are the current heterogeneous models.

So what is "accuracy and integrity"? In this instance the two concepts are distinct but interrelated in goal. NRF would suggest that accuracy is nearly synonymous with "correctness" and, in light of the use to which consumer reports are put, integrity relates to the reliability (i.e. the "soundness") of the information reported. In other words, the users of the reports not only want to know that the data within them is a correct reflection of that which was transmitted to the consumer reporting agencies by the furnishers, but that the methods for determining what goes into any individual report is premised on sufficiently sound practices such that the users of reports can reasonably rely on the validity of the report itself.

In another context, a pollster wants to ensure that the responses he is provided accurately reflect what was said to the field workers. But that pollster also wants assurance that the polled individuals were not chosen by so skewed a process that their answers, however accurate, are meaningless input into his ultimate prediction (i.e. that the process has integrity).

Now this definition of integrity covers a number of fronts. It means, for example, that one wants procedures designed to minimize the likelihood that consumer reporting agencies will place the data of one individual in the file of another. It also means that one wants to minimize biases in the manner in which furnishers choose to report such that they might be induced to compromise the accuracy of what

they provide.[4] In all cases, we must recognize that procedures, however desirable and reasonable they may appear in the abstract, must not overwhelm the voluntary nature of the system. The integrity of the consumer reporting process can be damaged by excessive burdens.

For these reasons, NRF would not support the regulatory definition of integrity set forth in the NPR. Attempting to require that all information relevant to a credit granting decision must have been furnished before any data is deemed to have integrity is akin to requiring that the subjects of a poll must have revealed every facet about themselves that might conceivably affect a pollster's analysis before conceding that a poll might be valid. At the outset, the amount of information necessary to make a decision will vary dramatically with the user of the information. If a retailer simply wants to determine whether a consumer is likely to write a valid check, information about six year old credit limits on revolving accounts is most certainly immaterial. Yet such information might be useful, though not compelling, to a creditor about to underwrite a mortgage. Since any piece of data might arguably have a bearing on a consumer's "creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" the regulatory definition of integrity places too great a burden on the reporting of data whose value might at best be exceptional.

The regulatory approach also shifts to furnishers obligations that properly reside with the consumer reporting agencies. How much work in terms of "perfecting" reports should be affirmatively place on furnishers? Some small businesses will report to their local bureau the fact that a particular customer has failed to pay for work performed in the customer's home. This information is valuable for other tradesmen who might otherwise invest many hours of labor and material in an untrustworthy endeavor. Subjecting the local businessman to elaborate legal requirements might at best discourage him from reporting in the first instance, and will do nothing to protect other similarly situated local businesses. That the businessman reports a failure to pay, without more, and is subject to existing FCRA dispute rights, reinvestigation, and the consequences of failing to do so, is all that can reasonably be expected unless one's goal is to diminish the amount of accurate information reported.

The Guidelines Definition Approach is the better of the two alternatives. It better recognizes the fluidity existing with the consumer reporting system and places fewer dubious burdens on information furnishers. It recognizes that some information, if consistently reported, can be probative, without demanding that furnishers must

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[4] As was mentioned in NRF's comments on the ANPR, forcing a credit granting retailer to directly and starkly choose between a longstanding customer's personal demand to be better reported to a consumer reporting agency versus losing that customer's future economic patronage could undermine the integrity of the credit reporting process.

Note, that this last point appears to be the opposite of the statement in the NPR that: "Industry commenters also stated that furnishers have a business incentive to maintain and report accurate information in order to maintain good customer relations..." and not because the quoted sentence is untrue. The statement is true because, in general, most reported information is positive. Businesses' and their customers' interest align. However, when the information reported is negative, involving the furnisher and the consumer too directly in an assessment of the information reported can have biasing consequences against accurate reporting, because it undermines the integrity of the process.

provide every element of data incident to that they do report. The guidelines definition of integrity goes part way to addressing the issue of soundness, by encouraging greater coordination between furnishers and consumer reporting agencies and reasonably suggests that furnishers should maintain evidence confirming the information they report. However, it does not specifically address the broader issues surrounding the underlying assumptions of the system, most important, efforts to maintain voluntary reporting.

A related concern with the Guidelines approach is the number of new "accuracy" based requirements it would impose. The extensive numbers of new (albeit not strictly mandatory) obligations are somewhat inconsistent with the common practice of negative reporting. That is for those furnishers, who merely report aberrant negative behavior (e.g. "the customer's check was twice dishonored") the proposed additional furnishing responsibilities are troublesome. The important data sought by users of reports is that which was furnished: the customer's check was twice dishonored. It is such occurrences that will cause other merchants to consider whether to accept a consumer's checks. One might question why it should be the merchant's obligation (as opposed to the consumer's) to immediately update consumer reporting agency files into which it does not regularly report, should the customer, six months later, deem to make a partial payment.

It is inconceivable that small merchants (whether community stores or literal mom and pop operations) who make up the majority of businesses in the United States will adopt, keep on file and routinely update the procedures proposed absent massive, ongoing education by the Agencies. For many of them, furnishing occurs too irregularly for it to be incorporated into their business. Moreover, to the extent these small merchants furnish at all, they do so according to the consumer reporting agency's stated policies and procedures, which are included in the agreement or written communications between the consumer reporting agency and the merchant. The final rule should state that small merchants and those who furnish to check service companies and similar consumer reporting agencies may comply with the rule's requirements for "reasonable policies and procedures concerning accuracy and integrity of furnished information" by following the written policies and procedures of the consumer reporting agency to which they report.

Finally, since we wholly disagree with the Agencies' analysis and conclusions with respect to direct disputes, we support the decision not to apply the definition of "accuracy" in that context at this time.[5]

Conclusion

Despite our very real disagreements with some elements of the Agencies' proposals, we appreciate their consideration of these comments. We recognize that the mandates for Agency review entails a very comprehensive examination of the

[5] In the event that a focused direct dispute requirement is developed, either in this or a subsequent rulemaking, NRF would support further clarification that challenges under that system would be confined to the "accuracy" of the reported information. We also note that "integrity" is not a statutory element of reinvestigations and should not, as proposed, by rule or guideline be read into the law as either an objective or requirement.

consumer reporting system, on the one hand, and yet may necessitate very targeted responses, if harm to the system is to be minimized, on the other. It is not an easy task.

We hope that these and other comments will better clarify issues confronting those primarily responsible for making the system work, and allow the Agencies to further refine the NPR so as to focus on that which it is essential to accomplish, while revisiting the need for the more expansive intrusions. NRF would be happy to answer additional questions in that regard.

ADDITIONAL COMMENTS

Proprietary credit is issued directly by the retailer, in its own name, to its customers. It is the traditional form of "retail credit" from which the current consumer credit system, including the concept of "credit bureaus," first developed. As its name implies, in a proprietary program all management of the credit relationship takes place completely within the retailer's operations. Application, approval, billings, additional extensions and collections are managed by the retailer. Proprietary retail credit was the predominate method of consumer credit extension for much of the past century. Today, relatively few large stores employ it. Over the past several years retail credit programs increasingly have shifted into private label. As a result of that trend and the proliferation of general-purpose bankcards, true proprietary retail credit is becoming the province of smaller, regional operations.

Far more prevalent are private label programs. Private label cards are issued by a bank on behalf of a retailer (in the retailer's name), to the retailer's customers for use in its stores. The issuing bank may be a corporate affiliate of the retail organization or it may be a distant third party. In the former case a private label card operation might appear to be similar to that of a proprietary card. However, responsibility for managing the portfolio and other aspects of the account resides with the financial institution, subject to contractual agreements between the financial institution and the retailer. Thus, for example, applications for credit may be completed and approved from the retailer's premises in the customer's presence. Monthly statements typically arrive in envelopes bearing the retailer's name and may include information about store events. From the customer's perspective a private label program may be nearly indistinguishable from that of a proprietary card. While the preceding discussion focused on revolving lines of credit tied to a card, comparable closed end installment arrangements also exist.

Finally, one step further removed are co-branded cards or those that have access to multiple accounts. The cards may bear both the retailer's name as well as that of one of the major general purpose bankcard issuers. These cards may incorporate distinguishable lines of credit for the named retailer and a separate line for general-purpose use (generally a Visa or MasterCard).

In each of these instances, the entity responsible for day-to-day operations of the account is also the entity responsible for communicating with any consumer

reporting agencies to which the entity reports. In general these entities have developed back-office operations commensurate with the responsibilities they have voluntarily undertaken in connection with their reporting activities.

History

In order to appreciate the extent of that role, and to gauge the effect of steps taken to enhance the accuracy and integrity of information furnished to consumer reporting agencies, it may be helpful to review briefly the U.S. history of reporting activity.

Years ago, merchants offered extended payment periods to allow their customers to purchase provisions throughout the agricultural season. The reliability with which a customer's repayments were made was one factor considered by the merchant in deciding the "terms" it would extend in the future.

While the financial reputation of each household, and its members, might have been known by most merchants in a small town, over time the town's growth and the proliferation of merchants meant that word of mouth between retailers became an increasingly important resource in determining to whom one could safely offer terms. This often confidential merchant-to-merchant exchange of their experiences with individual customers was of benefit to the merchants, and their better customers. For the merchants it helped ensure that they would not provide extended terms to individuals whose failure to repay might result in hardship or even bankruptcy for the retailer. For the customers it meant that they did not have to repeatedly re-earn their reputations over a period of years; they were able to use existing merchant relationships as references.

A few things are evident from this model. The cobbler had to rely on the dry goods seller to provide reasonably accurate information. Each of their businesses depended upon it. The nature and frequency of the information conveyed was not always comparable. One merchant might experience singular purchases that were quickly paid off, while another might encounter large purchases paid for over an extended period of time. Therefore, the exchanged information was, at best, a guide. The information might be summary (X pays well); detailed (Y has been advanced this amount and repaid it several times with few difficulties); or selective in nature (Z has yet to pay me for his last purchase). But regardless of its form, it is more valuable to the merchant, and the town's commerce, than no information at all.

As towns grew into cities and the number of merchants expanded further several additional factors emerged. It became far less likely that any merchant would know the financial status of even a substantial portion of his or her potential customers. The effort required to seek out and share repayment information became an exponentially greater burden. While a customer might provide "references" to demonstrate his or her reputation, it was not in the customer's interest to volunteer the names of those merchants who had not been repaid. And, as towns grew into cities it was more likely that those merchants with experience might be direct competitors of

those with which a customer wished to do business, a situation that could undermine the mutual trust on which the reference system relied.

To help alleviate these factors merchants developed mutual benefit associations: retail associations or chambers of commerce to which they all sought to belong. One of the primary functions of these associations was to provide a place for merchants to record, in an organized fashion, their financial experience with various customers. The nature of the information collected was not necessarily consistent. It might consist solely of negative files (Z hasn't paid) or some combination of observations. Nor was the manner in which each association compiled the information the same. Regardless, centralizing it reduced search costs, lessened the likelihood that potential competitors would receive skewed information (information was generally available to members of the association to the extent they contributed), and improved the participating merchants' financial health. Those who contributed to and used the shared resource were likely to make better financial arrangements with their customers. It also allowed them to more reliably allocate fair terms and conditions among consumers.

As the country grew and its citizens became more mobile, these associations became increasingly important. Some began to share information with nearby cities and towns, eventually becoming regional operations. By the second half of the last century these "credit bureaus" began to encourage merchants to volunteer their information in a more routinized manner to facilitate comparisons among merchant reports. To help defray the costs of the operations, bureaus began selling access to the association's files to merchants who had not contributed data, while simultaneously encouraging them to become data furnishers in hopes of making the files more complete.

In time many of these local and regional associations were purchased by or became affiliated with the major consumer reporting agencies that are the primary subject of the Fair Credit Reporting Act and its subsequent amendments. While those laws have structured the behavior of credit bureaus, they have not changed the underlying dynamic on which they are based. This is an important factor to keep in mind when considering the proposed changes.

Direct Dispute Regulations

The most significant inquiries in the NPR are those dealing with the possibility of direct disputes. As was discussed above, the credit reporting system provides significant benefits to consumers and to the businesses that use them. But the system itself rests upon a series of behaviors and assumptions that have grown organically over the past century. Fundamental to these is that the balancing of competing interests, incentives and economic commitments that cause the system to operate are, at base, voluntary.

Performing furnishers' duties cost money. A merchant, or its affiliated bank in a private label context, must invest in equipment and personnel to interact with the consumer reporting agencies to which it furnishes data and to help ensure that the

data provided is accurate. In addition to those employees managing the credit program, at a minimum it must hire staff to address Section 611 disputes that cannot be resolved adequately through automated processes.

Consider certain competing factors. It is indeed a delicate sense of obligation and self-interest that causes one merchant to invest time and money to furnish information that will benefit its competitor. Historically, the merchant associations addressed this issue in part by encouraging a sufficiently large body of businesses to contribute whatever they could afford to the system such that the benefits to a merchant of receiving information about unknown customers from a wide variety of sources, and its desire to encourage that process, outweighed the costs of providing information to businesses with whom it competed. However, the cost/benefit assessment of that trade-off is not the same for all merchants or other furnishers.

As the Agencies are aware, some furnishers will not disclose all of the information they have about all of their customers to the same extent as do other furnishers. For example, some restrict disclosure of the size of their customers' credit lines, or even the amount of their maximum purchases, above a preset limit. In some cases, this is done for reasons of customer privacy. But in others, it represents a compromise between the desire to provide some information for the benefit of the credit reporting system, and a desire not to cost the furnisher the consequences of revealing the profitability of its very best customers.

From the merchant's perspective, disclosing that a customer routinely spends $10,000 or more on merchandise, and repays promptly, is deemed to be sufficiently indicative of the customer's financial capability as to warrant reporting; while not revealing to his competitors that the customer is a $90,000 a year buyer. The merchant has made an assessment, whether justified or not, that detailed identification and possible loss of a few such customers could quickly overwhelm the benefits of hiring staff and maintaining equipment in order to furnish in the first instance.

Merchants have a choice not to furnish and instead purchase the reports of those who do.[6] That decision potentially makes the system less representative and potentially less robust. In attempting to determine whether there are instances in

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[6] In a sense the credit reporting system model is analogous to that of a volunteer fire department. No member of the volunteer corps has an immediate incentive to rise from his bed when the alarm sounds at night if his house is not burning, other than to encourage fellow members of the force to continue to respond in the event his home caught fire in the future. At first blush members of the department have no incentive to douse the fire in the home of an individual who does not volunteer until one considers that stopping the spread of fire potentially spares their homes as well.

On the other hand, if a fire breaks out in a distinct neighborhood from which no volunteers are drawn, while support of their fellow citizens may still be a motivating factor, the members of the department have somewhat less incentive to risk their lives extinguishing that remote blaze, unless that neighborhood has contributed something of value – e.g. the cost of maintaining the firehouse or equipment – such that the loss of that neighborhood would harm the department. In a sense, the members of the remote neighborhood are in a position comparable to merchants or credit grantors who pay to use the credit reporting system but do not furnish information. Given the other alternatives available, the costs of furnishing are greater than they are willing to bear.

which direct disputing to furnishers might be imposed, you should recognize there is a possibility that the costs of reporting will drive merchants to underreport, or not to report at all. Therefore, we suggest the Agencies exercise extraordinary caution.

Discussion

In light of the foregoing, and the other provisions of the amended FCRA, NRF members are hard-pressed to determine circumstances under which furnishers should be required to investigate directly filed disputes. While the information in consumer reports is gathered from a number of sources, the report itself is the product of the consumer reporting agency. The report's content, its format, the points it chooses to emphasize, the manner of reporting, coding and categorization of the data are all determined by the consumer reporting agency. As the history suggests, no two CRAs necessarily treat information in the same way. Therefore the final reports, even though they may be drawn from similar sources, will undoubtedly differ in some respects.

Currently disputes are directed, in the first instance, to the entity that is responsible for compiling the product about which the consumer has questions: the CRA. While there is a benefit in having numerous locations where consumers might dispute reports, CRAs already have a number of avenues to resolve the consumers' complaints. In some cases it is a matter of explaining how the report is constructed. Consumers may not understand why historic data is suppressed in some companies' reports but not in others. They may not understand why one report contains trade lines that another does not; or understand the display of trade lines established before a marriage or a divorce. This lack of understanding may result in a dispute. But a direct dispute to the merchant or other furnisher is not likely to assist the consumer in understanding how or why CRAs handle information in the manner they do.

The merchant is unlikely to have the disputed reports. They would need to be provided in a form comparable to that given to consumers and the merchant would need to retain employees to explain the CRAs' products. Even if the merchant were supplied with copies and had the staff on hand, it is unlikely that the merchant adequately could explain vagaries in the manner different CRAs codify information, nor do anything to change those differences if it could explain them. Even if the matters touched on the retailer's trade lines, in many instances complaints concerning how the merchant's data was reflected in the report could not be resolved by the merchant. At a minimum, someone with access to the report would need to explain to consumers the differences between the kinds of data susceptible of being influenced by furnishers and that which is not. The entity best situated to perform this task is the CRA. Otherwise, every furnisher would need to have trained staff on hand to address the possibility that a question might arise about products they do not create.[7] Logic strongly suggests that cost of staffing and training all, or nearly all, furnishers to duplicate the work now done by the CRAs would dwarf any benefit from having additional avenues for inquiries.

[7] By extension, would every courthouse, registrar of deeds, state office housing publicly available data, or any other source of CRA information be required to do the same thing?

Since they are the primary source for explaining their reports, CRAs are also in the best position to determine whether a consumer inquiry likely is addressing a matter beyond their control and is more appropriately directed to a merchant or other furnisher. In most such cases, disputes are filed with furnishers electronically for reinvestigation. These are often sent with a particularized dispute code reflecting the complaint the CRA understands the consumer to be lodging. If the consumer could dispute directly to the furnisher as well, there is no guarantee that the consumer will not simultaneously lodge the same complaint both places. At a minimum this could mean that each such dispute is reviewed twice, once under the Section 611 procedure and a second time under the proposed Section 623 procedure. This doubles the time, cost and effort of resolving disputes for all of the parties.

In addition, it is entirely possible that the consumer reporting agency and the furnisher could code the dispute differently, meaning that the same information is reviewed from two different perspectives. Depending on the timing of the inquiries a reinvestigation that results in a correction could find itself "uncorrected," because the dispute in the second inquiry is deemed to be without merit, confirming the tape data and thus overriding the earlier "correction." Unless there is a mechanism (beyond merely asking consumers not to dispute more than once) for ensuring that multiple requests are coordinated the likelihood is that they will introduce more costs and greater opportunities for error and fraud into the system.

In fact, some direct disputing with furnishers occurs today. It can result in changes to the information contained in CRA files, but it is not necessarily an improvement in terms of accuracy or integrity.

Most furnishers already have on staff individuals responsible for customer service in the credit area. These employees assist with responses to electronic inquiries, with payment terms, account status, credit line inquiries and so forth. They also receive complaints from some consumers concerning the reporting of their accounts to the bureaus. In many cases the complaints are not true disputes, our members tell us that consumers often inadvertently acknowledge that the information the merchant is reporting is accurate, but instead claim that the reporting of it is unfair, or harmful, because it does not accord with the view of himself the consumer wishes to portray to another potential creditor. Or the consumer may argue that there were undisclosed circumstances which he or she believes, had the furnisher been aware of them, would have led the furnisher not to report the derogatory information. Extended vacations, marital disputes, and irresponsible friends are often cited as reasons one or more payments were not made on time.

There are mechanisms for explaining these circumstances within the current FCRA. They may be added to a report as a statement if the consumer disagrees with the manner in which a dispute is resolved. But if the goal is to enhance the accuracy and integrity of the system, addressing these disputes through an intermediary, such as the CRA is a better means of doing so than disputing them directly to the furnisher. Again, recognizing that no one is perfect, the goal of the credit reporting system is to determine whether payments were timely made and comparing that payment record, to the extent feasible, with that of other imperfect consumers. To the extent some individuals' imperfections are selectively excused, the reliability of the system is

compromised. The charge to the CRA, when a dispute with a merchant is tendered, is to initiate a reinvestigation of the accuracy of the disputed information. The CRA is a neutral party. If the accuracy of the information is confirmed, it is not changed. Since the goal of each CRA is to offer more accurate information than its competitors, it has no incentive to change information it has collected that has been shown, upon reinvestigation, to be accurate. Similarly there is strong incentive for the CRA to modify the report if inaccuracies are established during the reinvestigation process. The central, neutral role of the CRA is an important bulwark against inaccuracy.

On the other hand, a furnisher, especially a furnisher who has multiple relationships with a consumer, may have incentives to convert accurately reported information into inaccurate information if doing so will avoid damaging other, potentially more profitable relationships with that consumer. If the government specifically directs consumers to furnishers for purposes of disputing, furnishers will be placed under increased and direct pressure to balance potential damage to the credit reporting system against the immediate risk of losing a longstanding customer. Further, some merchants may feel conflicted at being placed in a role of "adjudicating" the "validity" of reasons their customer may have missed payments. This will further undermine the premise of the reporting system – to simply report the fact that payments are on time or late rather than attempting to characterize the reason for a particular payment behavior. In many cases a furnisher might resolve a customer dispute not by affirmatively reporting inaccurate information, but rather by reporting no information about the consumer. Since, as was discussed above, the incentives for fully supporting the system itself are not compelling for some merchants, introducing pressures that further undercut incentives to maintain the system's accuracy or completeness must serve an unusually high purpose if they are to be adopted. We do not believe such a purpose exists.

Other Costs

As was discussed above, furnishers already have in place methods and procedures for servicing their customers and complying with existing obligations under the FCRA. Direct disputing would expand these obligations. Merchants who use electronic reinvestigation processes, such as those available under E-OSCAR, must familiarize their staff with operational aspects of those programs. They must recognize the significance of the various codes delivered by the system, but they generally need not analyze each customer inquiry and convert it into code form. Direct disputing necessarily will mean additional staffing. Anecdotally, our members inform us that only six to seven percent of trade lines disputed at the credit bureau result in information actually being blocked from appearing on subsequent credit reports. That means only a small percentage of disputes are ever actually found to be valid during routine reinvestigations. It is uncertain what percent of the remaining 93% of consumers would then initiate a direct dispute with the furnisher, but needing to process and reinvestigate even a modest percentage of that number would greatly increase the number of employees required.

By way of example, one large merchant reports that it received approximately 478,000 automated disputes in 2005, up from 364,000 in 2004. In addition to

managing those, in 2004 its staff of 27 also handled 178,000 personalized requests on a voluntary basis. Assuming no duplication of disputes, it would have needed to have more than doubled the number of staff if substantially all of its disputes were directly submitted in the first instance. This additional cost would need to be replicated for every other furnisher, for an uncertain consumer benefit, if any.

There are additional costs not captured by this calculation. Currently furnishers have limited legal obligations with respect to disputes. If direct disputing were legally sanctioned, far more robust compliance programs than currently exist for discretionary accommodations would be needed. Worse, the existence of the obligation would open an additional avenue for abuse by credit repair organizations.

At present, credit repair organizations, while a threat to the system as a whole, have had only somewhat troublesome effects on furnishers. Typical credit repair organization tactics, to file serial disputes of the same item or to file multiple disputes of an item in such a manner as to provoke different codes creates difficulties for the CRAs who must determine whether the disputes are genuine. Masked among thousands of other disputes it is often difficult to determine whether a dispute is an attempt to introduce inaccurate information or a good faith effort to better explain a previously rejected dispute. CRAs have the unfortunate advantage of exposure to millions of such activities, providing them a larger base from which to extract evidence of repeated credit repair organization patterns. Few, if any, furnishers would have the breadth of exposure as to allow them to as readily detect such patterns. In light of the fact that CRAs have estimated that as many a 1/3 of the disputes they receive are illegitimate efforts at credit repair, it is evident that unleashing that many disputes directly on furnishers will disrupt the fragile balance currently encouraging reporting.

The risks to the system are high. Creditors could easily avoid potential legal liability, and the considerable economic costs of responding, ab initio, to an overwhelming number of disputes by choosing either to furnish very limited information, or provide none at all. As was common at one time, merchants might choose only to provide notice of write-offs or defaults. The number of consumers who default on obligations is fairly small. By electing to limit furnishing only to that group, a creditor correspondingly limits the number of potential disagreements (and therefore likely disputes) with the information it is furnishing. While it would encounter legal compliance costs, absent unusual circumstances, its staffing workloads are unlikely to be increased substantially.

Of course the potential costs to the credit reporting system and consumers of this approach are very high. The amount of information provided by such furnishers would be of only limited value: a consumer who did not default or file for bankruptcy necessarily would be deemed to have "paid as agreed," regardless of his or her actual pattern of payment practices. However, a system that reports only one extreme of behavior is a very blunt instrument for distinguishing among consumers in a general population, especially since the current system has led to the development of highly predictive credit scoring models. (Indeed, the fundamental purpose of credit scoring is to predict future repayment behavior based on detailed historical experience.)

As the higher information costs of providing data to the system were borne by a decreasing number of furnishers, the data they supplied would become increasingly critical in separating good, from mediocre, from poor credit risks. Perversely, the data they provided, being among the only distinguishing data available, would become the target of greater interest by other creditors and by affected consumers. Said another way, if all classes in a typical public high school were graded on a pass/fail bases, the detailed scores provided by the SAT would take on far greater significance in the college admissions process than if those scores were accompanied by a range of graded classes for consideration as well. The increased attention given to the remaining traditional information furnishers would have the adverse effect of making their reporting subject to even greater pressure from direct disputes – further increasing the costs associated with their furnishing information. At some point, they too will decide that the cost of providing detailed data for the benefit of others is less valuable than the information they receive from the system in return.

For consumers, the effect of increasingly being graded on a default/no default system is that they would have fewer means of demonstrating their creditworthiness. Creditors, in order to minimize their risk would need to provide less credit, or extend it on less favorable terms, to the entire pool of eligible applicants, until such time that each could determine on its own which of their customers had demonstrated a pattern of responsible behavior. This would take us closer to the credit system that existed early in the last century than the one we have today. To the extent availability of credit is a societal good, it would be reduced.

The foregoing assumes that some merchants initially only reduce the quantity of information they are furnishing. If the perceived costs of adapting to the new system are sufficiently high, many merchants and other furnishers might well be induced to stop providing data altogether. In that case, the effects on otherwise creditworthy consumers and the credit system generally, would be profound.

The consumer reporting system is not perfect. It is the consequence of a long history of economic and social tradeoffs that have resulted in the sharing of information now deemed essential to the distribution of a scarce resource: consumer credit. Those who furnish information to the system do so for a combination of economic inducements and social incentives. So long as they can benefit both their businesses and the greater good while not unduly burdening their operations, we hope they will continue to do so. Adjusting the system should not be undertaken lightly. Once incentives for desirable behavior have been broken, a mere reversal of an erroneous decision provides no certainty that companies will again undertake the expense necessary to reestablish the common good. A merchant who out-sources its credit operation is unlikely to bring it back in-house. Similarly, a merchant who stops furnishing is unlikely to invest in new technology and staffing necessary to reestablish that practice. It required considerable persuasion over the past century to develop the current system, government should be careful not to devalue that effort.

As to the information itself, the consumer reporting agencies compete on the completeness and accuracy of the data they provide. This competition is tempered by their desire to collect data in a manner least burdensome to those who are supplying

it. While they have standardized some processes, the very competition that drives their operations militates against reports among the firms being identical. The multiple new requirements imposed by the NPR seek to achieve laudable goals. However, our members tell us that these new burdens will discourage merchants (especially small merchants who are not regular reporters) from reporting and these real burdens will outweigh the potential benefits.

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February 11, 2008

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eRulemaking Portal)

Re: Federal Reserve Board Docket No. R-1300
Federal Deposit Insurance Corporation RIN 3064-AC99
Office of Thrift Supervision OTS-2007-0052

Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies

Ladies and Gentlemen:

This letter is submitted by American Express Travel Related Services Company, Inc., on behalf of itself and its affiliates (collectively "American Express"), in response to the Interagency Notice of Proposed Rulemaking on Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies under Section 312 of the Fair and Accurate Credit Transactions Act ("FACTA").

American Express appreciates the opportunity to comment on the proposed rule and thanks the Federal banking agencies (the "Agencies") for their hard work in developing it. As a diversified financial services company subject to regulation by several of the Agencies, we also thank the Agencies for coordinating their work on the proposed rule. The uniformity of rules that cut across the Agencies greatly assists our compliance efforts.

Overall, American Express believes the proposed rule represents a sound and reasonable implementation of both the furnisher information and direct dispute provisions of Section 312 of FACTA. In the sections of the letter that follow, American Express addresses these aspects of the proposed rule in more detail and comments on many of the discrete issues on which the Agencies have solicited comment.

I. Furnisher Information

American Express believes the furnisher information provisions of the proposed rule establish the comprehensive but flexible regulatory regime for furnisher information contemplated by Section 312 of FACTA as codified in § 623(e) of the Fair Credit Reporting Act ("FCRA"), 18 U.S.C. § 1681s-2(e). Section 312 charges the Agencies with establishing "guidelines" for the accuracy and integrity of information furnished to consumer reporting agencies and with requiring furnishers of information to establish "reasonable" policies and procedures to implement those guidelines. The Agencies have fulfilled the letter and spirit of Section 312 by placing interagency guidelines at the heart of the furnisher information provisions. The Agencies have also recognized that the regulatory scheme authorized by Section 312 requires flexibility. In the words of Section I.A of the proposed guidelines, the reasonableness of furnisher policies and procedures depends on the "nature, size, complexity, and scope of each furnisher's activities."

American Express Strongly Supports "Guidelines Definition Approach"

The Agencies solicit comment on the "Guidelines Definition Approach" and "Regulatory Definition Approach" alternatives to the definition of information "integrity" and on the issue of whether the definitions of information "accuracy" and "integrity" should be placed in the furnisher information guidelines or the regulatory text itself. For the reasons discussed below, American Express strongly supports the "Guidelines Definition Approach" on both of these issues.

The Guidelines Definition Approach defines "integrity" as information (i) "reported in a form or manner [such as in a standardized format and with proper identifying information and dates] that is designed to minimize the likelihood that the information, although accurate, may be erroneously reflected" in the consumer's credit report, and (ii) "substantiated by the furnisher's own records." This definition will require furnishers to safeguard consumers against misdirected credit information and its attendant frustrations and other adverse

consequences. This definition is workable, verifiable, and provides furnishers with certainty on the meaning of "integrity." It is also consistent with a fundamental duty of furnishers to ensure that such information as they choose to report is correctly packaged and labeled.

The Regulatory Definition Approach, by contrast, would establish a vague definition of "integrity" that would prohibit a furnisher from "omit[ting] any term...the absence of which can reasonably be expected to contribute to an incorrect evaluation" of the consumer's credit characteristics. This definition would provide furnishers with no certainty on the scope of their credit reporting obligations and would subject their choices in this regard to case-by-case challenge. Put another way, it is a recipe for a morass of unproductive litigation about the reasonableness of omitting various pieces of credit information in general and in any number of specific circumstances. In addition, this definition may require furnishers to make a Hobson's choice between reporting proprietary, immaterial, or other credit information they would not otherwise report and risking liability for failure to report the information. The result may be to deter full participation in the credit reporting system by various furnishers, to clog the system with extraneous information, or both. In short, the uncertainties of the "integrity" definition in the Regulatory Definition Approach could do significant harm to the levels of participation and the quality of information in the nation's credit reporting system.

The Guidelines Definition Approach also provides for placement of the definitions of "accuracy" and "integrity" in the guidelines for furnisher information rather than in regulatory text. American Express supports the placement of these definitions in the guidelines because they are an integral part of the guidelines and are easiest to read there. Placing the definitions in regulatory text, as proposed by the Regulatory Definition Approach, would wrench the definitions out of their natural context and make the guidelines less self-contained and harder to read. Equally important, the definitions of "accuracy" and "integrity" are used in the guidelines as the "objectives" of furnisher policies and procedures "reasonably designed" to accomplish those objectives. In other words, the definitions and concepts of "accuracy" and "integrity" are organizing principles and quality management goals for furnisher information, not absolute standards. Placing the definitions in regulatory text risks confusion on this point and the needless disputes such confusion might engender. In the final analysis, the definitions not only belong in the guidelines but are more likely to be construed and used properly if placed there.

American Express Does Not Believe Updating Requirement Should Be Added to "Accuracy" Definition

The Agencies also ask whether an information updating requirement should be added to the definition of information "accuracy." American Express believes this is unnecessary for three basic reasons. First, the proposed furnisher information guidelines already establish information updating as one of the four main objectives of furnisher policies and procedures. Accordingly, information updating is already a key element of the guidelines. Second, there is

no compelling need to address information updating further in the proposed guidelines. Information updating on a monthly or other periodic basis is already a ubiquitous feature of the voluntary credit reporting system. Third, moving information updating into the "accuracy" definition may be another invitation to disputes and litigation. Again, the information "accuracy" and "integrity" definitions are intended to shape furnisher policies and procedures and not to serve as tripwires for non-compliance. Expanding the "accuracy" definition with an updating requirement may blur that distinction.

American Express Is Concerned About Statements in the Proposed Information Furnisher Guidelines Encouraging Voluntary Reporting and Third Party Feedback

Two specific provisions in the proposed furnisher information guidelines are also of concern to American Express.

First, American Express is concerned about the introductory sentence to the guidelines, which states that each Agency "encourages voluntary furnishing of information to consumer reporting agencies." Specifically, we are concerned that this sentence may unintentionally create a *de facto* standard for bank examiners regarding the duty of supervised institutions to engage in credit reporting. This, in turn, may result in supervisory guidance requiring an institution to report on matters or in ways it has chosen not to report for competitive, customer service, or other reasons. Because such a result would be antithetical to the voluntary nature of the credit reporting system, we urge the deletion of this sentence from the proposed guidelines.

Second, American Express is concerned about the statement in Section III.A.3 of the guidelines that a furnisher should identify practices or activities that can compromise the accuracy and integrity of information furnished to consumer reporting by, among other things, "Obtaining feedback from consumer reporting agencies, consumers, the furnisher's staff, or other appropriate parties." Specifically, we are concerned that this statement may be construed as imposing an affirmative duty on furnishers to undertake costly market research or engage in a systematic program of information exchanges with third parties that may put at risk proprietary information of the furnisher pertaining to business processes, new products, marketing plans, and the like. We do not think that is the intent of the statement, and we believe that any affirmative information gathering efforts on the part of furnishers should be voluntary and based on the furnisher's judgments regarding its needs. To address this concern, we believe this statement should be deleted or substantially modified to indicate that it does not require any affirmative information gathering efforts on the part of the furnisher. Toward that end, we suggest that the statement might be modified to read as follows: "Considering feedback received in the ordinary course of business or otherwise obtaining feedback from consumer reporting agencies, consumers, the furnisher's staff, or other appropriate parties."

II. Direct Disputes

American Express believes the direct dispute provisions of the proposed rule appropriately balance the needs of consumers, furnishers, and the credit reporting system. Section 312 of FACTA as codified in FCRA § 623(a)(8), 18 U.S.C. § 1681s-2(a)(8), charges the Agencies with identifying the type of disputes concerning the "accuracy" of information furnished to consumer reporting agencies that furnishers must investigate "based on a direct request of a consumer." It also sets forth the factors the Agencies should weigh in developing a rule on the issue. Among those factors are the benefits of such investigations to the consumer, their costs to furnishers, their impact on credit reports, and whether direct contact between the consumer and the furnisher "would likely result in the most expeditious resolution" of the disputes subject to such investigations. American Express believes that the direct dispute provisions of the rule proposed by the Agencies balance these factors superbly by limiting direct disputes to information discretely relating to the account or relationship between the consumer and furnisher and excluding general information best handled by inquiries to consumer reporting agencies. (American Express also appreciates and supports the express exclusion of disputes initiated on the consumer's behalf by either for profit or non profit credit repair organizations, which is consistent with the statutory exclusion of such disputes in FCRA § 623(a)(8)(G), 18 U.S.C. § 1681s-2(a)(8)(G).)

American Express offers the following comments on certain of the discrete issues regarding the direct dispute provisions on which the Agencies have specifically requested comment:

- **American Express agrees that the definition of information "accuracy" should be *made applicable to direct disputes if the Guidelines Definition Approach, which we* strongly support, is adopted**. The reason, as summarized by the Agencies in the supplemental information for the proposed rule, is that the direct dispute provisions of Section 312 of FACTA require a furnisher to investigate the "accuracy" of information directly disputed by a consumer, FCRA § 623(a)(8), 18 U.S.C. § 1681s-2 (a)(8), in contrast to the furnisher's obligation to investigate the "completeness or accuracy" of information disputed by a consumer through a consumer reporting agency. FCRA § 623(b), 18 U.S.C. § 623(b); *see also* FCRA § 611 (a)(1)(A), 15 U.S.C. § 1681i(a)(1)(A) (imposing same obligation on consumer reporting agency). Accordingly, we agree that it is appropriate for the Agencies to clarify that the concept of accuracy as applied to direct disputes means "without error" in terms of the account or relationship information provided by the furnisher and does not include any contextual information necessary for "completeness" of the information as presented in the credit report. We also believe a cross reference to the "accuracy" definition in the proposed guidelines might be the simplest way to achieve this clarification.

- **American Express supports an amendment to § _.43(c)(2) permitting furnishers to notify consumers orally of the address for direct disputes.** This would permit customer service representatives to redirect consumers involved in a direct dispute to special handling or other non-standard addresses if and as warranted by the furnisher's internal procedures. The resulting efficiencies in handling direct disputes would benefit furnishers and consumers alike. We believe that "clear and conspicuous" oral disclosure of such address information can be achieved through appropriate customer service training, telephone scripts, and other standard business processes. Due to the many variations in customer service discussions, we do not believe it is helpful or necessary for the Agencies to mandate any particular form of oral disclosure of this address information for "clear and conspicuous" disclosure purposes. Accordingly, we urge the Agencies not to impose such a mandate.

- **American Express does not believe the direct dispute provisions of the proposed rule require a specific time period for retaining records for purposes of direct dispute investigations.** Record retention requirements for various types of consumer accounts are adequately addressed by other federal and state statutes and regulations. These requirements tend to be tailored to the particular types of consumer accounts at issue, and the record retention practices of various lines of business are often built around them. Any record retention requirement imposed solely for purposes of the direct dispute provisions of this rule may conflict with those other requirements. The results of such conflicts may be disruptions to well established record retention programs and an attendant increase in compliance burdens imposed on furnishers by the direct dispute provisions of the proposed rule.

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Once again, American Express thanks the Agencies for the opportunity to comment on this proposed rule. We would welcome the opportunity to discuss our comments further with staff members from any of the Agencies. Toward that end, any staff member should feel free to call me at any time at 212-640-5773.

Sincerely,

Benjamin Parks

R. Benjamin Parks
Senior Counsel

COMMENTS
of
Consumers Union
National Consumer Law Center
(on behalf of its low-income clients)
World Privacy Forum

and

Consumer Federation of America
National Association of Consumer Advocates
National Workrights Institute
Privacy Rights Clearinghouse
U.S. Public Interest Research Group

to the

Federal Trade Commission
Project No. R611017

Board of the Governors of the Federal Reserve System
Docket No. R–1300

Office of the Comptroller of the Currency
Docket No. OCC-2007-0019

Federal Deposit Insurance Corporation
RIN 3064-AC99

Office of Thrift Supervision
Docket No. OTS-2007-0022

National Credit Union Administration
12 CFR Part 717

Notice of Proposed Rulemaking
Pursuant to Section 312 of the Fair and Accurate Credit Transactions Act

Consumers Union,[1] National Consumer Law Center ("NCLC"),[2] and World Privacy Forum[3] submit the following comments, as well as the Consumer Federation of

[1] **Consumers Union of U.S., Inc**. is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education, and counsel about goods, services, health and personal finance; and to initiate and cooperate with individual and group efforts to

America,[4] National Association of Consumer Advocates,[5] National Workrights Institute,[6] Privacy Rights Clearinghouse,[7] and U.S. Public Interest Research Group[8] regarding the Interagency Notice of Proposed Rulemaking concerning procedures to enhance the accuracy and integrity of information furnished to consumer reporting agencies ("CRAs").[9] The Fair and Accurate Credit Transactions Act of 2003 required the federal banking regulatory agencies and the Federal Trade Commission ("Regulators") to issue the Regulations and Guidelines proposed in the NPRM.[10]

We appreciate the efforts undertaken by the Regulators in drafting the proposal. We believe that significant changes must be made in the proposal in order for it to: (1) promote the furnishing of information that is accurate, timely, up to date, complete, and

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maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived form the sale of *Consumer Reports*, its other publications and services, and from noncommercial contributions, grants, and fees. Consumers Union's publications and services carry no outside advertising and receive no commercial support. Consumers Union's Financial Services Campaign team has been deeply engaged in the development of consumer protections to prevent identity theft and to enhance data security, as well as other problems consumers face in the financial services marketplace, including the consequences for consumers of errors in consumer credit reports. These comments were co-authored by Gail Hillebrand, Senior Attorney, Consumers Union.

[2] **The National Consumer Law Center** is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit transactions to determine appropriate claims and defenses their clients might have. As a result of our daily contact with these practicing attorneys, we have seen numerous examples of invasions of privacy, embarrassment, loss of credit opportunity, employment and other harms that have hurt individual consumers as the result of violations of the Fair Credit Reporting Act. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. *Fair Credit Reporting* (6th ed. 2006) is one of the eighteen practice treatises that NCLC publishes and annually supplements. These comments were co-written by Chi Chi Wu, editor of NCLC's *Fair Credit Reporting* treatise, and are submitted on behalf of the Center's low-income clients.

[3] **The World Privacy Forum** is a non-profit public interest research group focusing on in-depth analysis of privacy topics, including financial topics. http://www.worldprivacyforum.org. The World Privacy Forum is based in San Diego, California. These comments were co-authored by Pam Dixon, Executive Director, World Privacy Forum.

[4] **Consumer Federation of America** (CFA) is a nonprofit association of some 300 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through research, advocacy, and education.

[5] The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

[6] The **National Workrights Institute** is a non-profit organization based in Princeton, NJ. We believe that all workers are entitled to their rights in the workplace.

[7] The **Privacy Rights Clearinghouse** is a nonprofit consumer education and advocacy organization based in San Diego, CA, established in 1992. It offers assistance and information to consumers on a wide range of informational privacy issues. And it represents consumers' interests in public policy proceedings at the state and national levels.

[8] **U.S. PIRG** serves as the federation of state Public Interest Research Groups, which are non-profit, non-partisan public interest advocacy organizations

[9] 72 Fed. Reg. 70,944 (December 13, 2007).

[10] Pub. L. No. 108-159, 117 Stat. 1952, § 312 (2003).

fully substantiated and (2) provide a workable method for consumers to dispute information directly with the entity that furnished that information.

Credit reports and credit scores are increasingly important in the determination of who receives credit and other economic opportunities, such as insurance in some states, rental housing, and even jobs, as well as what prices consumers are offered for credit and services. The need for strong and effective Regulations and Guidelines is critical to the economic health of consumers and to the American economy. Indeed, Congress enacted the Fair Credit Reporting Act ("FCRA") in the explicit recognition that the health of the consumer banking and credit system "depend[s] upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of the banking system." 15 U.S.C. §1681(a)(1), (a)(4), and (b). Congress realized that credit decisions made on the basis of faulty information undermine the vitality of the consumer credit system and the ability of Americans to enjoy the fruits of this country's material prosperity. Failure within this system is not only expensive but also severely disruptive, while accurate, timely, up-to-date, complete and fully substantiated information keeps the system running well.

The need for strong and effective Regulations and Guidelines is especially critical given current economic conditions. During any economic downturn, there is an increased focus on credit quality. This occurs at the very time that access to jobs, services, and the price of credit take on special importance for families. The credit tightening that is occurring in response to the reverses in the subprime mortgage market gives added importance to where an individual consumer falls on a continuum of credit scores. These factors make it extremely important that the contents of consumer credit reporting files be accurate, complete, up to date and robustly substantiated.

I. Introduction

The package of proposed Regulations and Guidelines has three parts. The Regulations describe what types of disputes the furnisher must resolve if reported directly to the furnisher. In addition, the Regulations require that furnishers establish and implement policies and procedures concerning the information they furnish to consumer reporting agencies. Finally, the regulatory package contains proposed Guidelines to shape the content of those policies and procedures.

We comment on each of these parts in order. A summary of the key issues are:

- The Regulations must define "accuracy" and "integrity." We support the "Regulatory Definition Approach" because it is more substantive in its requirements and because these key definitions are much too important to be relegated to flexible Guidelines which only inform a furnisher's policies and procedures.
- The definition of "accuracy" must require that information furnished to consumer reporting agencies (CRAs) be "complete."

- The Regulations should define "accuracy" to require that information furnished to CRAs be substantiated. In addition, the Guidelines should include requirements as to what kind of substantiation is required.
- The proposal should not artificially divide "accuracy" and "integrity," because that would prevent consumers from submitting valid disputes to furnishers about errors falling in the "integrity" category.
- "Accuracy" should require that information furnished to CRAs be updated so that it is, and remains, current.
- The Regulations must clearly state that the purpose of the regulatory requirement for furnisher policies is to achieve accurate reporting of information which is timely, complete, up to date, and substantiated.
- The direct dispute Regulations should require that the furnisher in fact conduct a reasonable investigation, including an attempt to seek documentation before rejecting a consumer's dispute.
- The Guidelines should require that records about the account should be kept at least as long as the account or other relationship with a furnisher is being reported.
- The Regulations and Guidelines should provide consumers with a workable, understandable, effective system to report and obtain correction of errors, by informing consumers of what types of disputes can be presented to the furnisher and where to submit those disputes. A key element of this is to require that a furnisher refer to a CRA any dispute that the furnisher declines to investigate because that dispute is of a type that the Regulations do not require it to consider.

Finally, we would like to comment on one overall theme in the Notice of Proposed Rulemaking, which notes in numerous spots that furnishing information to CRAs is a voluntary activity. We are troubled by the implication that too much emphasis on accuracy and integrity of information might deter valuable reporting. Furnishers have significant business reasons to report. While there is no legal requirement to furnish information to CRAs, the choice to furnish provides enormous benefits for furnishers. It is a key tool for creditors to encourage consumers to comply with payment terms, and even to induce a consumer to select a particular account for payment at the expense of other household needs. For many furnishers, furnishing is indispensable – there is no realistic likelihood that they would "opt out" of the system. For furnishers such as debt collectors, reporting to CRAs is a powerful weapon in their arsenal, "designed, in part, to wrench compliance with payment terms….[and] to tighten the screws on a non-paying customer."[11]

With these tremendous benefits to furnishers, as well as the significant harms that credit reporting errors can cause consumers, it is only fair that furnishers be subject to certain duties so that the information provided is accurate and does not lack integrity. If furnishes make the choice to "voluntarily" participate in the credit reporting system, then they must do so responsibly. There is no benefit to consumers from "voluntary" furnishing that is inaccurate, incomplete, unsubstantiated, or stale.

[11] Rivera v. Bank One, 145 F.R.D. 614, 623 (D.P.R. 1993).

II. Comments on Regulation on Furnisher Policies.

A. Accuracy and Integrity Definitions (Proposed __.41(a) and (b); Guidelines I.B.)

The Regulators have proposed two alternative approaches to define accuracy and integrity: the "Regulatory Definition Approach" and the "Guidelines Definition Approach." The key differences in these Approaches are:

- Where the definitions are placed, *i.e.*, in the Regulations vs. in the Guidelines, which affects their enforceability.
- The definition of "integrity" in the Regulatory Definition Approach includes a requirement that information is complete, *i.e.*, that it "not omit any term, such as credit limit or opening date, …the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user…"
- In addition, Regulatory Definition Approach includes as an Objective in the Guidelines that information furnished to CRAs in general should "avoid misleading a consumer report user."
- The Guidelines Definition Approach takes a more procedural approach to integrity, focusing on whether the procedure for reporting is likely to avoid error rather than on the quality of the information in fact reported or omitted.

We support the Regulatory Definition Approach, which requires that the information both be without error and not omit any term that can reasonably be expected to contribute to an incorrect evaluation by a user of a credit report. We suggest this definition should be augmented to also refer to a user of a credit score.

1. *The definition of accuracy rightfully requires information to be "reflected without error," but it should be clear that such reflection must be "objective."*

In both Approaches, "accuracy" is defined to mean that information provided to a CRA "reflect without error the terms of and liability for the account or other relationship and the consumer's performance and other conduct with respect to the account or other relationship."

We support the concept in the definition of accuracy that information furnished to a CRA should "reflect without error" the actual terms of, liability for, and other conduct of the consumer about the account or relationship. It is fundamentally important that "accuracy" requires information to be accurate as a matter of fact, not simply requiring conformity between the furnisher's records and information in a CRA's database. We recommend making this absolutely clear by adding the word "objectively" before the world "reflects."

Furthermore, the definition of "accuracy" should also require that information reported to a CRA reflects without error the *furnisher's* performance or other conduct with respect to the account or other relationship.

2. *The definitions of "accuracy" and "integrity" should be set forth in the Regulations.*

We believe "accuracy" and "integrity" must be defined in the Regulations, not solely in the Guidelines. The requirement that furnishers should strive to report information with accuracy and integrity should not merely be a Guideline for consideration. This requirement should be mandatory; indeed it should be the core purpose of a furnisher's credit reporting systems. Furthermore, if these key terms are not defined in the Regulations, the failure to do so will create uncertainty about the scope of the direct dispute obligation.

3. *Accurate credit scores must be a component of accuracy.*

Any test of accuracy must be considered in context of credit scoring. What may appear to be a minor issue taken in isolation may create an enormous distortion in a credit score. Even the smallest inaccuracies in a credit report can have a significant deleterious impact on the economic opportunities offered to hardworking individuals and their families, because they can cause significant negative changes in a credit score. The classic example is the furnisher's failure to report a credit limit, which artificially drives up the utilization ratio – a factor that affects 30% of a credit score.

Thus, any standards for accuracy and integrity of information furnished to a CRA must examine not only the potential for an incorrect evaluation a user of a credit report, but also the potential for an incorrect evaluation by the user of a credit score.

4. *The definition of "accuracy" must include "completeness."*

Accuracy must include a requirement that information furnished must be complete, *i.e.*, must not omit any important terms. If the failure of the furnisher to provide complete information creates a misleading evaluation of a consumer's creditworthiness, including a different credit score if the information were included, the furnisher has reported inaccurate information.

The Regulators have proposed either requiring completeness to be part of integrity (Regulatory Definition Approach) or omitting it altogether (Guidelines Definition Approach). The Guidelines Definition Approach is simply unacceptable. Information cannot be "without error" if its omission of critical terms creates a misleading evaluation or a different credit score. Indeed, the omission of a material term that creates a misleading impression is a form of deception under the FTC Act.[12] If

[12] FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985); Sterling Drug, Inc. v. FTC, 741 F.2d 1146 (9th Cir. 1984); American Home Products Corp. v. FTC, 695 F.2d 681 (3d Cir. 1982);

information could be considered "deceptive" under the FTC Act, how can it be "accurate" under the FCRA?

The Regulatory Definition Approach is not perfect either, in that it separates completeness from accuracy, when the former is a necessary element of the other. We support a definition of "accuracy" that includes completeness. This point is critical, because nowhere else is "accuracy" defined in the Act or Regulations, yet the term is used several times in the FCRA, including requirements under Section 1681e(b) for CRAs to use reasonable procedures to assure maximum possible accuracy. We do not want a definition of accuracy that inadvertently allows CRAs to have procedures that result in incomplete, misleading information in their files.

For example, under current caselaw, "accuracy" is defined for purposes of Section 1681e(b) already to include completeness, in the cases that reject the "technical accuracy" defense theory.[13] Thus, the Regulators would weaken the current accuracy standard by suggesting that completeness is not a part of accuracy and instead somehow is an additional component under the new integrity prong. Congress clearly knew that completeness is part of accuracy under the normal rules that Congress legislates with full knowledge of existing law. Separating completeness from accuracy is a threat to accuracy as we now know it.

Furthermore, Congress must have assumed that completeness was a part of accuracy in choosing the word "accuracy" only for the dispute section. Congress could not have divided the universe of errors into two parts, to be treated differently.

If completeness is included in the definition of "integrity," then integrity should be included as a subset of, and thus part of, accuracy. The Regulations also should make it clear that any limited definition of accuracy for purposes of FCRA Section 1681s-2(e) has no effect on the meaning of the term "accuracy" under other sections of the FCRA, which impose other duties with respect to accuracy on CRAs and furnishers.

5. *Completeness should be about any item about an account or other relationship, not just the terms of the account*.

Whether completeness is a part of "accuracy" (as we support) or "integrity", it should cover omission of all material information about an account or other relationship with the furnisher. We note that the Regulatory Definition Approach's definition of integrity in Proposed __.41(b) is limited to prohibiting the omission of any "term" of the account or other relationship. We urge that completeness also prohibit omissions about

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International Harvester Co., 104 F.T.C. 949 (1984). *See generally*, National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.14.2 (6th ed. 2004).

[13] Koropoulos v. Credit Bureau, Inc. 734 F.2d 87 (D.C. Cir. 1984), Pinner v. Schmidt, 805 F.2d 1258 (5th Cir. 1987). *See also* Wilson v. Rental Research Serv.,Inc., 165 F.3d 642 (8th Cir. 1999), *rehearing en banc without published opinion*, 206 F.3d 810 (8th Cir. 2000) (by vote of an equally divided court, the district court's order is affirmed).

the liability for the account, the consumer's performance on the account, and the furnisher's conduct with respect to the account.

6. Accuracy should include substantiation.

We support the Regulators' express recognition of the need for substantiation in the furnisher's records of all furnished information. However, we believe the substantiation should be part of the definition of "accuracy." Both Definition Approaches include a requirement for substantiation, but it is either stated as an Objective for the policies of a furnisher (Regulatory Definition Approach) or an element of integrity (Guidelines Definition Approach), not as a requirement for accuracy.

We support retaining and strengthening the requirement for substantiation by placing it in the Regulations, not just the Guidelines, and by locating it in the definition of accuracy. Substantiation should not merely be an objective, nor should it be something addressed only in the Guidelines to be considered by furnishers as they develop their own policies. Instead, substantiation should be a core part of accuracy. Furnishers should be required to have in their possession documents that substantiate information they send to the CRAs. Furthermore, as discussed below, the Guidelines should include requirements as to what types of substantiation are required.

7. "Accuracy" and "integrity" should not be artificially separated.

The issues of whether "completeness" and "substantiation" should be elements of "accuracy" versus "integrity" points to another problem – that both the Regulatory Definition and the Guideline Definitions Approach artificially separate the two concepts, when they should be treated together for reasons of both policy and practicality. Integrity should be considered a subset of accuracy, and not as a category separate and distinct from accuracy.

First, artificially separating accuracy and integrity does not make logical sense. Information provided without integrity will result in inaccuracies. If information is inaccurate, it lacks integrity.

Another reason that an artificial distinction between accuracy and integrity is problematic is that the statute contemplates direct disputes about accuracy, and the Regulations define a "direct dispute" which can be pursued directly with the furnisher as only those disputes which are about accuracy. Under the proposed Regulations, some types of errors by a furnisher constitute a lack of accuracy, while other types of errors are put in the category of lacking integrity. This means that some types of real errors by a furnisher could be directly disputed, but others could not.

An artificial distinction between accuracy and integrity will be harmful to consumers if the proposed Regulations continue to permit consumers to use the direct dispute process only for accuracy and not for integrity disputes. Consumers should be able to seek and obtain direct corrections by a furnisher of erroneous information

regardless of where the error falls on an artificial line between the definitions of accuracy and integrity. A simple way to do this is to treat integrity as an element or subset of accuracy, rather than as some wholly separate category to which no right of direct dispute can attach.

8. *Accuracy requires that information be updated so that it is, and remains, current.*

The Regulators ask whether the definition of "accuracy" should include updating information as necessary to ensure that information furnished is current. Our answer is an unequivocal "yes". Similar to the issue of completeness, requiring information to be updated so that it is factually correct must be an inherent element of accuracy. Stale or out of date information cannot be accurate, especially when there is a subsequent material change in the status of the account.

For example, one of the most problematic failures to update information is the failure of furnishers to accurately report debts discharged in bankruptcy. Both the FTC Commentary on the FCRA at § 607 ¶ 6 and the instructions to furnishers for the CRAs' own standard reporting format (Metro 2) require that debts discharged in bankruptcy be reported with a zero balance. Yet often furnishers will continue to inaccurately report a debt as seriously past due with a significant balance, information which is much more negative than correctly reporting that the debt has been discharged in bankruptcy. This error deprives the debtor of the legally provided "fresh start" of a bankruptcy discharge and is time-consuming and expensive to correct.

Furthermore, this problem happens with alarming frequency. The court's opinion in two related legal decisions described how a bankruptcy lawyer's survey of approximately 900 clients found that 64% of Trans Union reports and 66% of Equifax reports erroneously listed one or more discharged debts as due and owing.[14] The same survey also found that the number of incorrectly reported discharged debts was between three and four per consumer for Trans Union reports, with some consumers having as many as ten or more errors on their reports.[15]

Thus, the Regulators should include a requirement that accuracy requires information be updated as necessary to ensure that it is current. In addition, the Regulators should require that information should be updated when the consumer requests it or disputes the current status of information. Finally, the Regulators should include recommendations in the Guidelines on how regularly information should be updated to ensure it is current.

[14] Acosta v. Trans Union, --- F.R.D. ---, 2007 WL 2137804, n. 3 (C.D. Cal. May 31, 2007).
[15] White v. Trans Union, 462 F. Supp.2d 1079 (C.D. Cal. 2006).

9. Proposed definition of accuracy.

We urge that the Regulators adopt a definition of "accuracy" that includes all of the above elements. We propose the following definition (proposed additions underlined and proposed deletions ~~marked~~):

"Accuracy" means that any information that a furnisher provides to a consumer reporting agency about an account or other relationship with the consumer:

(1) objectively reflects without error the terms of and liability for the account or other relationship; the consumer's performance and other conduct with respect to the account or other relationship; and the furnisher's performance or other conduct with respect to the account or other relationship;
(2) has integrity in that the information does not omit any term, such as a credit limit or opening date, of that account or other relationship; information about liability for the account or other relationship; the consumer's performance and other conduct with respect to the account or other relationship; and the furnisher's performance or other conduct with respect to the account or other relationship; the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user of a consumer report or credit score of a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living;
(3) is substantiated by the furnisher's own records; and
(4) is updated as necessary to reflect the current status of the account or other relationship.

B. Other Comments About Definitions (Proposed __.41)

a. The definition of furnisher should only exempt individual consumers who are self-reporting. (Proposed ___.41(c))

Proposed __.41(c) exempts individual consumers from definition of "furnisher." This exemption should be limited to individual consumers who are furnishing information about themselves. Indeed, the Regulator's stated purpose for this exemption is to exempt self-reporting. 72 Fed. Reg. at 70951, column 2.

We urge the Regulators to limit this exemption to self-reporting in order to make absolutely clear that individuals who furnish information in other capacities are covered as furnishers. There should be no risk that the exemption could be interpreted to cover a debt collector who is an "individual" sole proprietor or an individual who is a landlord. Thus, the first sentence of Proposed __.41(c) should be amended to state:

(c) Furnisher means an entity ~~other than an individual consumer~~ that furnishes information relating to consumers to one or more consumer reporting agencies. An individual consumer or his/her guardian, conservator, or attorney is not a furnisher when providing information regarding that consumer to a consumer reporting agency.

b. The Guidelines Definition Approach appears to omit definitions for "furnisher," "identity theft," and "direct dispute".

As stated above, we strongly oppose the Guidelines Definition Approach. That being said, we note that the Guidelines Definition Approach appears to omit Proposed __.41(c) thru (e), or is at best confusing about this point. Since there seems to be no controversy between the Regulators over these definitions (although we have concerns about certain aspects discussed elsewhere), we assume this was an oversight.

C. <u>The Regulation on Furnisher Policies Needs to be Strengthened</u>. (Proposed __.42)

1. *The Regulations must clearly state that the purpose of the regulatory requirement for furnisher policies is to achieve accurate reporting of information.*

Proposed __.42(a) should require furnishers to establish and implement policies that "promote" accuracy and integrity, not just "regard" them. In addition, Proposed __.42(b) should be amended to add the basic requirement that the policies and procedures must be reasonably designed to facilitate the reporting only of accurate, complete, up-to-date information which is fully substantiated and has no tendency to mislead users of a credit report or a credit score. The statutory and regulatory requirement for policies and procedures should not be satisfied by policies and procedures that do not serve this goal, regardless of the nature or size of the furnisher. The section also should be amended to require that the policies and procedures "implement the guidelines," as required by Section 1681s-2(e)(1)(B) of the FCRA.

The regulatory text on furnisher policies and procedures in Proposed __.42(b) is weaker than the statutory requirement. The Act requires that the Regulators prescribe regulations requiring furnishers to establish reasonable policies and procedures "for implementing the guidelines," Section 1681s-2(e)(1)(B), and that the Guidelines must be "regarding the accuracy and integrity" of information furnished. The Act requires that in developing the guidelines, the Regulators shall determine whether furnishers maintain and enforce policies "to assure the accuracy and integrity" of furnished information, Section1681s-2(e)(3)(C), as well as policies and processes "to conduct reinvestigations and correct inaccurate information" furnished. Section 1681s-2(e)(3)(D).

While the proposed Guidelines address the various topics identified in the Act, the actual proposed Regulation fails to require that the furnishers' policies and procedures be reasonably designed to "implement" the Guidelines. Instead, the proposed Regulation allows furnishers to simply "consider" the Guidelines and to "incorporate those guidelines that are appropriate." How will the Congressional mandate for regulations requiring furnishers to implement the Guidelines be met if the Regulations simply allow the furnishers to comply by incorporating some of those Guidelines, without any direction about the underlying purpose which should guide that choice, and without any regulatory requirement that the policies in fact implement the Guidelines?

The absence of any requirement that the policies actually be designed to implement the Guidelines creates the very real possibility that the Regulation will be satisfied by the mere existence of policies and procedures which are unlikely to achieve the goal of assuring accuracy and integrity of furnished information.

2. Each and every furnisher should be required to have certain minimum levels of procedures and policies that promote accuracy and integrity.

Proposed section __.42(a) is troubling in that it appears to allow certain furnishers to choose a lower standard of accuracy and integrity for furnished information. The second sentence of that subsection states that a furnisher's policies should be "appropriate to the nature, size complexity and scope" of the furnisher's activities. Thus, smaller or less sophisticated furnishers appear to have leeway to furnish information that does not have the same level of accuracy and integrity as other furnishers.

The Guidelines take this idea even further. Guideline I.A allows a furnisher's policies and procedures to vary depending on the furnisher's type of business activity, nature and frequency of information furnished to CRAs, and even the technology used by furnisher. Thus, furnishers might be allowed to offer the excuse of having chosen not to invest in adequate and up to date technology to justify inaccurate reporting.

We are deeply concerned that this language will give small furnishers or even large furnishers with old technology a green light to report inaccurate information. While a small furnisher may not be expected to report as often or have the same number of personnel devoted to furnishing, there should be a minimum level of accuracy and integrity expected of all furnishers who choose to furnish information for consumer credit files.

The FCRA obliges all furnishers, regardless of size or the complexity of their businesses, to refrain from furnishing any information which the furnisher knows or has reasonable cause to believe is inaccurate. Section 1681s-2 (a)(1)(A). The statute does not authorize reporting of information that is known or should reasonably be known to be inaccurate because the furnisher is small or because credit reporting is not central to the furnisher's main line of business.

Accuracy should not depend solely on characteristics of the furnisher, such as size and sophistication, because inaccurate information has the same negative impact on consumers regardless of the size or sophistication of the furnisher. There should be some fundamentals that are required of all furnishers. Furnishers must be required to have policies and procedures to:

- Correctly identify the consumer to whom information pertains;
- Correctly provide key dates, including the date to calculate obsolescence under the FCRA;
- Correctly state the terms of and liability for the account or other relationship;

- Correctly state the conduct of the consumer and of the furnisher with respect to the account or other relationship;
- Substantiate information furnished to a CRA;
- Provide for the retention of records that substantiate information furnished;
- Update information to keep it current; and
- Conduct a reasonable investigation.

Furthermore, if small furnishers are not held to the same standards as large furnishers, the Guidelines should specify where duties of large furnishers are greater than other furnishers. For example, large furnishers should be required to conduct annual audits, to furnish information to CRAs in the standard reporting format, and to update their technology on a regular basis.

3. *The Regulations must make clear that portions of the Guidelines are mandatory under the FCRA.*

One overall concern about the Guidelines is that they are fairly general. In addition, they give a great deal of discretion, as does Proposed __.42(b), as to whether or not a particular Guideline needs to be incorporated into a furnisher's policies and procedures.

We are extremely troubled by this level of discretion. As we discuss above in Section II.C.1, furnishers should be required to implement all of the Guidelines. In addition, the particular Guidelines which should be either more specific or leave less discretion is discussed below in Section IV of these comments, which analyzes each Guideline individually.

Another reason for our concern about the excessive amount of discretion the Guidelines give furnishers is that some of the furnishers' duties described in the Guidelines are mandatory duties under the FCRA. The Guidelines cannot make these duties optional, and should not create that impression. These mandatory duties include:

- All of proposed Part II of the Guidelines.
- Requirements for:
    *preventing re-aging of old debts (at Guideline IV.G), which is required by Section 1681s-2(a)(5) of the FCRA.
    * preventing reinsertion of inaccurate information (at Guideline IV.I), which is required by Section 1681s-2(a)(2) (prohibiting furnishing of inaccurate information after correction, *see also* 1681i(a)(5)(B)(i) requiring furnishers to certify that information is accurate and complete if they reinsert previously deleted information).

The problem with including these mandatory requirements in the Guidelines is that proposed Regulations at __.42(b) merely require furnishers to "consider the Guidelines" and incorporate those that are "appropriate." As an initial matter, we believe

Proposed __.42(b) is unduly weaker than the statutory requirements, which we discuss above at Section II.C. Moreover, the statute requires more than that furnishers merely "consider" the various statutory requirements listed above. Putting these requirements in the Guidelines, without making clear they are mandatory under the FCRA, risks creating a misleading impression that the Guidelines weaken or water down these requirements.

The Regulators must make clear in Proposed __.42(b), that where the Guidelines address mandatory provisions under the FCRA, they do not introduce a level of flexibility or choice for the furnisher about compliance with those mandatory provisions. Whenever such mandatory provisions appear in the Guidelines, language must be included which clarifies that the provision is mandatory under the FCRA and that the flexibility inherent in a Guidelines-based approach does not apply. In addition, furnishers must have policies and procedures to assure compliance with all applicable aspects of the FCRA

4. Policies and procedures should be written.

The Regulators have asked for comment regarding the need for policies and procedures to be in writing. We support requiring that dispute resolution policies and procedures, and policies and procedures on accuracy and integrity in furnishing, be in writing. Companies place in writing those policies and procedures that they expect their employees to learn and follow. An oral policy or procedure would be difficult to communicate effectively to new employees, hard to enforce internally, hard for regulators to evaluate for compliance, and unlikely to send the same signal to the company's employees and contractors about the level of commitment to the policy or procedure that would be sent by a written document. Written policies and procedures also create documents against which systems can be designed, internal audits for systems compliance and employee performance compliance with polices and procedures can be conducted, and actual practices can be measured against the expectations and requirements set forth in the written policies and procedures.

5. Furnishers should be required to regularly review and update their policies and procedures for furnishing information to CRAs (Proposed __.42(c)).

Proposed __.42(c) requires furnishers to review their policies and procedures for furnishing information to CRAs and update the policies to ensure their continued effectiveness. We support this requirement, and agree that furnishers should be required to conduct periodic evaluations of their policies and procedures. More importantly, we agree that furnishers must be required to update their policies and procedures if an evaluation reveals the need to do so to ensure continued effectiveness. In addition, as mentioned above, we urge that the Guidelines require large furnishers to conduct evaluations at least annually.

6. *Proposed Revisions to __.42.*

Proposed ___.42 should be modified to read:

(a) Policies and Procedures: Each furnisher must establish and implement reasonable written policies and procedures to promote the accuracy and integrity of the information related to consumers that it furnishes to a consumer reporting agency. The policies and procedures must be reasonably designed to accomplish the furnishing only of accurate information which has integrity. They may be appropriate to the nature, size, complexity, and scope of each furnisher's activities, but must at a minimum address:

- Correctly identify the consumer to whom information pertains;
- Correctly provide key dates, including the date to calculate obsolescence under the FCRA;
- Correctly state the terms of and liability for the account or other relationship;
- Correctly state the conduct of the consumer and of the furnisher with respect to the account or other relationship;
- Substantiate information furnished to a CRA;
- Provide for the retention of records that substantiate information furnished;
- Update information to keep it current; and
- Conduct a reasonable investigation.

(b) Guidelines: Each furnisher must establish and follow reasonable policies and procedures to implement ~~consider~~ the guidelines in Appendix E of this part. ~~, in developing its policies and procedures required by this section, and incorporate those guidelines that are appropriate~~ The guidelines incorporate provisions of the FCRA that are mandatory for furnishers; as to those provisions, the policies must ensure compliance.
(c) Reviewing and updating policies and procedures. Each furnisher must review its policies and procedures required by this section periodically and update them as necessary to ensure their continued effectiveness.

III. Comments on the Direct Dispute Regulations

The most important issues in the direct dispute Regulations are that the definitions of accuracy and integrity be retained in the Regulations, be strengthened, and that integrity be treated as part of accuracy. This section further describes how failure to include integrity as part of accuracy would restrict the scope of direct disputes to a much narrower group than the Supplementary Information suggests was intended. This section then recommends additional improvements that are needed in the direct dispute Regulations to make the direct dispute a reasonable option for consumers. This section is presented as a series of problems that we foresee if changes are not made to the Regulations, along with recommended changes to avoid those problems.

A. Problem: The proposed Regulation does not permit direct disputes to correct an omission, no matter how important the omission.

How the proposed Regulations create this problem: As discussed in Section II.A.7, the Regulations segregate types of errors between the two definitions of "accuracy" and of "integrity." Proposed __.41. The Regulations require that furnishers investigate only certain types of "direct disputes." Proposed __.43(a). The Regulations define "direct dispute," however, to cover only "a dispute...concerning the accuracy of any information contained in a consumer report relating to the consumer." Section __.41(e). The effect of these interlocking sections is that unless "integrity" is defined as part of "accuracy," a large subset of issues about the quality of furnished information will be excluded from the direct dispute process.

Reasons why this is wrong: "Integrity" addresses omissions which are of special importance – omissions which the Regulatory Definition states: "can reasonably be expected to contribute to an incorrect evaluation by a user of a consumer report of a consumer's creditworthiness [and certain other characteristics]." Consumers will be told how to dispute the accuracy of information in their consumer reporting files directly with furnishers. Consumers will have no reason to make a distinction between inaccuracies caused by bad information versus inaccuracies caused by important omissions, yet the ability to dispute under the proposed Regulations is very different for these categories. A dispute about an omission may be the very type of dispute that could be most effectively and efficiently handled directly with the furnisher. A broad direct dispute avenue is particularly important in light of the ongoing practice, which consumer groups believe to be illegal, of consumer reporting agencies to decline to forward to furnishers all of the material which a consumer submits with a dispute; instead summarizing the consumer's reasons into a simple dispute code with or without a line of additional comment.

The Supplementary Information states that the proposed rule on direct disputes "is designed to permit direct disputes in virtually all circumstances involving disputes with respect to the types of information typically provided by the furnisher to a CRA, while excepting out certain types of information [for which disputes are more appropriately directed to the CRA]." 72 Fed Reg. at 70,954. It is contrary to that expressed goal to define direct disputes as limited to accuracy disputes and divide what would commonly be thought of as accuracy into the categories of accuracy and integrity.

We agree with the stated goal, and with the prediction contained in the Supplementary Information that a narrow dividing line excluding disputes about some types of information commonly supplied by furnishers will defeat consumer expectations and make it "difficult for consumers and furnishers to know whether there is a right to a direct dispute in any particular circumstance." 72 Fed Reg. at 70,954.

To achieve the goal stated in the Supplementary Information, the definition of accuracy, particularly for purposes of the "direct dispute" Regulations, must be modified

to include "integrity" as a subset of accuracy, so that disputes about important omissions are not artificially excluded from the direct dispute process.

The changes for Proposed __.41(a) are described above in Section II.A.8 of these comments and would address this issue. In addition, a conforming change would be needed in Proposed ___.41(c): to add "omitted from" after "contained in" in the definition of direct dispute. This would further clarify that omissions can be the subject of a direct dispute.

An alternative way to solve the problem of a too-narrow scope for allowable direct disputes would be to change the definition of "direct dispute" at Proposed __.41(c) to refer to "a dispute concerning the accuracy or integrity of any information contained in or omitted from a consumer report.

B. Problem: The proposed Regulations do not require that the furnisher's investigation must be a reasonable one.

How the proposed Regulations create this problem: To their credit, and consistent with the statute, the Regulations require that the furnisher "must investigate" covered disputes filed directly with the furnisher. However, there is no definition of what it means to investigate, no express requirement that the investigation go beyond the record from which the furnisher initially supplied the information, no express requirement to consider the relevant material supplied by the consumer, no express requirement to consider contradictory information in the furnisher's own records, and no general obligation that the investigation be a reasonable one from which these other duties could be inferred in an appropriate instance.

Current law already requires furnishers to conduct a reasonable investigation for disputes submitted to a CRA and then sent on to the furnisher.[16] A consumer dispute should not be subject to a lower, vague, or non-binding standard with respect to the investigation merely because the consumer submits the dispute directly to the furnisher instead of submitting it through a CRA. The Guidelines do discuss the need for the investigation to be a reasonable one, but it is the Regulations which will actually define the requirements for furnisher conduct in handling a direct dispute.

We do not favor a restrictive or comprehensive definition of "investigate," but it is essential that the Regulations require that the furnisher investigation be a reasonable investigation. Without this requirement, furnishers might simply look at their files to see if there is any documentation for what the furnisher supplied, without considering whether that information is wrong and without considering the additional information provided by the consumer.

[16] *See* Johnson v. MBNA Am. Bank, NA, 357 F.3d 426 (4th Cir. 2004); Hurocy v. Direct Merchants Credit Card Bank, N.A., 371 F.Supp.2d 1058 (E.D.Mo. 2005); Schaffhausen v. Bank of America, N.A., 393 F.Supp.2d 853 (D.Minn. 2005).

Medical identity theft presents another illustration of why the Regulations must require that the investigation be a reasonable one, without attempting to describe the exact contours of a reasonable investigation for all circumstances. In cases of medical identity theft, a reasonable investigation may require review of information which the consumer provides, or which is available to a furnisher who is a health care provider or insurer. This may include documentation from doctors, dentists,o ther health care providers, and other HIPAA-covered entities.

Congress plainly intended that furnishers be required to consider all relevant information provided by the consumer. Section 1681s-2(a)(8)(C) of the FCRA applies paragraphs (D)-(G) to those disputes filed with furnishers covered by the Regulations, and subsection (E) requires the person receiving the dispute to both "conduct an investigation" and "review all relevant information provided by the consumer with the notice."

Recommended change: Add Section __.41(f) "Investigate" as used in __.43(a) of those regulations means a reasonable investigation.

C. Problem: The proposed Regulations do not require a creditor or other furnisher to report the accurate credit limit, *even when a consumer disputes the failure to do so.*

How the proposed Regulations create this problem: The proposed Regulations require the furnisher to investigate a direct dispute if it relates to the terms of the credit account or other debt, and give as an example a dispute about "the amount of the *reported* credit limit." This example leaves it unclear whether the failure to report a key term, such as the credit limit, is also covered by Proposed __.43(a)(2). The general catch-all requirement in subsection (4) will not cover failure to report the credit limit, because that section is limited to information "contained in" a consumer report. A material omission is not information contained in the report, and so will not be covered by Proposed __.43(a)(4).

Reasons why this is wrong: When the credit limit is not reported, a credit scoring model may treat the actual balance as the credit limit, which can make it falsely appear that the consumer is using a high percentage of his or her available credit. This depresses the credit score. This problem has been brought up numerous times by consumer advocates.[17] The OCC has told its regulated national banks that their "ability to make prudent underwriting and account management decisions may be adversely affected by incomplete credit bureau files" in a cover memo transmitting an FFEIC memo specifically addressing non-reporting of credit limits.[18] The direct dispute Regulations

[17] National Consumer Law Center, et al, *Comments to Regulators' Advanced Notice of Proposed Rulemaking: Furnisher Accuracy Guidelines and Procedures Pursuant to Section 312 of the Fair and Accurate Credit Transactions Act*, May 2006; Evan Hendricks, et al, *In Re: OCC and Docket Number 06–04 RIN 1557–AC89 12 CFR Part 41 ''Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies,''* May 2006.

[18] *See* OCC Bulletin 2000-3, Consumer Credit Reporting Practices, http://www.ffiec.gov/ffiecinfobase/resources/retail/occ-bl2000-3_ffiec_consumer_credit_report.pdf.

should be modified to clarify that consumers can use the direct dispute process to get the true credit limit reported.

Recommended changes:

At Proposed __.43(b)(2), delete "reported" so that the obligation to investigate will apply to all direct disputes about "the amount of the ~~reported~~ credit limit" on an open-end account.

At Proposed __.43(a)(4), after "contained in" add: "or omitted from."

D. Problem: The proposed Regulations allow a furnisher to reject a detailed, well documented dispute as frivolous or irrelevant if the topic of the dispute is outside of the types of disputes covered by the Regulation. This rejection need not tell the consumer that this type of dispute can still be pursued through a CRA.

How the proposed Regulations create this problem: The definition of "frivolous or irrelevant" disputes in Proposed __.43(e)(iii) includes all disputes that the furnisher is not required to investigate under the direct dispute section. Proposed __.43(e)(2) requires a notice to the consumer that the dispute was determined to be frivolous or irrelevant and the reasons for such determination. However, same subsection permits the notice to "consist of a standardized form describing the general nature of such information" which is missing and required. A consumer with a well documented dispute might receive a form letter that says, in essence: "We determined that your dispute was frivolous or irrelevant for one of these reasons: 1) It was not a type we must consider, or 2) You did not provide enough information. You must provide this type of information (categories)."

Reasons why this is wrong: A rejection of a direct dispute due to its type is fundamentally different from a rejection because the dispute comes from a credit repair organization or because the consumer did not provide all of the necessary information. If the only reason a dispute will not be investigated is that the furnisher is not required by law to pursue it, consumers should be told that this is the case. We agree with the policy choice that consumers must receive notice from the furnisher about any dispute which the furnisher rejects or declines to investigate, including those which are rejected or declined because they do not fit the category of allowable direct disputes. However, permitting a general "frivolous or irrelevant" notice to be sent about disputes that are rejected due to their type will be both insulting and potentially misleading to consumers. A consumer who goes to the trouble of providing careful documentation to a furnisher and receives a rejection may be unaware of the right, or even be dissuaded from, filing that same well-documented dispute with a CRA. It goes against common sense to expect that a furnisher who has rejected a dispute will examine that same dispute more carefully if it is refilled with a CRA, yet in fact that is the effect of Regulations that permit some disputes to be rejected solely based on the type of dispute.

In addition, when a furnisher rejects a dispute on the ground that the dispute is of a type that the furnisher is not required to consider, the furnisher must be required to provide with that rejection a clear written statement advising the consumer that he or she may dispute this information with the CRA, providing the address to do so, and stating that the furnisher will have an obligation to investigate the dispute once the CRA forwards the consumer's dispute to the furnisher. Without this disclosure, consumers could be misled into thinking that it would be pointless to file a dispute with a CRA after the furnisher has rejected that dispute. Where the reason for the rejection was "wrong place of filing," nothing could be further from the truth.

The Regulations should require different and additional notice when the reason for the rejection is that the type of dispute does not fall within the direct dispute Regulations.

Recommended changes:

This section sets forth all of the suggested changes to Proposed __.43(e), including some which are discussed in the next several sections.

(e) Frivolous or irrelevant disputes. (1) A furnisher is not required to investigate a direct dispute if the furnisher has reasonably determined that the dispute is frivolous or irrelevant. A dispute may be frivolous or irrelevant if:

(i) The consumer did not provide sufficient information to investigate the disputed information as required by paragraph (d) of this section <u>after a request for that information, which request identified what type of information was missing with respect to the particular dispute</u>;

(ii) The direct dispute is substantially the same as a dispute previously submitted by or on behalf of the consumer, either directly to the furnisher or through a consumer reporting agency, with respect to which the furnisher has already satisfied the applicable requirements of the Act or this section; provided, however, that a direct dispute is not substantially the same as a dispute previously submitted if the dispute includes information listed in paragraph (d) of this section that had not previously been provided to the furnisher; or

(iii) The furnisher is not required to investigate the direct dispute under this section.

(2) Notice of determination. Upon making a determination that a dispute is frivolous or irrelevant, or that the furnisher is not required to investigate the direct dispute under this section, the furnisher must notify the consumer of the determination not later than five business days after making the determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the furnisher.

(3) Contents of notice of determination that a dispute is frivolous or irrelevant, or that the furnisher is not required to investigate the direct dispute under this section. Where the reason for the determination is the absence of information required to investigate the disputed information, a notice of determination that a dispute is frivolous or irrelevant must include the reasons for such determination, and identify any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information, plus checked boxes or other indication of what type of information was missing with respect to the particular dispute. Where the reason for the determination is that the furnisher is not required to investigate the direct dispute under this section, the notice shall include a statement that: "We are not required to investigate all types of disputes that you file directly with us. We chose not to investigate your dispute because it is not the type that the law requires us to consider when you file it directly with is. If you refile the same dispute with a consumer reporting agency, we will be required by law to investigate that dispute after the consumer reporting agency refers it to us. You can file your dispute with a consumer reporting agency by contacting (address to all three CRAs, or at least the ones this furnisher provides information to.)"

E. Problem: The furnisher may reject a dispute even if the missing information is readily available in the furnisher's own files.

How the Regulations create this problem and why it is wrong: The Regulations allow the furnisher to reject a dispute if certain information is missing, without checking whether the required information is in fact already on file with the furnisher. For example, the Regulations require that every direct dispute notice include the name, address, and telephone number of the consumer. If the consumer omits the phone number, but that information is readily available in the furnisher's own files, why should this form a basis to reject the dispute? In an identity theft allegation, the consumer may have already filed extensive material with the furnisher's fraud department, indeed the dispute might refer to that prior correspondence with the furnisher. A dispute notice should not be deficient because it refers to previously submitted material instead of re-filing that material.

Recommended change: Section __.43(d)(5) add: (5) Notwithstanding (1)-(4), the dispute notice is not deficient if the missing information is identifiable from the notice and is readily available in the furnisher's files."

F. Problem: The proposed dispute Regulations allow a furnisher to reject a dispute without telling the consumer what else should be supplied.

How the proposed Regulations create this problem: Under the notice section, the consumer could simply receive a form that says: "We have determined that your request to investigate a problem with the information that we supplied to a consumer reporting agency was frivolous or irrelevant because you did not give us enough information. You

must give us information sufficient to investigate the dispute such as your name, address, and phone number, sufficient information to identity the account or other relationship in dispute, the specific information that you are disputing and an explanation of the dispute, and all supporting documentation or other information reasonable required by us to substantiate the basis for the dispute."

The consumer won't receive this notice until his or her dispute has already been rejected. This notice won't even tell the consumer which category of items was deficient, and it won't give the consumer any hint of how to refile with more complete information. How is the consumer to know what else is required if the notice is so general? Why allow a furnisher to make the consumer go through a rejection of the dispute before telling the consumer what is missing?

The Guidelines do include a provision that the furnisher attempt to obtain necessary information before rejecting a consumer's dispute as frivolous or irrelevant. This obligation belongs in the Regulations. The direct dispute option will have little meaning for consumers if the furnisher can comply with the Regulations by rejecting a dispute before asking the consumer for the information that the furnisher believes is necessary to investigate the dispute.

Recommended changes:

Proposed __. 43(e)(1)(i): after: "The consumer did not provide sufficient information to investigate the disputed information as required by paragraph (d) of this section," add: "<u>after a request from the furnisher for that information, which request identified what type of information was missing with respect to the particular dispute</u>."

Proposed __.43(e)(3): After "general nature of such information" add: "<u>plus check boxes or other indication of what type of information was missing with respect to the particular request</u>."

G. Problem: The dispute Regulations won't help consumers add information about the furnisher's conduct that would help to show that a debt is a duplicate because the furnisher has transferred, sold or engaged in similar conduct with respect to the debt.

How the Regulations create this problem: Proposed __.43(a)(3) requires a furnisher to investigate a direct dispute concerning the "consumer's performance or other conduct concerning an account" but it omits any requirement to act with respect to a dispute about what the furnisher fails to report or concerning other aspects of the furnisher's conduct with respect to the account.

Reasons why this is wrong: When an account goes to an outside collection agency which reports to a CRA, it will look like two unpaid accounts on the credit report if the initial creditor fails to properly instruct the CRA to delete the tradeline or show that

it has been transferred Duplicate tradelines are a significant problem, as discussed below in Section IV.1.B of these comments. We appreciate the Guidelines addressing the need to prevent duplicate tradelines, and we urge that Proposed __.43(a)(3) be revised to provide a parallel ability for consumers to use a direct dispute when a furnisher fails to prevent a duplicate tradeline.

> Recommended change: Proposed __.43(a)(3) should be amended to read in relevant part: "the consumer's or the furnisher's performance or other conduct with request to the account, or other relationship between the consumer ~~with~~ and the furnisher, such as …"

> **H. Problem: The restriction to direct disputes about liability and terms to debts "with" the furnisher may exclude some disputes about information furnished by collection agency which is collecting a debt on behalf of another.**

How the Regulations create this problem: Proposed __.43(a)(1) and (2) address only direct disputes with respect to "a credit account or other debt *with* the furnisher." Proposed __.43(a)(3) and (4), by contrast, cover both accounts with and other relationships with the furnisher. If a collection agency is collecting on behalf of another entity, the account and the debt are with that other entity, not with the collection agency. This is probably a technical drafting error rather than a policy choice.

Reasons why this is wrong: If "with the furnisher" restricts direct disputes to debts owed to the furnisher and excludes debts being collected by the furnisher for another party, then the consumer's only recourse with respect to liability or terms – the items covered by Proposed __.43(a)(1) and (2) - could be to dispute the debt with the CRA. The CRA's investigation will be an inquiry to that same furnisher – the debt collection agency. If the debt collection agency simply confirms the debt, the consumer will be left with no simple way to get either the CRA or the collector to look at the underlying issues of whether the consumer was ever responsible for this debt in the first place, and whether the recorded amount of the debt is correct. The use of the word "with" in subsections (1) and (2) could exclude a group of disputes that are very appropriate for use of the direct dispute mechanism, and that are permitted when the debt collector has purchased the debt, making the debt "with" the collector.

> Recommended change: The references in Section __.43(a)(1)-(2) to an account "with the furnisher" should be modified to refer to "an account with or being collected by the furnisher or other relationship with the furnisher…"

> **I. Problem: The furnisher may reject the dispute because it has requested information that is not reasonably available to the consumer, and the examples of what the furnisher may require are overbroad.**

How the proposed Regulations create these problems: Proposed __.43(d)(4) requires that the consumer to provide all information "reasonably required" by the furnisher. However, it contains no escape hatch to allow the dispute to go forward when

the furnisher seeks information which is not reasonably *available* to the consumer. The examples set forth in Proposed __.43(d)(4) illustrate this problem. They refer to "account statements," but it is particularly inappropriate to require a consumer to provide account statements when the consumer is disputing information due to either a very old or discharged debt, or because the debt arises from identity theft. A key aspect of accounts opened by identity thieves is that the statements usually go to the thief. For discharged debts, the consumer may no longer have the old account statements, and the same is true for very old debts which are resurrected in a debt sale (what is sometimes called "zombie debt").

A requirement that consumers provide information that they can't be reasonably expected to have could unduly obstruct a dispute that might otherwise reveal that the furnisher lacks substantiation for the information it has furnished about the debt. The consumer should be required to provide only that information which is both reasonably required by the furnisher and reasonably available to the consumer.

A related problem in Proposed __.43(d)(4) arises from the broad list of examples of what the furnisher may insist that the consumer provide as part of the dispute. This proposed subsection appears to permit a creditor to insist that the consumer include a copy of his or her consumer report with any dispute. This raises potentially significant privacy concerns. A consumer should not have to reveal his or her full consumer report to a furnisher in order to dispute one entry on that report.

Finally, we are concerned that Proposed __.43(d)(4) includes as examples, "police report, a fraud or identify theft affidavit, court order…." Clearly, these examples are only appropriate for some types of disputes and not for others. The implication that a furnisher can insist on a police report or even a court order in a case when an identify theft affidavit filed with the FTC would be sufficient opens the door for mischief against the consumer. This list should be deleted from the Regulation because the items in it will not be appropriate in all cases.

Recommended change: Section __.43(d)(4) should state:

> (4) All supporting documentation or other information reasonably required by the furnisher and reasonably available to the consumer to substantiate the basis of the dispute. ~~This documentation may include, for example: A copy of the consumer report that contains the allegedly inaccurate information; a police report; a fraud or identity theft affidavit; a court order; or account statements~~.

J. Problem: A furnisher can ignore a well-documented dispute which actually comes to its attention if the dispute was sent to the wrong address.

How the proposed Regulations create this problem: While we generally support the address structure in the proposed Regulations, the Regulations make no allowance for a dispute filed at the wrong address that comes to the actual notice of the furnisher.

Why this is wrong: If the consumer sends the direct dispute to the wrong address but it actually comes to the attention of the furnisher, the Regulations should not permit the furnisher to simply treat it as frivolous or irrelevant.

Recommended change: Section __.43(c)(2) add at the end of this subsection: "any other address at which the dispute actually comes to the attention of the furnisher; or"

K. Problem: The Regulations should plainly state that there are other statutory obligations with respect to direct disputes under Section 1681s-2(a)(8)

The proposed direct dispute Regulations address part, but not all, of the elements of the direct dispute process. Because Congress asked the Regulators to develop regulations on what types of direct disputes must be considered, the Regulations are focused on the types of disputes, what missing information permits a dispute to be rejected, and the type of notice to the consumer in the event of a rejection. In effect, the Regulations incorporate the statutory requirements for consumers to provide a notice and documentation to the furnishers, but do not mention any of the furnisher's duties under 1681s-2(a)(8)(E). The Regulations should at least include a section clarifying that furnishers also have these other duties.

Recommended change: Add a new Section __.43(g): These regulations do not describe all of the statutory obligations of a furnisher with respect to direct disputes. For example, additional furnisher obligations are imposed by Section1681s-2(a)(8).

L. Problem: the proposed Regulations must be amended to provide consumers with a workable, understandable, effective system to report and obtain correction of errors.

Effective notice and efficient referral are key elements to making the direct dispute process more than just an empty procedure. In particular, when a dispute is rejected because it is of a type that should have been filed with the CRA rather than the furnisher, it is inherently misleading for a furnisher to reject the dispute without telling the consumer that the consumer can send the dispute to the CRA, and that this will start a process in which the furnisher will have to investigate a dispute that it was not required to consider as a direct dispute.

Without this information and required cross referral, consumers may be misled and may subsequently fail to pursue a valid dispute via the CRA dispute channel because they received no resolution after first filing that dispute with a furnisher – even if the only reason there was no satisfactory resolution was that the type of dispute was a type that should have been filed with a CRA instead of with the furnisher.

The Regulations should require that:

1. Each furnisher must communicate effectively to the public, including on its web site:

- The address(es) for filing a direct dispute;
- A description of the types of disputes that the consumer can file with the furnisher; and
- A clear and conspicuous statement that other types of disputes can be filed directly with the CRAs, along with the addresses to do so, and a plain statement that the filing of a dispute with the CRA can trigger a process leading to an investigation by the furnisher even if the dispute has been rejected by the furnisher as not appropriate under the direct dispute process.

2. Each furnisher must forward directly to any CRA to whom it furnishes information any dispute which the furnisher rejects because it is of a type not required to be considered by the furnisher, excluding only disputes that the furnisher determines to be substantively frivolous or irrelevant for reasons other than that the dispute should have been filed with the CRA rather than with the furnisher. A regulatory interpretation may be required so that CRAs must treat those referred disputes as if they had been filed by the consumer with the CRA.

3. When a furnisher rejects a dispute on the ground that the dispute is of a type that the furnisher is not required to consider, the furnisher must be required to provide along with that rejection a clear written statement advising the consumer that he or she may dispute this information with the CRA, providing the correct address to do so, and stating that the furnisher will have an obligation to investigate the dispute once the CRA forwards the consumer's dispute to the furnisher. Without this disclosure, consumers can be misled into thinking that it would be pointless to file a dispute with a CRA after the furnisher has rejected that dispute. Where the reason for the rejection was "wrong place of filing," nothing could be further from the truth.

4. Each furnisher must make public, on its web site and upon request by any member of the public, its policies for furnishing information to CRAs and for handling disputes about that information.

Recommended changes:

Automatic referral:
Section __.43(f)(1): <u>"If the furnisher rejects a direct dispute on the grounds that it is not the type of direct dispute which may be filed with a furnisher, the furnisher shall, within one business day, forward to each consumer reporting agency to which the furnisher provided the disputed information the following: (i) a notice that a dispute is being referred to the CRA, (ii) the dispute; and (iii) all information provided by the consumer in connection with the dispute. A CRA receiving such a referral shall treat the dispute as a dispute filed by the consumer under FCRA Section 611(a), from the date of its receipt by the CRA."</u>Notice of right to file directly:

Web site policies disclosure:
Section __.43(f)(2): Each furnisher must communicate effectively to the public, including on its web site, all of the following: (i)The address(es) for filing a direct dispute; (ii) a description of the types of disputes that the consumer can file with the furnisher; and (iii) a clear and conspicuous statement that other types of disputes can be filed directly with the CRAs, along with the addresses to do so, along with a plain statement that the filing of a dispute with the CRA can trigger a process leading to an investigation by the furnisher even if the dispute has been rejected by the furnisher as not appropriate under the direct dispute process.

Notice of right to file directly:
This change is included with the other proposed changes to Section __.43(e).

IV. Comments on Proposed Accuracy and Integrity Guidelines

We address the Proposed Guidelines on a section by section basis, except for the issue of the "accuracy" and "integrity" definitions (*i.e.*, the different Approaches being proposed). This latter issue is addressed earlier in Section II.A. of these comments, as it is the most important issue in this proposal.

Part I

Guideline I.A. Nature and Scope

As discussed above, we are extremely concerned about this Guideline, because it appears to allow certain furnishers to abide by a lower standard of accuracy and integrity for furnished information. We recommend that all furnishers be subject to minimum standards, as discussed above in Section II.C.2 of these comments, and that the following sentence be inserted after the first sentence in this Guideline:

"However, all furnishers must have written policies and procedures to addressed the subjects listed in Section __.42(a)."

We are particularly concerned about paragraph 3 in this Guideline, which permits a furnisher's policies and procedures to vary depending on the technology it uses. We recommend that it be deleted or modified to state:

3. The type of technology used by the furnisher to furnish information to consumer reporting agencies; however, furnishers must maintain and update technology as necessary to ensure the accuracy and integrity of information furnished to CRAs.

In addition, we recommend that this Guideline include another element -- the probable impact of the type of information commonly reported by that type of furnisher:

4. The impact on evaluations of the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living or on the consumer's credit score, of the type of information reported by the furnisher on consumers.

An alternative way to accomplish this would be to add as part of paragraph 2:

"and the impact of that type of information on evaluations of the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living or on the consumer's credit score"

We believe that this fourth element is necessary to protect consumers from inaccuracies in information that are especially harmful. For example, a debt collector reports a type of information that is far more likely to have a negative impact on the consumer's credit report, and a depressive impact on predictive scores about the consumer, than a report from another type of furnisher of the very same size. The proposed Guideline refers to the nature of the furnisher and the nature of its information, but it should more directly acknowledge that some types of information are more harmful to consumers than other types and that the obligations of furnishers who choose to provide those types of information to CRAs must be higher.

Guideline I.B. Objectives

Paragraph 1. In the Regulatory Definitions Approach, the "Objectives" Guideline is missing one element found in the definition of accuracy, which should be added. That element is "liability for" the account or other relationship. Paragraph 1(b) should be modified to read: (b) Accurately reports the terms of and liability for those accounts and other relationships."

The omission appears to be a technical oversight, since the liability for the debt is found in both the definition of accuracy in the regulatory definition in Proposed __.41(a) and also in the alternative Guidelines Definition approach. The obligation in the Guidelines should match the definition of accuracy, which includes accurately reporting who is liable for the account or debt. The continuance of the identity theft epidemic makes it important to include liability in any section listing the elements of accuracy.

Paragraph 4. This paragraph addresses the need for updating. As stated above in Section II.A.8 of these comments, we strongly support a requirement that all material information about an account be updated as necessary to be current. Furthermore, we believe this requirement should be added as an explicit element of "accuracy," set forth in the Regulations.

As currently proposed, this Paragraph only mentions two types of updating – to reflect transfer of an account and to reflect the consumer's cure of a default. This Paragraph could be misinterpreted to be limited to those circumstances. It should be modified to state:

4. Ensure that it updates information it furnishes as necessary to reflect the current status of all material information concerning the consumer's account or other relationship, including but not limited to:

For example, this paragraph omits the example of the need to update an account discharged in bankruptcy. This is a critical issue for the reasons stated in Section II.A.8 above. The Guidelines should make very clear that accuracy requires updating an account to reflect that it has been discharged in bankruptcy. At a minimum, this paragraph should include a third example stating:

(c) Any discharge of an account or other debt in bankruptcy, including that the amount owed is zero and a notation that the account is "included in bankruptcy".

Furthermore, the first example (a) regarding transfer of an account should require that the furnisher take reasonable steps to prevent duplicate tradelines. Accounts that are sold or transferred to others for collection often result in duplicate tradelines, especially acute with student loan and collection accounts. They are especially harmful, because credit grantors do not expect duplicate from the Metro 2 industry standard. Thus, they falsely appear to multiply the amount of outstanding debt, either magnifying adverse information or making the consumer appear overextended.

Finally, the second example (b) requires furnishers to update information to reflect a consumer's cure of a default or delinquency. We strongly support this provision. Failure to reflect a cure is a reprehensible omission by a furnisher. Furthermore, consumers often make payments to cure a default pursuant to negotiated settlements specifically pitched to consumers as a method to "fix" their credit files. Failing to reflect a cure in this case deprives the consumer of the benefit of these settlements.

Part II

This part consists of a list of obligations that furnishers have under the FCRA. While this list is a good reminder to furnishers, as we stated above, we recommend that the Regulators made clear that these obligations are mandatory, and further indicate that there are other laws as well that address the furnished information. These two changes would be added by modifying the first paragraph to state:

A furnisher's policies and procedures must assure ~~should address~~ compliance with all applicable requirements imposed on the furnisher under the FCRA~~, including the duties to:~~ These FCRA requirements are mandatory, and include*:* [1]

[1] This is not a complete listing of furnisher duties relating to furnished information. Furnishers should consult the FCRA to determine what additional duties may apply. In addition, furnishers should consult other statutes that impose limitations with respect to the furnishing of information or other obligations with respect to such information, such

as the Health Insurance Portability and Accountability Act, Gramm-Leach-Bliley Act, Truth in Lending Act, Real Estate Settlement Procedures Act, and the Fair Debt Collection Procedures Act.

Part III

In general, this Section suffers from the problem of allowing furnishers too much discretion in whether to establish and implement key procedures that promote accuracy and integrity of furnished information.

Guideline III.A.

This Guideline addresses review of existing practices and policies that can compromise accuracy and integrity. However, each of the procedures it enumerates is given as an optional example because the Guideline states "such as by:" We urge the Regulators to strike the words "such as".

Paragraph.A.1. This paragraph sets forth the concept of an audit as an example only. It does not require an audit, no matter how large or sophisticated the furnisher is. We strongly urge that this paragraph substitute "including an audit for large furnishers" instead of "such as through an audit" at the end of this paragraph.

Paragraph A.2. This paragraph discusses reviewing a furnisher's own historical records. However, even this relatively simple step within the control of the furnisher is optional, because this paragraph permits furnisher to choose to review unspecific "other information relating to the accuracy and integrity of information provided by the furnisher" to the CRAs. We recommend this paragraph require the furnisher to review historical records.

Paragraph A.3. This paragraph discusses obtaining feedback, but allows the furnisher to choose to look to any one of these: customers, CRAs, even the furnisher's own staff OR "other appropriate parties." Thus, obtaining feedback from all or any of these sources is optional. We urge that this paragraph require feedback from all of these sources, by substituting the word "and" instead of "or."

Guideline III.B.

This Guideline requires furnishers to evaluate their effectiveness of their existing policies and procedures on accuracy and integrity, and to consider whether to update them. However, there is no requirement to adopt new policies or update policies if the existing ones are found to be deficient by an evaluation. We recommend the addition of the following at the end of this Guideline "and adopting new, additional or different policies and procedures or modifying existing ones if such an evaluation reveals the need

to do so to ensure the accuracy and integrity of information furnished to consumer reporting agencies."

Part IV

Guideline IV.A

As with Proposed __.42(a) of the Regulations, this Guideline should be amended to add the basic requirement that the policies must be reasonably designed to facilitate the reporting only of accurate, complete, up to date information which is fully substantiated and has no tendency to mislead users of a credit report or credit score. It should also refer to the minimum standards for furnishers set forth in our recommended additions to that subsection.

Guideline IV.B.

This Guideline addresses the need to use a standard data reporting format and standard procedures for compiling and furnishing data, where feasible. The current standard format would be the Metro 2 format. We strongly agree that furnishers should be required to use Metro 2 or any format that replaces it as the standard reporting format. In fact, we urge the Regulators to strengthen this Guideline by stating that furnishers should use standard reporting unless *infeasible*, not just where feasible.

We also urge that this Guideline require furnishers to complete all applicable fields in the current standard reporting format Metro 2. Failure to fully complete the Metro 2 format can create significant inaccuracies. For example, the failure to fill out a co-borrower's address in Metro 2 results in the primary borrower's address being listed for the co-borrower. We recommend this Guideline be revised to state:

> B. Using standard data reporting formats, including completing all applicable data fields, and standard procedures for compiling and furnishing data, unless infeasible ~~where feasible~~, such as the electronic transmission of information about consumers to consumer reporting agencies.

Guideline IV.C

This Guideline addresses substantiation and recordkeeping. It is a KEY Guideline, as these elements are essential to promote accuracy

> **This Guideline should specify the types of documents necessary for substantiation.** As stated above, we strongly support a requirement in the Regulations that furnishers substantiate the information they initially furnish, and remove any disputed information that cannot be substantiated at the time of the dispute. In addition, we believe the Guidelines should include requirements as to what kind of substantiation is required. Otherwise, a furnisher may claim it has

substantiation merely because its electronic records reflect the same information which it furnished to the CRAs.

To prevent any misunderstanding, this Guideline should specify that certain documents must be in the possession of the furnisher in order to constitute substantiation. For example, credit card companies should be required to have in their possession account applications, agreements, and billing statements. Most importantly, debt buyers should be required to have certain evidence (that the consumer is the current individual liable on the account, account agreements, billing statements, and payment records) in their possession, and to have reviewed such information before furnishing to a CRA.

Indeed, in one of the few enforcement actions by a federal regulator against a furnisher, the FTC required a debt buyer to obtain and review the files of an original creditor in its enforcement action against Performance Capital Management.[19] This standard should be applied to all debt buyers, assignees, and collection agencies.

Time period for recordkeeping. The Regulators have asked whether the Guidelines should specify a time period for furnishers to retain records. We support a requirement that records should be kept as long as the account or other relationship with a furnisher is being reported. There should not be a specific time limit; the standard should be "as long as necessary to substantiate information." Even a time limit of 7 years, the period of obsolescence for most information under the FCRA, would be inadequate, because documentation can be required to substantiate liability for an account beyond 7 years.

For example, with a credit card account, the furnisher must be required to retain the original account application as long as the furnisher is reporting the account in order to substantiate that the consumer is liable on the account. This is especially important to determine whether a second person listed on the account is a co-borrower or merely an authorized user. It may be many years, if not decades, before a credit card account becomes delinquent (or the primary borrower dies). We have seen many cases in which a credit card lender will pursue liability against the secondary party on the account, including authorized users. The Guidelines should require that the credit card issuer must retain the records substantiating that the secondary party is actually a liable joint borrower and not just an authorized user before it reports to a CRA that the secondary party is liable.

The Guideline as currently proposed would require records to be kept "not less than any applicable recordkeeping requirement,…" This language is ambiguous, and could be interpreted as merely requiring records to be kept as long as another federal statute or regulation requires. Other federal statutes,

[19] U.S. v. Performance Capital Management (Bankr. C.D. Cal 2000) (consent decree), *available at* www.ftc.gov/opa/2000/08/performconsent.htm.

however, have much shorter time periods, such as two years under the Equal Credit Opportunity Act or the Truth in Lending Act/Regulation Z. These statutes are primarily concerned with the granting of credit and the disclosure of terms at the outset. The FCRA in contrast, governs the furnishing of information over the entire length of the relationship while it is being reported, including liability for the account.

In addition, the Regulators should specifically state the failure to keep records on file substantiating information, including original account application information, requires that the furnisher report the results of the dispute as unverifiable and instruct the CRA to delete the information. The Regulators acknowledge that lack of substantiation should require that information be deleted, but they do so only in the Supplementary Information. 72 Fed. Reg. at 70,953. This acknowledgement should be in the Guideline, not just the Supplementary Information.

Finally, the Regulators should also state that the requirements of substantiation and recordkeeping requirement are also applicable to furnisher investigations triggered by disputes sent to a CRA.

Recommended Change:

C. Ensuring that the furnisher ~~maintains~~ retains ~~its own~~ records for as long as necessary to substantiate the accuracy and integrity of any information it provides or has provided to a consumer reporting agency, including the terms of and liability for the account or other relationship and the performance or other conduct with respect to the account or other relationship by the consumer and by the furnisher.

i. In the case of a credit card account or other account for unsecured revolving credit, such records should include but are not limited to: original account applications, original account agreement, any addition or substitution of a person to an account and the nature of that addition, revisions to the agreement, billing statements, records of payments and credits, and any records of disputes made and the resolution of those disputes.

ii. In the case of real estate secured loans, such records should include but are not limited to: the contract, other loan-related material from the real estate settlement package , any contract modifications, records of payments and credits, forbearance agreements, changes in payment schedules, and any records of disputes made and the resolution of those disputes.

iii. A debt collector, assignee, or purchaser must have in its possession records that include but are not limited to: the evidence necessary under i, or ii, depending on the type of account or debt, evidence that a consumer is the correct individual liable on the account, proof of assignment, account applications, account agreements, billing statements, record of payments and credits and any records of

disputes made and the resolution of those disputes. The debt collector, assignee, or purchaser must have reviewed these documents and determined that they substantiate the information to be provided before providing information to a consumer reporting agency.

If a consumer disputes information either directly with the furnisher or with a consumer reporting agency, the furnisher's failure to retain records substantiating that information requires the furnisher to report the results of its investigation as unverifiable and to instruct the consumer reporting agency to delete the information.

~~for a reasonable period of time, not less than any applicable recordkeeping requirement, in order to substantiate the accuracy of any information about consumers it furnishes that is subject to a direct dispute~~.

Guideline IV.D.

This Guideline discusses appropriate internal controls "regarding" the accuracy and integrity of information, "such as by" implementing standard procedures, verifying random samples, and conducing regular reviews. This Guideline allows furnishers too much discretion in whether to establish and implement key internal controls. We recommend that this Guideline substitute "including" instead of "such as by." Furthermore, the Guideline should require establishing internal controls that "promote" accuracy and integrity of furnished information, not just "regarding" them.

Guideline IV.E

This Guideline addresses the need to train staff. Such trainings should cover dispute procedures as well as the procedures for the furnishing of information to CRAs.

Guideline IV.F

This Guideline addresses oversight of service providers. We appreciate the Regulators pointing out the need for such oversight. Too many times, we have seen examples of furnishers attempting to "pass the buck" and shift their responsibilities under the FCRA to service providers. This Guideline should make clear that furnishers, not the service providers, are ultimately responsible for both the accuracy and integrity of information as well as for handling disputes.

Guideline IV.G

This Guideline addresses the furnishing of information to CRAs following mergers, portfolio acquisitions or sales, or other acquisitions or transfers of accounts or other debts. The Guideline states that after such an event, a furnisher's policies should address reporting in a manner that prevents re-aging of information, duplicative reporting, or other problems affecting the accuracy or integrity of the information furnished.

Of course, we support the general concept of preventing re-aging, duplicative reporting and other errors after a sale or transfer. Such errors are a common cause of inaccuracies in credit reports. In some cases, re-aging errors are even deliberate.

As stated above, we note that re-aging is prohibited under the FCRA already under Section 1681s-2(a)(5), which requires furnishers to provide the date of the delinquency on an account that preceded charge-off or placement for collection. We recommend that this Guideline make this clear by stating that the furnisher's obligation to provide a correct date of delinquency to prevent is mandatory under the FCRA. However, we appreciate re-aging being addressed, because despite the clear mandates of the FCRA, debt collectors and buyers continue to re-age accounts. This points to another gaping problem – the need for adequate enforcement against furnishers who violate the FCRA, especially since most furnisher obligations (with the exception of 1681s-2(b)) cannot be addressed by the very consumer harmed by violations.

With respect to duplicative information, we urge that this Guideline be modified to specify how a furnisher should avoid creating a duplicate tradelines. The transferee/buyer furnisher should be required to follow Metro 2 Guidelines by not changing any account numbers, identification numbers, portfolio types, and/or date opened. In addition, the transferor furnisher should be required to instruct the CRAs to whom it reports to delete the account.

> Recommended change: Add to the end of Guideline IV.G.: "<u>Measures to avoid duplicative reporting should include instructing a consumer reporting agency to which a furnisher provides information to delete an account after sale or transfer, and following the instructions of the most current industry reporting format to prevent duplicate accounts, such as by utilizing the same account identifiers as were used before the transfer of an account by the furnisher who purchases or holds the account after transfer</u>."

Guideline IV.H.

This Guideline states that furnishers should attempt to obtain the information listed in Proposed__.43(d) from a consumer before determining that the consumer's direct dispute is frivolous or irrelevant. As we stated above in Section III.F. of these comments, this measure should be required in the direct dispute Regulation at Proposed __.43(e)(1)(i).

Guideline IV.I.

This Guideline addresses the issue of ensuring that deletions, updates and corrections reported to a CRA are reflected in the furnisher's systems, *i.e.*, that furnishers should have procedures to avoid reinsertion of erroneous information. As stated above in Section II.C.3, we note that avoiding reinsertion is mandatory already under Section 1681s-2(a)(2) of the FCRA, which prohibits the furnishing of inaccurate information after

correction. In addition, Section 1681i(a)(5)(B)(i) of the FCRA requiring furnishers to certify that information is accurate and complete if they are reinserting previously deleted information.

We recommend that this Guideline make this clear by expressly stating that avoiding reinsertion of erroneous information is mandatory under Section 1681s-2(a)(2) and that if previously deleted information is reinserted as correct, the furnisher must so certify under 1681i(a)(5)(B)(i). However, we appreciate re-aging being addressed, because despite the clear mandates of the FCRA, furnishers continue to reinsert erroneous information that was previously corrected. Again, this continued and flagrant violation of the FCRA points to the need for more enforcement by the Regulators.

Guideline IV.J.

This Guideline calls for the efficient resolution of direct disputes. We are unclear what is meant by "efficient resolution." Of course, furnishers must have procedures to respond to direct disputes within the statutory time period required by Section 1681s-2(a)(8)(E)(iii). However, if furnishers are responding in a timely manner, it is far more important that their procedures promote accurate and integrity than speed. Efficient resolution may not be accurate resolution, if taking reasonable steps to investigate a dispute is sacrificed in favor of speed. We urge that this Guideline substitute the word "effective" for "efficient."

Guideline IV.K

This Guideline addresses the need for furnishers to have technology and other means of communication with CRAs that prevent errors. We urge the Regulators to require furnishers to upgrade their technology when necessary to ensure the accuracy and integrity of information furnished to CRAs. Furthermore, this Guideline should make clear that outdated technology cannot be used as excuse for the furnishing of inaccurate, incomplete, outdated or unsubstantiated information.

Guideline IV.L.

This Guideline requires furnishers to provide sufficient information to the CRAs properly identify a consumer. This Guideline should specify that furnishers must provide the name, address, and entire social security number (SSN) of consumers whom they furnish information about to CRAs. The failure to report a consumer's full SSN, in order to match the SSN that the CRAs already has on file, contributes to the problem of mixed files. Although the CRAs are primarily responsible for mixed files, the Guidelines should address the problem to the extent furnishers play a role by reporting information without an SSN.

Guideline IV.M

This Guideline states that furnishers should conduct a "periodic" evaluation of its practices, CRA practices, dispute investigations, corrections and other factors that may affect the accuracy and integrity of information furnished to CRAs. As stated above in Section II.C.5, we agree that furnishers should be required to conduct periodic evaluations and we urge that large furnishers should be required to conduct evaluations at least annually.

V. Policy Choices in the Proposed Regulations Which We Support

The Guidelines and Regulations make several important policy choices which we support. These include:

1. We support defining accuracy to include the absence of a factual error. This is of fundamental importance. We support this choice made in the definition of "accuracy" in Proposed __.41(a). Both the Regulations and the Guidelines must require that accuracy includes "without error." We believe, however, that the definition of accuracy must be strengthened in the ways we discuss in Section II.A of these comments.

2. We support express recognition of the need for substantiation in the furnisher's records of all furnished information. As discussed above, we believe that substantiation should be part of the definition of accuracy. While the Regulations and Guidelines do not yet accomplish this, both the Regulatory Definition and Guideline Definition Approaches do include a substantiation objective in the Guidelines. We support retaining and strengthening this objective by adding it to the definition of accuracy. We also believe the Guidelines should specify the types of documents necessary for substantiation.

3. We support permitting direct disputes with the furnisher for all types of information which a furnisher may provide, not just disputes arising from ID theft, fraud claims, or areas of special complexity. The Supplementary Information indicates that some furnishers have suggested that direct disputes be limited to disputes about liability for the account, such as identity theft and fraud disputes. We support the approach in the Regulation to refuse to so drastically narrow the direct dispute process. We recommend, however, more broadly defining direct disputes to cover every type of dispute except specific identified categories such as public record and identifying information. The Regulators assert in the Supplementary Information that this "everything except" approach is the approach that was chosen. It will make the direct dispute process more flexible and useful for consumers going forward, as new types of information may be furnished in the future. As discussed above, we are deeply concerned about the use of an artificial distinction between accuracy and integrity and we strongly oppose any regulatory language that would limit direct disputes solely to a reading of "accuracy" which excludes completeness or integrity.

4. We support requiring that policies and procedures on accuracy and integrity in furnishing and on dispute resolution be in writing.

5. We support the requirement that furnishers periodically review and update their policies as necessary to ensure their continued effectiveness. This should occur as a matter of good business practice, but consumers may suffer if it does not.

6. We support requirements for employee training in dispute resolution and in the accuracy of initial reporting. Training both for in-house employees and for service providers is essential to promote compliance. We also believe the Guidelines should make clear that furnishers, not the service providers, are ultimately responsible for both the accuracy and integrity of information as well as handling disputes.

7. We support permitting the consumer to send the direct dispute to the address shown on the consumer credit report as the furnisher's address in addition to any other address designated by the furnisher. Consumers are most likely to learn of the need to file a dispute from reviewing their consumer reports. The furnisher can work with the CRA to ensure that the address listed for the furnisher on the CRA's reports provided to consumers is an address at which the furnisher can receive and process direct disputes. It would be a recipe for disillusion and delay to allow furnishers to reject direct disputes simply because the dispute was sent to the very address shown on the consumer credit report that also shows the disputed information.

8. We support requiring updating of information as necessary to ensure that information furnished is current. As discussed above, we believe that updating should be part of the definition of "accuracy." We also believe that the Guidelines should make clear that its provisions regarding updating to reflect transfer of an account and to reflect the consumer's cure of a default are only examples, and that all material information about the account must be updated.

9. We strongly agree that furnishers should be required to use Metro 2 or the current standard reporting format. In fact, we urge the Regulators to strengthen this Guideline by stating that furnishers should use standard reporting unless infeasible, not just where feasible. We also urge that this Guideline require furnishers to complete all applicable fields in the current standard reporting format Metro 2.

10. We support the requirement in the Guidelines that furnishers retain records to substantiate the information they provide to CRAs. We believe that furnishers should be required to retain these records as long as the account or other relationship is being reported.

11. We appreciate the Guidelines recognition of the problems of re-aging, duplicate tradelines, and re-insertion of inaccurate information. We recommend that the Guidelines make clear the mandatory nature of the furnisher's obligation to provide a correct date of delinquency to prevent re-aging, and to avoid reinsertion. With respect to

duplicative information, we urge this Guideline to specify how a furnisher should avoid creating a duplicate tradelines

VI. Responses to Specific Questions Posed by the Regulators

Q: Questions on accuracy and integrity.

A: The discussion about accuracy and integrity, above, responds to many of the specific questions posed address the alternative definitions of "integrity" and the alternative placement of the definitions of "accuracy" and "integrity" in regulatory text or in the Guidelines. In brief, we submit that these definitions must be placed in the Regulations, that the definition of accuracy should include integrity as a subset of accuracy rather than as something separate from accuracy, that completeness and the existence of substantiation should both be plainly and explicitly included in the definition of accuracy, and that there be no set of disputes with respect to types of information commonly supplied by a furnisher (as opposed to information most commonly acquired by CRAs from other sources, such as personal identifying and public record information) which is excluded from the meaning of "accuracy" for purposes of determining what can be directly disputed.

Q: "Whether the proposed definition of 'accuracy' is appropriate for the direct dispute rule, and, in particular, whether the definition of 'accuracy' needs to be clarified in order to more clearly delineate those disputes that, while subject to the CRA dispute process, would not be subject to the direct dispute rule."

A: As already discussed at some length, we are deeply troubled by the apparent assumption in this question that certain types of disputes about types of information commonly provided by a furnisher could be disputed only through the CRA dispute process, and not through the process mandated by the direct dispute Regulations. Even if it may be appropriate as a matter of efficiency for the direct dispute Regulations to exclude that type of information that generally does not come from a furnisher, such as public record information or identifying information, it would significantly undermine the right of direct dispute to limit direct disputes to only certain types of disputes about commonly furnished information.

We believe that the most appropriate form of direct dispute regulation would permit direct disputes for all information provided by a furnisher, perhaps excluding by category only certain limited categories such as public record information that generally are acquired by CRAs in a manner other than reporting by furnishers.

Q: "Whether the Agencies' approach to direct disputes appropriately reflects the relevant considerations, or whether a more targeted approach would represent a more appropriate balancing of relevant policy considerations?"

A: For the reasons described above, a narrower category of information which can be subject to direct dispute would be directly inconsistent with the purpose of the direct

dispute right – which is to create a process the consumer can use directly with the entity who supplied the information to improve its accuracy. In this context, accuracy should have a plain meaning which includes items that the more technical guidelines may treat as completeness or integrity. In short, the proposed direct dispute Regulations should not be more targeted, they are too narrowly targeted now.

Q: "Whether proposed §_.43(c)(2) should be amended to permit furnishers to notify consumers orally of the address for direct disputes and, if so, how an oral notice can be provided clearly and conspicuously?"

A: Permitting solely oral notice would be a significant mistake. The requirement of providing the notice of the required address "in writing or electronically" in Proposed __.43(c)(2) will not prevent a furnisher from also choosing to give this information to a consumer by live or prerecorded customer service. However, the writing requirement provides a degree of notice that allows a consumer who is trying to determine what his or her choices are with the ability to get that information before first making contact with the furnisher. Provision of the information only through a customer service center creates the very real possibility that the consumer could be dissuaded from exercising his or her rights before getting to the portion of the oral or prerecorded customer service center that is tasked with disclosing the address. In addition, providing oral notice creates the very real risk that the address will be stated incorrectly, or the consumer will incorrectly copy it down, perhaps because the information will be read too quickly. Written notice avoids those pitfalls.

We also note that the allowance for electronic delivery if there has been an agreement for that form of communication should be conditioned on the electronic provision of the address meeting the requirements of the Electronic Signatures in Global and National Commerce Act, (E-Sign), which requires that the information provided electronically be done so in a manner which the manner of collected the consent indicates which in fact be accessible to the consumer. The FTC itself, in a joint report with the Department of Commerce, the NTIA, and other agencies, has indicated that "The consumer consent provision in ESIGN appears to be working satisfactorily at this stage of the Act's implementation."[20]

Q: "What additional mechanisms should be required, if any, for informing consumers of their direct dispute rights?"

A: As discussed above, we recommend that the Regulations require furnishers to communicate effectively to the public, including but not limited to on any public web site of the furnisher:

- The address(es) for filing a direct dispute;

[20] Dept. of Commerce, Federal Trade Commission, et. al., *Electronic Signatures in Global and National Commerce Act, The Consumer Consent Provision in Section 101(c)(1)(C)(ii)* (June 2001), *available at* http://www.ftc.gov/os/2001/06/esign7.htm.

- A description of the types of disputes that the consumer can file with the furnisher; and
- A clear and conspicuous statement that other types of disputes can be filed directly with the CRAs, along with the addresses to do so, and a plain statement that the filing of a dispute with the CRA can trigger a process leading to an investigation by the furnisher even if the dispute has been rejected by the furnisher as not appropriate under the direct dispute process.
- The furnisher's policies with respect to both furnishing and disputes.

We further recommend that the Regulations require furnishers to forward disputes which they reject on the grounds of "wrong type of dispute for a direct dispute" to each CRA to whom the furnisher supplied the information, and that this referral have the same legal effect as if the consumer had filed that dispute directly with the CRA on the date it is received by the CRA.

Q: "How direct dispute requirements would affect furnishers to smaller and specialty CRAs, such as CRAs that report medical information, check writing history, apartment rental history, or insurance claim filings?"

A: Direct dispute rights are just as essential for consumers who have been the subject of reported information to a specialty CRA that the consumer believes is erroneous or creates a misleading impression. The information held by specialty CRAs can determine whether an individual can find an apartment for rent, and in what neighborhood. This information can determine whether the consumer can open a checking account, and what price he or she must pay for critically important auto or homeowners insurance.

Q: "Whether the guidelines should incorporate a specific time period for retaining records in order to provide for meaningful investigations of direct disputes, and, if so, what record retention time period would be appropriate?"

A: We believe that the record retention time period for records substantiating furnished information should be kept as long as the account or other relationship with a furnisher is being reported. There should not be a specific time limit; the standard should be "as long as necessary to substantiate information." Entities that do not wish to retain substantiating information should choose not to report.

Q: "Whether §_.42(c)(2) should exclude certain types of business addresses, such as a business address that is used for reasons other than for receiving correspondence from consumers or business locations where business is not conducted with consumers."

A: No. Proposed__.42(c)(2) is already limited to an address specified by the furnisher. The furnisher should not select an address that doesn't work for it. If this question was meant to refer to Proposed ___.42(c)(1), the address provided by the furnisher and included in the consumer report, the answer is still no. The furnisher can work with the CRA to ensure that the address found in this spot on the consumer report is an address convenient to the furnisher. Finally, if the furnisher does not choose to specify an

address under Proposed __.42(c)(2), then some of its addresses which a consumer might select in the absence of the designation should not be off limits for this purpose. Proposed __.42(c)(1) and (2) allow the furnisher to limit the available addresses to only the address on the consumer report and the same or another address designated by and subject to notice by the furnisher. If a furnisher declines to take advantage of Proposed __.42(c)(2), it should not have some of its addresses excluded under Proposed __.42(c)(3).

Q: "The Agencies recognize that small institutions operate with more limited resources than larger institutions. Thus, the Agencies specifically request comment on the impact of this proposal on small institutions' current resources, including personnel resources, and whether the goals of the proposal could be achieved for small institutions through an alternative approach."

A: Concern about resource impacts on small institutions must be offset by concerns about the quality of information contained in consumer reporting files which shapes the economic opportunities available to individuals and by the recognition that errors in consumer reporting files can distort the business decisions made by credit grantors of all sizes. Small financial institution furnishers, like large ones, already have obligations to investigate various other types of errors under other statutes, such as the Electronic Fund Transfer Act and the Fair Credit Billing Act. Small furnishers also have the ultimate safety valve of choosing not to report if they believe that the obligation to report accurately and with integrity is too burdensome. While consumer advocates see value in a wide range of furnishers, that value does not exist if the information furnished it not consistently accurate, timely, up-to-date, complete, and substantiated. Consumers can be harmed just as much by erroneous information furnished by a small furnisher as by a large one. Consumers have less choice than small furnishers; consumers become part of the consumer reporting system as a result of the decisions of furnishers. Consumers' only choice when there has been a furnisher error is between enduring the economic cost of that error and undertaking the burden of working to correct the error.

Q: The Agencies invite comment from individuals and public interest and consumer advocacy organizations on the effect this proposal may have on consumers and the credit reporting industry.

A: This proposal will benefit consumers, CRAs, and users of consumer reports and consumer credit scores *if* it is modified to require the initial reporting only of accurate, timely, complete and up to date information which is fully substantiated by the furnisher's own files, and which qualifies as accurate only if it meets standards for both accuracy and integrity. The direct dispute Regulations will benefit consumers and others in the credit reporting system, including CRAs and potential creditors, if they provide an effective, easy-to-use avenue for consumers to obtain corrections to bring information supplied by furnishers up to the standard of accurate, timely, complete, up to date and consisting only of information that is both fully substantiated in the furnisher's own files and not reasonably contradicted by independent evidence provided by the consumer. If

the Regulations and Guidelines are not modified to accomplish these goals, then they will not deliver benefits to consumers or to the system as a whole.

ZIONS BANCORPORATION

Corporate Compliance
1 South Main Street Ste. 1100
Salt Lake City, UT 84111

February 11, 2008

Filed via email to regs.comments@federalreserve.gov

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington DC 20551

Re: Docket No. R-1300
Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies

Ladies and Gentlemen:

Zions Bancorporation appreciates this opportunity to provide comments on the Proposed Rule related to Section 312 of the Fair and Accurate Credit Transactions Act that was published in the Federal Register on December 13, 2007.

Our institution is a $50+ billion-dollar financial services company with banking offices located in Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Texas, Utah and Washington. Our affiliated banks engage in financial activities that are directly affected by the accuracy of information contained in consumer reports.

Our primary concern with the proposed rule is in the detail of the regulatory requirements relating to the implementation of policies and procedures. We feel that the regulation's detail is overly burdensome and oversteps the boundaries of regulatory intent. While we agree with the need for policies and procedures to ensure accuracy and integrity in the credit reporting process, we feel that the detail of the policy and procedures requirements (specifically Appendix E, part III - Establishing and Implementing Policies and Procedures and part IV – Specific Components of Policies and Procedures) within the proposed rule exceeds the intent of §623(e)(1)(B) of the Fair Credit Reporting Act and will result in more burdensome regulatory examinations.

Section §623(e)(1)(B) of the Fair Credit Reporting Act merely requires the Federal Banking agencies to prescribe regulations requiring each person that furnishes information to a consumer reporting agency to establish reasonable policies and procedures for implementing [accuracy and integrity] guidelines. We believe that Section__.42 of the proposed regulation satisfactorily addresses the requirement without the detailed guidelines of parts III and IV of Appendix E.

We feel that that the policy and procedures requirement detailed in the Proposed Rule will result in an increased and unnecessary regulatory burden. During the current examination processes, regulators routinely assess the adequacy of policies and procedures, discuss identified weaknesses with management, and, if warranted, include a comment in the examination report. This process has been working well for decades without detailed regulatory requirements.

We are concerned that incorporating detailed components of policies and procedures into the regulation exposes reporting institutions to unnecessary regulatory scrutiny, should an individual examiner take the guidelines literally during an examination. As such, we respectfully suggest that parts III and IV of Appendix E be excluded from the final rules.

Again, thank you for providing us with an opportunity to comment on ways to minimize the regulatory burden of the final rule. If you have any questions concerning our comments, please contact me at 801-844-7955

Sincerely,

Norman Merritt, CRCM
Executive Vice President &
Corporate Compliance Director
Zions Bancorporation

cc: Federal Deposit Insurance Corporation
Office of the Comptroller of the Currency

January 25, 2008

Federal Trade Commission
Project No. R611017

Board of the Governors of the Federal Reserve System
Docket No. R–1300

Office of the Comptroller of the Currency
Docket No. OCC-2007-0019

Federal Deposit Insurance Corporation
RIN 3064-AC99

Office of Thrift Supervision
Docket No. OTS-2007-0022

National Credit Union Administration
12 CFR Part 717

Re: Comments regarding Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies under Section 312 of the Fair and Accurate Credit Transactions Act, Project No. R611017

Dear Sir/Madam:

We are writing to comment on the proposed Regulations and Guidelines issued by the federal banking regulators and Federal Trade Commission (FTC) (collectively as "Regulators") under Section 312 of the Fair and Accurate Credit Transactions Act of 2003. We appreciate the efforts undertaken by the Regulators in drafting the proposal, but we believe that significant changes must be made in the proposal in order for it to (1) promote the furnishing of information that is accurate, timely, up to date, complete, and fully substantiated and to (2) provide a workable method for consumers to dispute information directly with the entity that furnished that information.

The changes which must be made include:

- The Regulations must clearly state that the purpose of the regulatory requirement for furnisher policies is to achieve accurate reporting of information which is timely, complete, up to date, and substantiated.
- The Regulations must define "accuracy" and "integrity." We support the "Regulatory Definition Approach" because it is more substantive in its requirements and because these key definitions are much too important to be relegated to flexible Guidelines which only inform a furnisher's policies.

- The definition of "accuracy" must require that information furnished to consumer reporting agencies (CRAs) be "complete."
- The Regulations should define "accuracy" to require that information furnished to CRAs be substantiated. In addition, the Guidelines should include requirements as to what kind of substantiation is required.
- The proposal should not artificially divide "accuracy" and "integrity," because that would prevent consumers from submitting valid disputes to furnishers about errors falling in the "integrity" category.
- "Accuracy" should require that information furnished to CRAs be updated so that it is, and remains, current.
- The direct dispute Regulations should require that the furnisher in fact conduct a reasonable investigation, including an attempt to seek documentation before rejecting a consumer's dispute.
- The Guidelines should require that records about the account should be kept at least as long as the account or other relationship with a furnisher is being reported.
- The Regulations and Guidelines should provide consumers with a workable, understandable, effective system to report and obtain correction of errors, by informing consumers of what types of disputes can be presented to the furnisher and where to submit those disputes. A key element of this is to require that a furnisher refer to a CRA any dispute that the furnisher declines to investigate because that dispute is of a type that the Regulations do not require it to consider.

Credit reports and credit scores are increasingly important in the determination of who gets credit and other economic opportunities, such as insurance, rental housing, and even jobs, as well as what prices consumers are offered for credit and services. There is an increased focus on credit quality during any economic downturn – the very time that access to jobs, services, and the price of credit take on special importance for families. These factors make it extremely important that the contents of consumer credit reporting files be accurate, complete, and up to date.

Even small inaccuracies in a credit report can have a significant impact on the economic opportunities offered to hardworking individuals and their families, because they can cause significant changes in a credit score. Thus, any standards for accuracy and integrity of information furnished to a CRA must examine not only the potential for an incorrect evaluation by a user of a credit report, but also the potential for an incorrect evaluation by the user of a credit score.

I. The Regulations Must Clearly State That the Purpose of the Regulatory Requirement for Furnisher Policies is to Achieve Accurate Reporting of Information.

The package of proposed Regulations and Guidelines has three parts. The Regulations describe what types of disputes the furnisher must resolve if reported directly to the furnisher. In addition, the Regulations require that furnishers establish and implement policies concerning the information which they furnish to consumer reporting

agencies. Finally, the regulatory package contains proposed Guidelines to shape the content of those policies.

The regulatory text on furnisher policies is missing a key element – it does not require that the furnisher policies must be reasonably designed to accomplish the objective that all information furnished in fact meet standards of accuracy and integrity. Instead, the Regulation simply requires that furnishers have policies "regarding" the accuracy and integrity of furnished information. The Regulation says that the policies "must be appropriate to the nature, size, complexity, and scope" of the furnisher's activities.

The regulatory section requiring furnisher policies should be amended to add the basic requirement that the policies must be reasonably designed to facilitate the reporting only of accurate, complete, up to date information which is fully substantiated and has no tendency to mislead users of a credit report or credit score. The statutory and regulatory requirement for policies should not be satisfied by policies that do not serve this goal, regardless of the nature or size of the furnisher.

II. Accuracy and Integrity Definitions

The Regulators have proposed two alternative approaches to define accuracy and integrity: the "Regulatory Definition Approach" and the "Guidelines Definition Approach." The key differences in these Approaches are:

- Where the definitions are placed, *i.e.*, in the Regulations vs. in the Guidelines, which affects their enforceability.
- The definition of "integrity" in the Regulatory Definition Approach includes a requirement that information is complete, *i.e.*, that it "not omit any term, such as credit limit or opening date, …the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user…"
- In addition, Regulatory Definition Approach includes as an Objective in the Guidelines that information furnished to CRAs in general should "avoid misleading a consumer reports user."
- The Guidelines Definition Approach takes a more procedural approach to integrity, focusing on whether the procedure for reporting is likely to avoid error rather than on the quality of the information in fact reported or omitted.

We support the Regulatory Definition Approach, which requires that the information both be without error and not omit any term which can reasonably be expected to contribute to an incorrect evaluation by a user of a credit report. We suggest this definition should be augmented to also refer to a user of a credit score.

a. *The definition of accuracy rightfully requires information to be "reflected without error," but it should be clear that such reflection must be "objective."*

In both Approaches, "accuracy" is defined to mean that information provided to a CRA "reflect without error the terms of and liability for the account or other relationship and the consumer's performance and other conduct with respect to the account or other relationship."

We support the concept in the definition of accuracy that information furnished to a CRA should "reflect without error" the actual terms of, liability for, and other conduct about the account or relationship. It is fundamentally important that "accuracy" requires information to be accurate as a matter of fact, not simply requiring conformity between the furnisher's records and information in a CRA's database. We recommend making this absolutely clear by adding the word "objectively" before the world "reflects."

Furthermore, the definition of "accuracy" should also require that information reported to a CRA reflects without error the *furnisher's* performance or other conduct with respect to the account or other relationship.

b. *The definitions of "accuracy" and "integrity" should be set forth in the Regulations.*

We believe "accuracy" and "integrity" must be defined in the Regulations. The requirement that furnishers report information with accuracy and integrity should not be merely a goal or Guideline to be considered. It should be mandatory; indeed it should be the core purpose of a furnisher's credit reporting systems.

c. *The definition of "accuracy" must include "completeness."*

Accuracy must include a requirement that information furnished must be complete, *i.e.*, must not omit any important terms. If the failure of the furnisher to provide complete information creates a misleading evaluation of a consumer's creditworthiness, including a different credit score if the information were included, the furnisher has reported inaccurate information.

The Regulators have proposed either requiring completeness to be part of integrity (Regulatory Definition Approach) or omitting it altogether (Guidelines Definition Approach). The Guidelines Definition Approach is simply unacceptable. Information cannot be "without error" if its omission of critical terms creates a misleading evaluation or a different credit score. Indeed, the omission of a material term that creates a misleading impression is a form of deception under the FTC Act. If information could be considered "deceptive" under the FTC Act, how can it be "accurate" under the FCRA?

The Regulatory Definition Approach is not perfect either in that it separates completeness from accuracy, when the former is a necessary element of the other. We support a definition of "accuracy" that includes completeness. This point is critical, because nowhere else is "accuracy" defined in the Act or Regulations, yet the term is used several times in the FCRA, including requirements for CRAs to follow reasonable

procedures to assure maximum possible accuracy. We do not want a definition of accuracy that inadvertently allows CRAs to have procedures that result in incomplete misleading information in their files.

In the alternative, if completeness is included in the definition of "integrity," rather than as part of accuracy, then at a minimum the Regulations should make clear that such a definition is applicable only to Section 1681s-2(e) of the FCRA and does not affect the meaning of the term "accuracy" under other parts of the FCRA which impose other duties with respect to accuracy.

d. Accuracy should include substantiation.

We support the Regulators' express recognition of the need for substantiation in the furnisher's records of all furnished information. However, we believe that substantiation should be part of the definition of "accuracy." Both Definition Approaches include a requirement for substantiation, but it is either stated as an Objective for the policies of a furnisher (Regulatory Definition Approach) or an element of integrity (Guidelines Definition Approach), not as a requirement for accuracy.

We support retaining and strengthening the requirement for substantiation by placing it in the Regulations, not just the Guidelines, and by locating it in the definition of accuracy. Substantiation should not merely be an objective, nor should it be something only in the Guidelines to be considered by furnishers as they develop their own policies. Instead, substantiation should be a core part of accuracy. Furnishers should be required to have in their possession documents that substantiate information they send to the CRAs. Furthermore, as discussed below, the Guidelines should include requirements as to what types of substantiation are required.

e. "Accuracy" and "integrity" should not be artificially separated.

The issues of whether "completeness" and "substantiation" should be elements of "accuracy" versus "integrity" points to another problem – that both the Regulatory Definition and the Guidelines Definition Approach artificially separate the two concepts, when they should be treated together. Integrity should be considered a subset of accuracy and not as a category separate and distinct from accuracy.

First, artificially separating accuracy and integrity does not make logical sense. Information provided without integrity will result in inaccuracies. If information is inaccurate, it lacks integrity.

Another reason that an artificial distinction between accuracy and integrity is problematic is that the statute contemplates direct disputes about accuracy, and the Regulations define a "direct dispute" which can be pursued directly with the furnisher as only those disputes which are about accuracy. Under the proposed Regulations, some types of errors by a furnisher constitute a lack of accuracy, while other types of errors are

put in the category of lacking integrity. This means that some types of real errors by a furnisher can be directly disputed, but others cannot.

An artificial distinction between accuracy and integrity will be harmful to consumers if consumers can use the direct dispute process only for accuracy and not for integrity disputes. Consumers should be able to seek and obtain direct corrections by a furnisher of erroneous information regardless of where the error falls on an artificial line between the definitions of accuracy and integrity. A simple way to do this is to treat integrity as an element or subset of accuracy, rather than as some wholly separate category to which no right of direct dispute can attach.

f. *Accuracy requires that information be updated so that it is, and remains, current.*

The Regulators ask whether the definition of "accuracy" should include updating information as necessary to ensure that information furnished is current. Our answer is an unequivocal "yes". Similar to the issue of completeness, requiring information to be updated so that it is factually correct must be an inherent element of accuracy. Stale or out of date information cannot be accurate, especially when there is a subsequent material change in the status of the account.

The Regulators should include a requirement that accuracy requires information be updated as necessary to ensure that it is current. In addition, the Regulators should require that information should be updated when the consumer requests it or disputes the current status of information. Finally, the Regulators should include recommendations in the Guidelines on how regularly information should be updated to ensure it is current.

III. The Direct Dispute Regulations Should Require that the Furnisher in Fact Conduct a Reasonable Investigation, Including an Attempt to Seek Documentation Before Rejecting a Consumer's Dispute.

Some important aspects of the steps a furnisher must take when it receives a direct dispute are relegated to the Guidelines. These requirements belong in the direct dispute Regulations.

a. The requirement for a reasonable investigation of a direct dispute should be in the Regulations.

The Regulators have included the reasonable investigation standard for direct disputes only in the Guidelines, not in the proposed Regulations that will actually set the legal requirements for furnisher conduct in handling a direct dispute. Relegating the important obligation to investigate a direct dispute to Guidelines that merely inform the furnisher's policies is illogical and troubling. Under current law, furnishers are required to conduct a reasonable investigation for disputes submitted to a CRA. A consumer dispute should not be subject to a lower, vague, or non-binding standard with respect to

the investigation merely because the consumer submits the dispute directly to the furnisher instead of submitting it through a CRA.

b. *The Regulations, not merely the Guidelines, should include the requirement that a furnisher seek documentation of a consumer's dispute before rejecting it.*

The Regulators have proposed including in the Guidelines a provision that a furnisher attempt to obtain necessary documentation from a consumer before rejecting a consumer's dispute as frivolous or irrelevant. We support this provision; however, we believe it should be a requirement in the Regulations, not just something to be considered in Guidelines about the content of the furnisher's policies. The direct dispute option will have little meaning for consumers if the furnisher can comply with the Regulations by rejecting a dispute before asking the consumer for the information that the furnisher believes is missing and essential.

IV. Substantiation and Recordkeeping Are Essential

As stated above, we strongly support a requirement in the Regulations that furnishers substantiate the information they initially furnish, and remove any disputed information that cannot be substantiated at the time of the dispute. In addition, we believe the Guidelines should include requirements as to what kind of substantiation is required. Otherwise, a furnisher may claim it has substantiation merely because its electronic records reflect the same information which it furnished to the CRAs.

To prevent any misunderstanding, the Guidelines should specify that certain documents must be in the possession of the furnisher to constitute substantiation. For example, credit card companies should be required to have in their possession account applications, agreements, and billing statements. Most importantly, debt buyers should be required to have certain evidence (that the consumer is the current individual liable on the account, account agreements and billing statements) in their possession, and to have reviewed such information before furnishing to a CRA.

The Regulators have asked whether the Guidelines should specify a time period for furnishers to retain records. We support a requirement that records should be kept at least as long as the account or other relationship with a furnisher is being reported. There should not be a specific time limit; the standard should be "as long as necessary to substantiate information reported."

V. The Regulations and Guidelines Should Provide Consumers with a Workable, Understandable, and Effective System to Report and Obtain Correction of Errors.

Effective notice and efficient referral are key elements to making the direct dispute process more than an empty procedure. In particular, when a dispute is rejected because it is of a type that should have been filed with the CRA rather than the furnisher, it is inherently misleading for a furnisher to reject the dispute without telling the consumer that the consumer can send the dispute to the CRA, and that this will start a

process in which the furnisher will have to investigate a dispute that it was not required to consider as a direct dispute.

The Regulations should require that:

1. Each furnisher must communicate effectively to the public, including on its web site:

- The address(es) for filing a direct dispute;
- A description of the types of disputes that the consumer can file with the furnisher; and
- A clear and conspicuous statement that other types of disputes can be filed directly with the CRAs, along with the addresses to do so, and a plain statement that the filing of a dispute with the CRA can trigger a process leading to an investigation by the furnisher even if the dispute has been rejected by the furnisher as not appropriate under the direct dispute process.

2. Each furnisher must forward directly to any CRA to whom it furnishes information any dispute which the furnisher rejects because it is of a type not required to be considered by the furnisher, excluding only disputes that the furnisher determines to be substantively frivolous or irrelevant for reasons other than that the dispute should have been filed with the CRA rather than with the furnisher. A regulatory interpretation may be required so that CRAs must treat those referred disputes as if they had been filed by the consumer with the CRA.

3. When a furnisher rejects a dispute on the ground that the dispute is of a type that the furnisher is not required to consider, the furnisher must be required to provide with that rejection a clear written statement advising the consumer that he or she may dispute this information with the CRA, providing the address to do so, and stating that the furnisher will have an obligation to investigate the dispute once the CRA forwards the consumer's dispute to the furnisher. Without this disclosure, consumers can be misled into thinking that it would be pointless to file a dispute with a CRA after the furnisher has rejected that dispute. Where the reason for the rejection was "wrong place of filing," nothing could be further from the truth.

4. Each furnisher must make public, on its web site and on request of any member of the public, its policies for furnishing information to CRAs and for handling disputes about that information.

VI. Conclusion

It is essential that the Regulators prescribe strong Regulations and Guidelines for furnishers that promote the initial reporting only of accurate, timely, complete and up-to-date information which is fully substantiated by the furnisher's own files. The dispute Regulations should serve this same goal. They should provide an effective, easy-to-use avenue for consumers to obtain corrections; should provide a true self-help method to ensure that information meets these standards; and should provide a method to effectively

dispute information which is contradicted by independent evidence provided by the consumer. Finally, the direct dispute process must require furnishers to engage in a real investigation and to fix errors shown by the consumer or otherwise revealed through the dispute process.

Sincerely,

Rhea Serna
California Reinvestment Coalition

Comments

of the

Consumer Data Industry Association

Concerning the Interagency Notice of Proposed Rulemaking

on

Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies under Section 312 of the Fair and Accurate Credit Transactions Act

72 Federal Register 70944 (Dec. 13, 2007)

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Department of the Treasury, Office of the Comptroller of the Currency

Docket ID OCC-2007-0019

RIN 1557-AC89

Federal Reserve System

12 CFR Part 222

Docket No. R-1300

Federal Deposit Insurance Corporation

12 CFR Parts 334

RIN 3064-AC99

Department of the Treasury, Office of Thrift Supervision

12 CFR Part 571

Docket No. OTS-2007-0022

RIN 1550-AC01

National Credit Union Administration

12 CFR Part 717

Federal Trade Commission

16 CFR Part 660

RIN 3084-AA94

The Consumer Data Industry Association ("CDIA") is pleased to offer comments on the above captioned matter.[1]

Accuracy and integrity of data are key priorities for our members. While our comments will focus primarily on the furnishing of information to nationwide consumer reporting agencies as that term is defined in FCRA § 603(p), it is important to remember that there is a diversity of consumer reporting agencies producing data products regulated under the FCRA and other data furnisher communities may also be affected by the final regulations and guidelines.

I. Data Furnishing

A. Recognition of the voluntary system of data furnishing

The key to successful guidelines and regulations is that they must take into account the factual reality that no data furnisher is required to provide any data to any type of consumer reporting agency. We agree with the Agencies inclusion of encouragement to furnish data to CRAs and applaud the Agencies' recognition of the fact that this voluntary system provides substantial benefit to consumers. However, we do not believe that the proposed regulations and guidelines sufficiently account for this factual reality.

To restate the context for the current process of issuing guidelines and regulations, in 1996 and again in 2003 substantial new obligations were placed on data furnishers by the Congress. Actions in the courts and federal banking agency examination practices have added to the statutory compliance burdens that are in place today. These proposed accuracy and integrity guidelines and rules will add yet again additional obligations to the substantial existing burdens and obligations. Thus, care and balance are critical in order to avoid a confusing, unnecessarily complex or overly rigid structure that could result not only in current data furnishers choosing not to supply data but also discourage future furnishers from providing data to CRAs. This result would harm consumers individually and the financial services system as a whole.

B. The proposed rule or guidelines could reduce data reported to consumer reporting agencies

"[I]imposing additional legal liability penalties, may, in a system of voluntary reporting, lead to unintended consequences, including less information reporting and a less efficient and effective system." *Credit Reporting Accuracy and Access to Credit,* Federal Reserve Bulletin, Summer 2004, 322 ("Federal Reserve Bulletin"). There are a number of components to the proposed rule and guidelines that could significantly reduce data reporting to CRAs. These include: the overbroad and unnecessary definitions of "accuracy", "integrity", and "furnisher", the requirement that furnishers have written guidelines, a lack of protections from frivolous disputes for furnishers and the granularity of the direct dispute provisions.

There are over 18,000 furnishers to the nationwide consumer reporting agencies alone and not all of them are alike. The Notice of Proposed Rulemaking ("NPR") appears to be drafted with the assumption that (a) all furnishers are large and report only to nationwide consumer reporting agencies, and (b) all consumer reporting agencies are operating on a nationwide basis. However, there are thousands of small and sometimes occasional furnishers that do not fit the assumed mold. There are many consumer reporting agencies that also do not fit the assumed role of a nationwide CRA. The value of a wide array

[1] CDIA is the international trade association representing over 250 consumer data companies that provide fraud prevention and risk management products, credit and mortgage reports, tenant and employment screening services, check fraud and verification services, data for insurance underwriting and also collection services.

of data is well recognized in the Federal Reserve Bulletin, by lenders,[2] the Federal Financial Institutions Examination Council,[3] members of Congress, [4] and policy researchers.[5] Indeed, the FTC is conducting a study to determine ways to encourage the reporting of data from non-traditional sources because "many Americans may be missing out on the benefits associated with the consumer reporting system."[6]

It seems incongruous for the FTC to study additional reporting while at the same time overly rigid requirements contained in the NPR could actually and significantly reduce reporting. The NPR's lack of recognition of these furnishers could result in a reduction or elimination of data being reported from smaller or non-traditional furnishers and from all furnishers to all CRAs.

A voluntary system of consumer reporting that is fair and accurate must be balanced and flexible to meet a diverse group of furnishers providing data to a wide array of consumer reporting agencies. Overly rigid rules or guidelines layered on top of complex and unnecessary definitions could provide just enough disincentive for furnishers to stop reporting to consumer reporting agencies. A final rule should recognize the value the reporting of data to CRAs and be structured in a way that provides the robust data flows that Congress supports, banking agencies want, lenders need, and consumers have come to expect.

C. Data furnished today is very accurate

The context for the issuance of guidelines and regulations is one of significant ongoing efforts, progress, innovation and success. To help set the context attached as Appendix I is testimony CDIA delivered before the House Committee on Financial Services. Significant strides have been made in the last few years to enhance the accuracy and integrity of information, including fraud and active duty alerts, tradeline blocking, red flag guidelines, and address discrepancy notices. These and other processes have and will continue to reduce inaccuracies and increase the integrity of information supplied to CRAs. We urge the Agencies to be cautious about imposing burdens that would harm the data furnishing systems that exist today. A cautious and deliberative approach makes sense initially while allowing for further review at a later date.

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[2] "One challenge facing lenders [considering lending to underserved markets] is finding borrowers with limited credit experience. Credit bureaus…often lack files on such people, or have only limited information about them * * * [To solve this problem] the biggest players in the home lending and credit card businesses have asked [credit bureaus] to collect data from nontraditional sources like utility, phone, and cable companies, as well as from landlords." Lisa Fickenscher, *Credit Bureaus Dig for Data on CRA Prospects, American Banker,* (March 24, 1995, at 20).

[3] "[W]here financial institutions rely on [scoring] in their underwriting and account management processes, their ability to make prudent credit decisions is enhanced by greater completeness of credit bureau files." Federal Financial Institutions Examination Council Advisory Letter to Chief Executive Officers regarding Consumer Credit Reporting Practices. Jan. 18, 2000.

[4] *See, Hearing* entitled "Helping Consumers Obtain the Credit They Deserve," *before the House Financial Services Subcommittee on Financial Institutions and Consumer Credit, May 12, 2005 (Statement of Chairman Michael G. Oxley)* ("As was conclusively demonstrated during the exhaustive hearings on the [FACT Act]…giving potential creditors access to detailed, continuously updated information about consumers…our national credit reporting system has vastly expanded the availability of credit to all segments of American society."), Serial No. 109-29, 42.

[5] *Eg.*, Giving Underserved Consumers Better Access to the Credit Systems, The Promise of Non-Traditional Data, Information Policy Institute, July 2005.

[6] Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003, FTC (Dec. 2004), 78.

II. General - Scaleable and Flexible Structure

We agree with the Agencies' decision to make clear "that a furnisher's policies and procedures must be appropriate to the nature, size, complexity, and scope of the furnishers' activities." Going forward, furnishers should take in to account the type and amount of information they provide to CRAs and how that information might be used in consumer reports. For example, educational and employment confirmation to an employment screening company, or tenancy confirmation to a residential screening company might be feel chilled from furnishing data. Providing sufficient regulatory flexibility is essential so that new burdens do not overwhelm data furnishers and operate as a disincentive for current data furnishers to continue to report and as an incentive for potential new data furnishers to choose not to begin reporting.

III. General - Recognition of A Data Reporting Standard for Furnishing Data to Nationwide Consumer Reporting Agencies

The NPR acknowledges the value of using data standards for reporting information to consumer reporting agencies by including this practice in the outline of "specific components of policies and procedures" of a data furnisher. *See*, 72 Fed. Reg. 70944, 70953 (Dec. 13, 2007). We agree that the use of data reporting formats can enhance the precision of the data reported and agree that the nationwide credit reporting industry's Metro 2 format is an example of such a standard.

Today, even in the absence of finalizing the details of this NPR, the nationwide consumer reporting agencies receive more than 81% of all data via the Metro 2 format. The Metro 2 format works because it is based on market needs, rather than legal requirements. Market forces have driven nearly all of the 18,000 data furnishers supplying data to nationwide consumer reporting agencies to use Metro or Metro 2. The broad adoption of this standard demonstrates the effectiveness of the marketplace in addressing data furnishing practices.

IV. General - Guidelines are Preferable to Regulations

By their nature, guidelines are more flexible than regulations and more adaptable to evolving technologies and marketplace changes. The Agencies should strive towards balanced guidance that will assure the flexibility and adaptability the credit marketplace needs to function today and in the future. Under a guidance approach, the Agencies would still retain the ability to make appropriate adjustments to address marketplace changes and new technologies. Thus CDIA urges use of guidance to provide the flexibility and ultimately the preservation of the current voluntary system of data reporting as well as the expansion of it to new data sources which otherwise might be dissuaded from participating. Further, guidance will help with the flexibility needed to consider how it applies to different data furnishing practices in the context of different types of consumer reporting agencies. Rules should simply require data furnishers to implement the guidance as appropriate to their respective circumstances.

V. Technical Problems with Specific Wording of the Regulations

While CDIA encourages the Agencies to adopt guidelines rather than regulations, there are a number of specific technical differences between the FACT Act and the proposed regulations. These differences could result in compliance difficulties and unnecessary legal jeopardy for CRAs and furnishers.

Proposed Secs. 660.3(a) and (c) all use standards for compliance that are significantly different from the statutory requirements.[7] Proposed Sec. 660.3(a) requires furnishers to "establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers that it furnishers to a [CRA]." However, the FACT Act requires a different standard. Specifically, the FACT Act requires regulations for furnishers that "establish reasonable policies and procedures for implementing the guidelines…" 15 U.S.C. Sec. 1681s-2(e)(1)(B).

Proposed Sec. 660.3(c) requires each furnisher to "review its policies and procedures…and update them as necessary to ensure their continued effectiveness." However, the FACT Act requires a different standard. Specifically, a furnisher is not required to review its policies and procedures to ensure continued effectiveness, but rather, the obligation for review is to ensure that the policy is reasonable. 15 U.S.C. Sec. 1681s-2(e)(1)(B).

Overly prescriptive and sometimes conflicting requirements like those found in Proposed Sec. 660.3 are just part of the burdens that might reduce the furnishing of data to CRAs, especially from occasional or small furnishers to nationwide and non-nationwide CRAs alike.

VI. Specific - Definitions

CDIA members have a general concern with the inclusion of new definitions for terms which in some cases have been used in the FCRA for decades. We do not believe that definitions are necessary to issuing appropriate guidance or that they can be drafted to account for the variety of data furnishers and consumer reporting agencies regulated under the Act.

We believe that the Agencies should simply forego definitions and issue general guidance. Below we discuss in more detail our concerns with various definitional approaches whether they are included in a guideline or a regulation.

A. Defining "accuracy" is problematic

> Regulatory and Guidelines Definition Approach: "*Accuracy means that any information that a furnisher provides to a CRA about an account or other relationship with the consumer reflects without error the terms of and liability for the account or other relationship and the consumer's performance or other conduct with respect to the account or other relationship.*"

As the NPR itself points out the Fair Credit Reporting Act does not define the term "accuracy", nor did Congress choose to do so when it enacted the FACT Act in 2003. Congress limited the definition of accuracy to that which a furnisher knows or has reasonable cause to believe is inaccurate. 15 U.S.C. Sec. 1681s-2(a). Further, Congress did not require the Agencies to formulate a definition in establishing the duty to issue guidelines and regulations regarding accuracy and integrity. Congress rightly so has not determined that a definition of this term is necessary or helpful to the operation of the FCRA. We would urge the Agencies to reach the same conclusion.

In the context of data furnishers, the FCRA properly structures the responsibilities of furnishers of information to consumer reporting agencies around the concept of "knows or has reasonable cause to believe the information is inaccurate." Any Agency guidance, even without establishing a definition, should hew to what the law itself says and should not unintentionally alter case law as it has evolved over time relative to what is considered accurate in the context of a particular pattern of facts.

[7] This provision is similar to other provisions in the NPR. For the sake of convenience, citations to the other provisions are not cited here, but the comment applies equally to the other provisions.

To expand on this point, we noted in our ANPR comment (attached as Appendix I), defining accuracy is problematic at best, and the examples we provided are still valid. Further, the Agencies are proposing an accuracy definition in the context of FACTA § 312 when the FTC is still "evaluating ways to study the accuracy and completeness of consumer report" under FACTA § 319.[8] For more than three years, the FTC has been engaged in a study to "determine the accuracy of information in credit reports". The "pilot study" of this research is ongoing.[9] It is incongruous to develop an accuracy definition for furnishers while the FTC has not resolved how to determine accuracy for consumer reports.

To the extent that agencies determine that a definition of the term "accuracy" is necessary, it should be placed in a guideline and not in a regulation regardless of the particulars of the definition. A guideline definition offers the flexibility the marketplace needs while still allowing the Agencies to adopt necessary changes as may be appropriate later.

B. Defining "integrity" is problematic

Regulatory Definition Approach: *"the term 'integrity' means that any information that a furnisher provides to a CRA about an account or other relationship with the consumer does not omit any term such as a credit limit or opening data, of that account or other relationship, the absence of which can be reasonably be expected to contribute to an incorrect evaluation by a user of a consumer report or a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mod of living."*

Guidelines Definition Approach: "*The guidelines would define 'integrity' to mean that any information that a furnisher provides to a CRA about an account or other relationship with the consumer: (1) Is reported in a form and manner that is designed to minimize the likelihood that the information although accurate, may be erroneously reflected in a consumer report; and (2) should be substantiated by the furnisher's own records*.

The NPR rightly points out that the FCRA does not define the term "integrity." Further, it cites a lack of statutory guidance on a definition of "integrity" and points to conflicting statements of Representative Oxley and Senator Sarbanes. Representative Oxley correctly noted that "'[a]ccuracy and integrity' was selected [by the Congress] as the relevant standard rather than 'accuracy and completeness' …to focus on the quality of the information furnished rather than the completeness of the information furnished." By contrast, Sen. Sarbanes suggested that "[t]he term 'integrity' relates to whether all relevant information that is used to assess credit risk and to grant credit is accurately provided."[10]

Establishing a definition may not contribute to the overall objective that is to issue guidance that encourages the reporting of data which is both accurate and that has integrity. To the extent that the Agencies determine that there must be a definition of the term "integrity" it should be in a guideline rather than a rule. Further, regarding the question of an approach to the definition of integrity, that which is proposed in the guidelines is preferred over the regulatory approach.

[8] 69 Fed. Reg. 61675 (Oct. 20, 2004).
[9] Processes for Determining Accuracy of Credit Bureau Information, Pilot Study Performed for the Federal Trade Commission Under Contract FTC04H0173, Sept. 12, 2006 < http://ftc.gov/reports/FACTACT/FACT_Act_Report_2006_Exhibits_1-12.pdf> ("Contractor's Report"), 5.
[10] 72 Fed. Reg. 70949 (citations omitted).

C. Furnishers

i. Defining a furnisher is unnecessary and could reduce reporting to consumer reporting agencies

Since 1970, the term "furnisher" has appeared in the FCRA and in the intervening 37 years a substantial amount of judicial history has developed around the FCRA, including the meaning the term "furnisher". It is unnecessary and inappropriate that the NPR would propose to define a term that has stood successfully without a definition for over a generation. CDIA is concerned that any definition now would unnecessarily alter the meaning of the term.

The Agencies propose to define furnisher in order to exclude consumer report users when they provide information to consumer reporting agencies in order to obtain consumer reports and also to make clear that consumers are not furnishers when they self-report information to consumer reporting agencies. The Agencies can accomplish that end simply by providing that consumer report users and consumers are not furnishers subject to the guidelines and regulations under these circumstances.

The proposed definition of a furnisher is so broad it could include occasional furnishers which would then be required to have written policies and procedures and accept direct disputes. These burdens, without additional regard to the diversity of furnishers and CRAs, could significantly reduce the number of furnishers to CRAs and limit the data that is reported to CRAs.

There is no indication that the Congress intended to alter the customary understanding of what constitutes a furnisher. The NPR definition might be read to cover many entities not considered to be furnishers (like public record repositories, court runners, and employers verifying employment status). Any guideline or final rule should recognize the diversity of data furnishers.

ii. Resellers are not data furnishers

Should the final rule contain a definition of a furnisher, that definition should also specifically exclude resellers. The proposed definition of a furnisher may inadvertently include resellers, even though there is no indication that Congress or the Agencies intended to do so.

A reseller is –

> a consumer reporting agency that—
>
> (1) assembles and merges information contained in the database of another consumer reporting agency or multiple consumer reporting agencies concerning any consumer for purposes of furnishing such information to any third party, to the extent of such activities; and
>
> (2) does not maintain a database of the assembled or merged information from which new consumer reports are produced.

15 U.S.C. § 1681a(u). Under the FCRA, resellers have an obligation to reinvestigate disputes and, under certain circumstances, convey the notice of dispute "to each consumer reporting agency that provided the reseller with the information that is the subject of the dispute". *Id*., §§ 1681i(f), (f)(2)(B). Thus, the nature and duties of furnishers are very different from those of resellers, and any definition of furnishers, should specifically exclude resellers and those CRAs that provide information to resellers.

iii. The proposed definition of a "furnisher" unnecessarily alters the FCRA definition of "person".

Under the FCRA, a "person" means "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." 15 U.S.C. Sec. 1681a(b). The FACT Act amendment to the FCRA that gave rise to the NPR requires the Agencies to "establish and maintain guidelines for use by each *person* that furnishes information to a [CRA]". Id., Sec. 1621s-2(e) (emphasis added). There seems to be disharmony between Sections 1681a(b) and 1621s-2(e) on the one hand, and the NPR's proposed definition of a "furnisher" on the other, which defines a "furnisher" to be an "entity". This possible change in legal effect can be easily rectified by elimination of the proposed furnisher definition.

D. The definition of a direct dispute presents a technical problem

The NPR takes the position that a direct dispute occurs when a consumer is disputing any information contained in the consumer's "consumer report". See, Proposed Sec. 660.2(e).[11] However, under the FCRA the consumer does not dispute information contained in a consumer report, the consumer disputes information contained in the "file". 15 U.S.C. Sec. 1681i(a)(1)(A). A consumer is not likely to have seen or ever see the "consumer report". However, consumers can readily receive disclosures of the information in their file from a consumer reporting agency. To comport with existing law and marketplace standards, any direct dispute should apply to either information contained in the consumers file or information contained in the disclosure provided to a consumer from a CRA under Sec. 1681h.

VII. The Interagency Guidelines Must Be Flexible and Acknowledge the Diversity of Furnishers and CRAs

We applaud the Agencies' comment in the introduction that "a furnisher may incorporate in its accuracy and integrity policies and procedures any of its existing policies and procedures that are relevant and appropriate." This concept should be carried forward into final guidelines. However, rigid guidelines or rules, or a requirement that all furnishers must have written policies and procedures could discourage data reporting.

A. Reasonable written procedures may be unnecessarily burdensome

The NPR "would require each furnisher to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information about consumers that it furnishes to a CRA." NPR § 660.3(a). While CDIA strongly supports the premise that "[t]he policies and procedures must be appropriate to the nature, size, complexity, and scope of the furnisher's activities", *id*., the Agencies may be able to do more to reduce the burdens that a written policies and procedures requirement might impose on furnishers. There may be situations where polices need not be written as this may be too onerous for some small or occasional furnishers. For example, in the case of companies that report to CRAs in the Metro 2 format, the final rule could permit a furnisher's written policy to do no more than acknowledge, where applicable that the furnisher is reporting data in the Metro 2 format in the case of data furnished to nationwide consumer reporting agencies. The Agencies acknowledges as much in the supplementary information. *Eg*., 72 Fed. Reg. 70954, 70951, 70969 (Dec. 13, 2007), and Appendix E to Part 41 IV.B.

[11] This provision is similar to other provisions in the NPR. For the sake of convenience, citations to the other provisions are not cited here, but the comment applies equally to the other provisions.

Similarly, the final rule should provide for alternative means of compliance for merchants that furnish to check verification companies, employers furnishing to employment screening companies and other small businesses that do not regularly furnish credit information to consumer reporting agencies and that may not be well positioned to develop their own written policies and procedures or to review and update the Agencies' guidelines. For example, it is not reasonable or realistic to expect a small merchant to comply with the proposed formal requirements in order to participate in a check verification program. The final rule could provide that these kinds of furnishers would satisfy the rule's requirements for reasonable policies and procedures concerning the accuracy and integrity of furnished information under NPR § 660.3 by agreeing to adhere to the contractual requirements and procedures for furnishers established by the consumer reporting agencies to which they furnish information. By following these requirements and procedures, a furnisher's policies and procedures would be "appropriate to the nature, size, complexity, and scope of the furnishers' activities."

B. A specific time limit for FCRA § 611(a)(5) is not necessary

In Section IV, which outlines specific components of policies and procedures, the NPR notes that "section 611(a)(5) of the FCRA "contains no time limit on the requirement that if a CRA reinvestigates a consumer dispute, it must modify or delete items that cannot be verified" and inquires "whether a specific time period for recordkeeping should be incorporated in the final regulations." *Id*., 70944, 70953.[12]

In undertaking its § 611(a)(5) responsibilities, a CRA must "promptly delete" or modify the item in question. The FCRA already requires a 30-day period for the entire reinvestigation process. 15 U.S.C. Sec. 1681i(A)(1)(B). In connection with a time period for recordkeeping, there is no evidence that a problem exists to warrant inclusion in the final rule and thus no timeframe in connection with recordkeeping is necessary. Moreover, because there is no evidence of a problem, there is no empirical data on which to base any required time period.

C. Additional flexibility in the guidelines is necessary to encourage data reporting

Since furnishers are encouraged to "include any of its existing policies and procedures that are relevant and appropriate", Appendix A to Part ___, the nature and scope of the policies and procedures should "consider", rather than "reflect" the attributes enumerated in Appendix __ to Part ___ I.A. The same concerns apply to rigidity of requirements in III and IV. Rather than require something to be done, the guidelines should require actions and situations to be considered. In that same vein, it is inappropriate for policies and procedures to require a furnisher to obtain feedback from CRAs. *Id.*, III.A.3, but better placed for such action to be a suggestion.

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[12] FCRA § 611(a)(5) requires that

> [i]f, after any reinvestigation under…of any information disputed by a consumer, an item of the information is found to be inaccurate or incomplete or cannot be verified, the consumer reporting agency shall—
>
> (i) promptly delete that item of information from the file of the consumer, or modify that item of information, as appropriate, based on the results of the reinvestigation; and
>
> * * *

15 U.S.C. § 1681i(a)(5).

In keeping with the need for flexibility, the guidelines should not require a furnishers policies and procedures "ensure" that information about a consumer meets certain standards, Appendix A to Part ___ I.B., but rather, the furnisher should have "reasonable policies and procedures for implementing the guidelines." 15 U.S.C. Sec. 1681s-2(e)(1)(B).

Since furnishers are already required to comply with the FCRA it seems at best redundant to require in the guideline a statement that it does so. Appendix A to Part ___ II. At worst, this provision creates an additional path to liability for furnishers and an additional roadblock on the way to furnishing data.

The proposed guideline presents additional potential obstacles to data reporting. The proposed guideline under the regulatory definition approach would require a furnisher to ensure that information furnished about account or other relationships with a consumer "avoids misleading a consumer report user". Appendix __ to Part ___I.B.2. The guideline offers no guidance to furnishers concerning the meaning of "misleading" and the net result of the lack of guidance in the guideline could be the further reduction in data being reported to CRAs. It is inappropriate to require a furnisher to intuit from users whether information a furnisher provides to a CRA might mislead a user. These concerns also apply to Appendix __ to Part __ IV.I.

The proposed guideline requires furnishers to ensure that information furnished is updated to reflect the "current status of the consumer's account or other relationship." *Id.*, I.B.4. This provision provides little guidance and encourages guesswork about the timeframes surrounding the update and we suggest that the Agencies incorporate language so that the updates are done consistent with the normal course of business in which the furnisher transacts business with the CRA.

D. Additional record retention requirements are unnecessary and could limit data reporting

Under state and federal statutes, common law, and insurance agreements, data furnishers are most likely under multiple obligations to retain records. Additional recordkeeping requirements are unnecessary and will stand as yet another excuse to not furnish data to CRAs.

E. Several specific components of the proposed policies and procedures present potential compliance problems and could reduce data furnishing to CRAs.

Part IV of the proposed Appendix provide for 13 specific components for proposed polices and procedures. One of these components requires, in part, that each furnisher conduct a periodic evaluation of "consumer reporting agency practices of which it is aware." It is unclear what such an evaluation would encompass and whether furnishers would then be expected to question the practices of a consumer reporting agency to which it furnishes data if it were to conclude that such practices were in some way lacking. This uncertainty represents a breeding ground for unnecessary new areas of litigation.

VIII. Specific - Direct disputes

The NPR sets out proposed "regulations identifying the circumstances under which a furnisher must reinvestigate disputes concerning the accuracy of information provided by a furnisher to a CRA and contained in a consumer report based on a direct request from a consumer…" *Id.*, 70946.

While our members believe that it can be appropriate for data furnishers to handle consumer disputes directly, the direct dispute proposal poses some challenges to furnishers. Section 623(a)(8)(F) of the FCRA provides that a furnisher is not required to investigate a dispute that a furnisher reasonably determines to be frivolous or irrelevant. However, the NPR's provisions concerning frivolous or irrelevant dispute determinations weaken the meaning and intent of the FACT Act making it harder for

furnishers to lawfully make such determinations. Credit clinics continue to generate about one-third of all consumer contacts with CRAs. We are concerned that a similar rate will be experienced with furnishers and that a weakened frivolous or irrelevant determination standard could increase fraud and ultimately the deletion of accurate, predictive data which contributes to safety and soundness.

The proposed guideline requires furnishers to "promptly notify" CRAs of a determination that the furnished information is not complete or accurate and provides different obligations for a furnisher that furnishes information in the regular course of business. Appendix __ to Part __II.A. . CDIA suggests that "prompt[] notif[ication]" within the meaning of this provision should be harmonized to conform to long-standing understandings of promptly elsewhere in the FCRA. Similar to other provisions, any reporting of a determination that information furnished is not complete or accurate should be done by all furnishers in their regular course of business.

IX. Conclusion

Through the ANPR, the Agencies fostered a thorough and productive dialogue on this subject. We hope that these comments are helpful to the Agencies as they consider proposed guidance and regulations with far reaching consequences .

CDIA firmly believes that the key to a successful credit reporting system is its voluntary nature. CDIA is concerned that new furnisher obligations that are significant, complex, or confusing will reduce the amount of data being provided to consumer reporting agencies. A reduction in data provided to consumer reporting agencies will ultimately harm consumers.

Respectfully submitted,

Eric J. Ellman
Vice President and Counsel, State Government and Federal Regulatory Affairs

Enclosure

Appendix I

STATEMENT OF

STUART K. PRATT

CONSUMER DATA INDUSTRY ASSOCIATION

WASHINGTON, D.C.

BEFORE THE

Committee on Financial Services

House of Representatives

ON

"Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information"

June 19, 2007

Chairman Frank, Ranking Member Bachus and Members of the Committee, thank you for this opportunity to appear before the Committee on Financial Services. I am Stuart Pratt, President and CEO for the Consumer Data Industry Association (CDIA).

The CDIA, is an international trade association representing approximately 300 consumer data companies that are the nation's leading institutions in credit and mortgage reporting services, fraud prevention and risk management technologies, tenant and employment screening services, check fraud prevention and verification products, and collection services.

We commend you for holding this hearing and welcome the opportunity to share our views. Thanks to the leadership of this Committee, the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*) was materially amended in 2003 through enactment of the Fair and Accurate Credit Transactions Act of 2003.[1] This Act changed the FCRA in a number of ways that are relevant to today's hearing.

My comments today will focus on:

- Our members' management of the quality of data in their databases, and consumer dispute processes, which have been stories of hard work and success.

- Tying up 30% of the industry's resources for assisting consumers with repetitive disputes that are deceptive is a problem worth solving. We believe that deceptive

[1] See Public Law 108-159, "The Fair and Accurate Credit Transactions Act of 2003."

credit repair activities are best addressed through additional resources dedicated to the FTC which has primary enforcement responsibilities over CROA. The FTC is doing a good job and could do more if resources are made available.

- Finally, CDIA data shows that the FACT Act has already had a positive effect on consumers. However, we believe that its provisions should be given time to work in the marketplace and that the full effectiveness of the Act cannot be assessed until all rulemaking processes are final

Data Accuracy – Industry and the Law

The FCRA makes it clear that all consumer reporting agencies are to "…follow reasonable procedures to ensure the maximum possible accuracy of information concerning the individual about whom the report relates."[2] The term accuracy is difficult to define and an extensive discussion of this point can be found in Appendix I.

The Federal Trade Commission's (FTC) own Commentary on the FCRA provides insight into the question of intent regarding the FCRA duty to be accurate:

> "General: The section does not require error free consumer reports. If a consumer reporting agency accurately transcribes, stores and communicates consumer information received from a source that it reasonably believes to be reputable and which is credible on its face, the agency does not violate this section simply by reporting an item of information that turns out to be inaccurate. However, when a consumer reporting agency learns or should reasonably be aware of errors in its reports that may

[2] FCRA Sec. 607(b) or 1681e(b).

> indicate systematic problems (by virtue of information from consumers, report users, from periodic review of its reporting system, or otherwise) it can review its procedures for assuring accuracy."

Our members employ a range of internal strategies for ensuring the quality of data reported to them. Some are proprietary, but the sampling below gives you an idea of what goes into managing incoming data.

New data furnishers – all of our members report having specialized staff, policies and procedural systems in place to evaluate each new data furnisher. Common practices include reviews of licensing, references, and site visits. All apply robust tests to sample data sets and all work with the furnisher to conform data reporting to the Metro 2 data standard. Once a furnisher is approved, there may be ongoing monitoring of this data reporting stream during a probationary period of time.

Ongoing furnishing – Our members report a variety of practices; some of these are listed below:

- Producing reports for data furnishers which outline data reporting problems, including errors in loading data and data which is not loaded. This reporting process ensures data furnishers are receiving feedback regarding the quality of their data furnishing practices.
- Cross-referencing data in certain fields to look for logical inconsistencies are often used as a data quality check.

- Historical data reporting trends, at the database level or data furnisher level, are used as baseline metrics upon which to evaluate incoming data.
- Manual reviews of data can occur when anomalous data reporting trends are identified.
- Reviewing incoming data for consistency with the Metro 2 data standard.

Beyond the extensive, individual corporate strategies for ensuring data quality, our members have undertaken industry-level strategies as well. Central to these efforts has been the development of a data reporting standard for all 18,000 data sources which contribute to their databases. The latest iteration of this standard is titled Metro2. Appendix III provides an overview of this standard. Standardizing how data is reported to the consumer is a key strategy for improving data quality. The National Consumer Law Center, writing on behalf of a range of consumer groups, appears to agree with this point when it stated in its letter to the Federal Reserve Board[3]:

> *"However, the failure to report electronically or to use Metro2 creates even more inaccuracies."*

Use of the Metro 2 data reporting format is climbing steadily. In 2005 CDIA reported to the FTC that approximately 50 percent of all data provided to our members' data bases was reported using the Metro2 Format. Today, this percentage has grown to 81.3 percent. Our members' data quality teams believe this 62.6 percent increase is directly

[3] Comments of the National Consumer Law Center, ANPR: Furnisher Accuracy Guidelines and Procedures Pursuant to Section 312 of the Fair and Accurate Credit Transactions Act, Pp. 16.

attributable not only to our members' tenacious efforts, but also to the FACT Act's focus on accuracy and yet-to-be proposed guidelines and rules governing accuracy and integrity of data.[4]

In addition to our members' individual efforts to encourage adoption of the Metro 2 Format, CDIA provides access to a "Credit Reporting Resource Guide" which is the comprehensive overview of the Metro2 Format. This guide is designed for all types of data furnishers, but it also provides specific guidance for certain types of furnishers to encourage proper use of the format. Target audiences include collection agencies, agencies which purchase distressed debt, all parties which report data on student loans, child support enforcement agencies and utility companies.

More than 500 of these guides are provided free of charge to data furnishers each year. Further, since 2004, CDIA and its Metro2 Task Force have administered telephonic and in-person workshops for thousands of data furnishers on a range of specialized topics regarding Metro2 including, for example:

- Reporting Requirements for Third Party Collection Agencies and Debt Purchasers.
- Reporting Requirements Specific to Legislation & Accounts Included in Bankruptcy.

[4] No data furnisher must report any data to a consumer reporting agency or to do so using a particular reporting standard. We will discuss this point in greater detail later in this testimony, but the voluntary nature of our system of data furnishing is important context.

Data Accuracy – Studies

Both the General Accountability Office and the FTC have also acknowledged the difficulty of developing a working definition of accuracy that is meaningful.

As this Committee knows, Congress believed that more information was necessary to understand the true error rate in credit reports. Section 319 of the FACT Act requires the FTC to conduct an ongoing study of credit report accuracy and completeness. Five interim reports are due over the period of time between the date of enactment and 2014, which is when a final report to Congress is due. The FTC has issued two reports and is still working on a methodology by which to measure the accuracy and completeness of reports.

Often quoted statistics about rates of accuracy are flawed. In fact the GAO's statement below is a clear warning against using these studies as a yardstick for measuring accuracy:

> 'We cannot determine the frequency of errors in credit reports based on the Consumer Federation of America, U.S. PIRG, and Consumers Union studies. Two of the studies did not use a statistically representative methodology because they examined only the credit files of their employees who verified the accuracy of the information, and it was not clear if the sampling methodology in the third study was statistically projectable.'
>
> *Statement of Richard J. Hillman, Director, Financial Markets and Community Investment, General Accountability Office, Before the Senate Banking Committee, July 31, 2003.*

In contrast to the studies discussed above by the GAO the Federal Reserve Board conducted research on more than 300,000 credit reports and made the following observations regarding the accuracy of reports:

> "This analysis of the effects of data problems on credit history scores indicates that the proportion of individuals affected by any single type of data problem appears to be small…"
>
> "Available evidence indicates that the information that credit-reporting [sic] agencies maintain on the credit-related experiences of consumers, and the credit history scoring models derived from these experiences, have substantially improved the overall quality of credit decisions while reducing the costs of such decision making.
>
> *Avery, Robert, et al., Federal Reserve Bulletin, "Credit Report Accuracy and Access to Credit", Summer 2004.*

While The FACT Act requires studies of the question of accuracy, it also sought to "connect" consumers with their credit file disclosures with the goal of ensuring consumers review their reports proactively and on an annual basis. Consider the following data that result from enactment of the FACT Act.

Between December of 2004 and December of 2006, over 52 million free reports have been issued through www.annualcreditreport.com. In fact, CDIA estimates that through the combination of direct-to-consumer products and consumers exercising their rights under the FCRA (including the new FACT Act right to one free disclosure per year) our members operating as nationwide consumer reporting agencies have issued over 160 million disclosures since December of 2004.

Further, while consumer groups claim error rates as high as 79 percent of "credit reports" reviewed by consumers, data from www.annualcreditreport.com shows that 89 percent of the credit file disclosures issued resulted in no disputes. There are a number of points to consider with regard to the 11 percent of consumers who did submit a dispute:

- The 11 percent dispute rate is low by all measures. The GAO's 2004 FACT Act-required survey of consumers regarding credit report literacy suggested that dispute rates ranged from 18-21.8 percent of the disclosures made to consumers. In fact, a CDIA study conducted in 1991 showed a dispute rate of 25 percent of disclosures.
- Out of 52 million credit file disclosures reviewed by consumers, only 1.98% of these resulted in a dispute where data was deleted.
- Many disputes, perhaps as much as 55 percent, are in reality a request for an update of accurate data.[5]
- A dispute is not synonymous with an error. As discussed below deceptive disputes submitted by credit repair agencies have nothing to do with the accuracy of data. In approximately 25 percent of the disputes, the data is verified as accurate.
- A dispute is not synonymous with an error which is consequential and which will lead to an adverse result.[6]

[5] Note that in the Federal Reserve Board's Federal Reserve Bulletin, Summer 2004, it was reported that data furnishers did not always report as consistently as they should and that approximately 29 of all accounts in the sample of 300,000 credit reports had not been updated in the 90 days. Further the Federal Reserve Board found that most disputes related to accounts closed by the consumer but which were not annotated by the lender as such.

Data Accuracy and the FACT Act

This Committee specifically addressed the question of ensuring the accuracy of data through bipartisan provisions in the Fair and Accurate Credit Transactions Act of 2003. The FACT Act passed the Committee by a bipartisan margin of more than a sixty votes and passed the House with more than 300 votes.

Many of the FACT Act requirements became effective on December 1, 2004, and one of the most relevant changes to the FCRA was the amendment to Sec. 623(a)(1)(A). This amendment directly addressed the accuracy of data furnished by a lender or other data source to a consumer reporting agency. The new standard of liability for furnishing accurate data to consumer reporting agencies is now "…knows or has reasonable cause to believe that the information is inaccurate" and it operates in stark contrast with the old standard of "…knows or consciously avoids knowing that the information is inaccurate."

Certain debt collection practices were also addressed in the FACT Act which speak to accuracy of data furnished to our members. For example, a prohibition on the sale or transfer of a debt where the owner of the account has been notified that it has been blocked by a consumer reporting agency due to an identity theft report (Sec. 615(f)). This provision ensures that accounts are not re-reported to a CDIA member, thus penalizing the consumer a second time. Sec. 615(g) requires third-party debt collectors

[6] The FRB/FTC Report to Congress on the Fair Credit Reporting Act Dispute Process cites a 2005 GAO survey of consumers where 13% of the reasons for submitting a dispute were due to either incorrect personal information (such as a misspelling reported by a data furnisher) or incorrect information on a former spouse (where a divorce is not accounted for by a data furnisher).

to notify the owner of the account when a consumer notifies it that the debt "may be fraudulent or may be the result of identity theft…" Here again, if an account can be properly identified as associated with identity theft, then the collector can return it to the owner and can proactively delete the account from the consumer's file.

The above provisions are effective today, however a number of rules which could have an effect on overall accuracy of data reporting to CDIA members are not yet complete, but are worth noting.

Accuracy and Integrity - An interagency advance notice of proposed rulemaking for enhancing the accuracy and integrity of information furnished to consumer reporting agencies was issued and CDIA provided comments on May 22, 2006. This particular rulemaking process includes consideration of the reinvestigation process, as well as practices regarding the upfront furnishing of data.

Red Flag Guidelines - Also incomplete are red flag guidelines which include rules for resolving address discrepancies. Resolving such discrepancies at the account opening will reduce the likelihood that data reported to a consumer reporting agency is inaccurate.

Direct Disputes - Finally, rules have not been promulgated regarding the circumstances under which a consumer may dispute information directly with a data furnisher rather than having to go through the consumer reporting agency (see Sec. 623(a)(8)). We believe this rule could be particularly helpful to consumers if drafted properly, taking into

account the effects it could have on a voluntary system of data furnishing. The GAO found in their 2004 FACT Act Survey of credit report literacy that 64 percent of consumers wish to dispute information directly with the furnisher of information.

Regardless of which rulemaking processes are not complete, CDIA members have sought to assist data furnishers which choose to respond to consumers who come to them directly. Through the e-Oscar system, all 18,000 data sources have an automated means of updating data previously reported. This voluntary effort results in 35 million automated updates to data per year that are not a result of consumer disputes or regular, cyclical data reporting. These updates are a strong indicator that consumers are already interacting with their lenders and lenders wish to work with their customers.

In closing this discussion, we believe that the agencies are exercising care in their work and we can appreciate the complexity of issuing guidance and rules that have a positive effect for consumers and lending practices, but which do not harm the voluntary system of data furnishing. We cannot fully assess many of the positive, longitudinal effects of the FACT Act until these regulatory processes are complete and the regulations have been given time to work.

Accuracy and a Voluntary System

It would be wrong to close out our discussion of accuracy without first touching on the careful balance which has to be maintained in a voluntary system of data provision.

Again, not a single one of the more than 18,000 data furnishers has to provide a single record of data to our members. Some tend to think of the data furnisher community as just large financial institutions. To the contrary, amongst these 18,000 furnishers of data are thousands small banks, credit unions and retailers. These furnishers remain committed to furnishing data and often provide data which ensures that all credit-active consumers have a full and complete report. A regulatory overreach, sending costs and liabilities too high, will not "fix" anything, but it will likely have the effect of driving data furnishers to reconsider reporting any data at all to our members' databases. We discuss this point in greater detail in our letter to the FRB found in Appendix I.

Accuracy Summary

It is no surprise that this Committee already has a very good understanding of the importance of data flows to consumers, not just at the macro-economic level, but at the level of each individual consumer. Just this year, H.R. 1852 was passed out of committee. It included an amendment offer by Congressman Green requiring The FHA to find ways to ensure that alternative credit data is used in automated underwriting systems. Clearly data empowers consumers to build better lives and vouches for them when a lender otherwise has no relationship.

In closing, the consumer reporting industry is constantly working to ensure that data reported is of the highest quality. In the context of a system where data is provided voluntarily, we must not stifle or retard the growth of alternative data sources as a means of empowering more consumers to qualify for a sustainable and responsible loan. Nor

should we develop a regulatory framework that encourages data furnishers to drop out of the world's most sophisticated "credit reporting" system. Either result harms consumers most of all.

Reinvestigation Process – FACT Act

The FACT Act amended the FCRA significantly with regard to the reinvestigation process both for consumers in general and for those who may be victims of identity theft. Consider the following provisions:

1. FCRA Sec. 623(a)(6) – Data Furnisher Accuracy & Identity Theft – This newly created section of law requires that a data furnisher accept a consumer's allegation that he/she is a victim of identity theft where the consumer provides an identity theft report. Where this takes place the data furnisher may not continue to furnish such information to a consumer reporting agency.

2. FCRA Sec. 623(a)(8) – Data Furnishers & Direct Disputes – this newly created section of law requires data furnishers to accept disputes directly regarding an item of data they have previously reported to a consumer reporting agency. This provision is not effective until the FRB, NCUA and FTC issue regulations. Regulations have not been issued at this time.

3. FCRA Sec. 623(e) – Data Furnishers & Regulations – For the first time in the history of this Act, Congress determined that the question of the accuracy and integrity of the data reported to consumer reporting agencies would not only be regulated by the law, but by the federal banking agencies issuing guidelines and implementing regulations. These guidelines and regulations would also address reinvestigations conducted by data furnishers when in receipt of a dispute from a consumer reporting agency. To date, guidelines and regulations have not been issued.

4. FCRA Sec. 605B – Consumer Reporting Agencies and Reinvestigations – Consumers who have a valid ID Theft Report can direct a consumer reporting agency to block data which is identified as resulting from the crime.

5. FCRA Sec. 611(a)(1)(A) – Consumer Reporting Agencies & Reinvestigations - This amendment changed the standard by which reinvestigations are conducted by consumer reporting agencies. The new standard states that a consumer reporting

agency "shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate."

6. FCRA Sec. 611(a)(5)(A)(ii) – Consumer Reporting Agencies & Reinvestigations- This amendment ensured that the data furnisher received confirmation from the CRA that the CRA had in fact followed through on the data furnisher's response to a dispute (e.g., delete or modify the data). This confirmation also serves as a reminder to the data furnisher to ensure that its system does not attempt to reinsert disputed information that is now correct.

Not only did the FACT Act directly address the reinvestigation process, but the FRB and FTC were also required to study the process, as well. This study was issued in August of 2006 and included no new legislative requirements. The statement below explains the agencies' thinking in this regard.

> "The FACT Act Section 313(b)(4) requires the FTC and the Board include in this report any legislative or administrative recommendations for improvements to the dispute process that the agencies jointly determine to be appropriate. The agencies recommend that no legislative action be taken at this time, in large part because the agencies believe such action would be premature. The FACT Act imposes a number of new requirements on CRAS and furnishers that should enhance the consumer dispute process and improve accuracy, including measures to reduce identity theft and new requirements on furnishers. Many of these requirements are being implemented, and their effects on the dispute process have yet to be seen. This is particularly important given the voluntary nature of the reporting system and the uncertainty of how additional requirements and burdens would affect that system."
>
> *Federal Trade Commission "Report to Congress on the Fair Credit Reporting Act Dispute Process", August 2006,Pp. 34.*

CDIA strongly agrees with this conclusion. However, the absence of legislative recommendations does not mean that the FACT Act has not already had a positive effect in the marketplace.

For example the number of disputes handled by our members' automated system for handling consumer disputes (named e-Oscar) has risen from 83 percent per the FRB/FTC report (see page 15) to 94 percent today (up 13.35 percent).[7] This is only good news for consumers because data furnishers that use the e-Oscar system respond to more than 72 percent of all disputes in 1-14 days. Consumers want responses that are both correct and timely. e-Oscar accomplishes this goal.

Consumers also expect their file to be complete and e-Oscar helps data furnishers manage this consumer expectation. When a lender does not respond to a dispute, law requires that data be deleted. This is not always a good result and may mean the removal of an entire account rather than only a particular item in dispute. The e-Oscar system provides data furnishers with tools necessary to effectively manage incoming disputes. Much wider use of the e-Oscar system and ongoing investments to ensure ease of use for data furnishers has led to a dramatic drop off in the percentage of disputes for which a data furnisher fails to respond. In CDIA's 2003 testimony before the Senate Banking Committee we reported that fully 16 percent of all disputes were not processed by data furnishers and thus data was deleted. This failure of a data furnisher to respond to a consumer's dispute has been reduced from 16 percent to 6.27 percent of all disputes. This is tremendous progress by any measure and benefits both consumers and our lending system.

The increase in the percentage of disputes handled by the e-Oscar system is, not surprisingly, paralleled by an increase in the number of users from 15, 400 per the

[7] For a complete discussion of the e-Oscar system, see Appendix II.

FTC/FRB report (see page 15) to more than 17,500 users[8] (which is a 13.63% percent increase). This is also positive for consumers because it means that virtually all disputes are now handled in a standardized way and, thus, whether a consumer is working with one of the largest or smallest lenders in the country, he or she can have confidence in the quality of the dispute process.

Consumer Disputes and Automated Dispute Processing

The FRB/FTC report on the reinvestigation process states that "Consumer groups commented that consumers often supply CRAs with information and documentation sufficient to support their disputes (including account applications, billing statements, and letters), but CRAs neither review the documentation nor forward it to furnishers." CDIA strongly disagree with this assertion based on the following data. First, on average across our members' consumer relations divisions 54.34 percent of all disputes are submitted by consumers through telephone or the Web. Use of these channels is increasingly the choice consumers themselves are making.

Of the 44.43 percent of consumers who submitted data in writing:

- Approximately 85% submitted only a standardized form or letter.
- Approximately 10% involved an identity theft report.
- Approximately 2-3% of communications involved other information.

[8] CDIA estimates that there were approximately 1000 users on the e-Oscar System in 2001.

It is clear from these data that, in fact, very few disputes involve extensive data and disputes are most often successfully processed to the satisfaction of the consumer with little more than a Web or telephonic communication. The FRB/FTC report cites data from TransUnion suggesting that 95 percent of the disputes handled are done to the satisfaction of the consumer with only 5 percent of consumers coming back to dispute the same data again (see page 24). Note that repetitive disputes are not necessarily an indication that the process is failing, when you consider that on average 30 percent of all disputes submitted are a result of credit repair activities. The problem of credit repair is discussed more thoroughly below.

The underlying concern some have expressed about automation is that the system of coding disputes used by our members often means consumer data is not submitted. The above data tells you that this is clearly not the case and that perceptions of the extent to which consumer's provide supporting data are inflated.

However, leaving aside how often a consumer submits additional data related to a dispute, the perception that our members' system for coding disputes is not effective is also wrong. As stated in the FTC's report on reinvestigations (page 17), CDIA's members estimate that a free-form field is used an average of 30 percent of the time to augment the dispute codes, clearly demonstrating that our members take a responsible approach to balancing the codes with additional data. This field allows an operator to include additional data for a data furnisher to consider.

It is also important to note that not all material submitted is legitimate and as discussed below efforts by credit repair agencies are an ongoing concern. For example, one of CDIA's members has a sample document which was ostensibly from Bank of America except that the name of the bank was misspelled on the stationery. One of the challenges our members have is ensuring that the dispute system is effective for consumers with legitimate concerns, but is not a system for deleting predictive data necessary for safety and soundness.

Credit Repair is a Concern

Our discussion of data accuracy and also reinvestigation processes would not be complete without acknowledging the problem of credit repair. It was this committee which enacted what is now known as the Credit Repair Organizations Act (citation) as Title II of the reform of the Fair Credit Reporting Act, all of which was passed in 1996. This enactment followed on the heels of more than 30 states which have enacted laws regulating such companies.

Historically credit repair operators would promise to delete accurate but negative data from a consumer's file for fees that in some cases exceeded $1,000. Their primary tactic was to flood the reinvestigation system with repeated disputes of the same negative data in an effort to "break" the system and cause the data furnisher to both give up and not respond or to simply direct the consumer reporting agency to delete the data. Today,

operators are savvier and often avoid making false promises but even now they suggest that they will assist the consumer with disputing inaccurate or "unverifiable" information. In many cases "unverifiable" equates to the same practice of flooding the system and trying to have accurate, predictive derogatory data removed.

Our members estimate that on average across our members operating as nationwide consumer reporting agencies, no less than 30% of disputes filed are tied to credit repair. Repetitive disputes can be particularly harmful to smaller data furnishers such as community banks, thrifts, credit unions and retailers. These data sources are often a key to ensuring full and complete data on all credit-active consumers, but their ability to absorb costs is limited. In extreme cases, small-business data sources may simply choose not to report at all if costs of responding to disputes are too high.

Thankfully, no one data source is usually the target of a credit repair operator and credit repair efforts most often end up in failure. But this failure is at a cost to our members and to consumers. Consumers spend money on a service that cannot deliver. Industry incurs costs as well when it has to dedicate resources which could be used to service legitimate disputes, to disputes that are not likely to be valid.

The FTC has materials for consumers cautioning them when it comes to using credit repair and in fact one official made the following quote:

> "The credit repair people that claim there's a bullet, a loophole in the laws that's going to let you instantly fix your credit, are lying to you. It's not true."

Steven Baker, Federal Trade Commission as quoted on MSNBC, 4-30-02

We believe the FTC should be given greater resources to investigate and prosecute violations of CROA. We also support amendments suggested by the FTC that would make their job of investigating and prosecuting those who violate the law.

Summary

In closing, let me touch on my opening three points again:

Our members' efforts to manage the quality of data in their databases, and consumer disputes have been a story of hard work and success. The data we've presented speaks for itself.

Tying up 30% of the industry's resources for assisting consumers with repetitive disputes that are deceptive is a problem worth solving. We believe that the problem of deceptive credit repair is best addressed through additional resources dedicated to the FTC which has primary enforcement responsibilities over CROA. The FTC is doing a good job and could do more if resources are made available.

Finally, we believe that the provisions of the FACT Act, which are extensive, should be given time to work in the marketplace and that the full effectiveness of the Act cannot be assessed at this time, though CDIA data shows that it has already had a positive effect.

Thank you for this opportunity to testify and I am happy to answer any questions.

Appendix I - Defining Accuracy

Following is a discussion of the difficulty of defining what constitutes accurate information and ultimately what is consequential.

We all know what we mean by the term 'accuracy.' But when we apply this term to an industry that sells three billion consumer reports per year and in fact which loads three billion updates of information per month, there's some context that can help us in our discussion. Consider the following points about the term "accuracy."

Accuracy and Voluntary Reporting: Fundamental to understanding the flow of information to consumer reporting agencies from more than 18,000 data furnishers is the fact that these data are provided voluntarily. Thus, there is always a careful balance that has to be maintained in order to ensure that the law creates appropriate duties for ensuring accuracy and alternatively, does not create a legal regime that imposes a strong disincentive to report at all.

Accuracy, Consumer Reporting Agencies and the Law: The CDIA's members are governed under the Fair Credit Reporting Act (15 U.S.C. Sec. 1681, *et seq.*), which establishes a duty that any consumer reporting agency must employ reasonable procedures to ensure the maximum possible accuracy of the information contained in the consumer report produced on a given consumer at a given point in time. Simply put, the law requires that the information contained in the report must be accurate as of the date reported. The Federal Trade Commission's own Commentary on the FCRA provides the following comment:

> "General: The section does not require error free consumer reports. If a consumer reporting agency accurately transcribes, stores and communicates consumer information received from a source that it reasonably believes to be reputable and which is credible on its face, the agency does not violate this section simply by reporting an item of information that turns out to be inaccurate. However, when a consumer reporting agency learns or should reasonably be aware of errors in its reports that may indicate systematic problems (by virtue of information from consumers, report users, from periodic review of its reporting system, or otherwise) it can review its procedures for assuring accuracy."

Accuracy, Data Furnishers and the Law: In 1996, the FCRA was materially amended. Perhaps the most significant change was the addition of Section 623, which imposed for the first time an express duty on data furnishers to report accurate data to the consumer reporting agencies. In taking this step, the Congress acknowledged that consumer reporting agencies, on their own, could not fully ensure the accuracy of information absent the partnership with the data furnishers that voluntarily provide information to the databases of consumer reporting agencies.

Accuracy and the Absence of Information in All Files: Some have posited that consumer reports are inaccurate when there is data missing from the file. CDIA disagrees with this characterization. There is no doubt that while the vast majority of the nation's largest lenders report voluntarily to all of the nationwide consumer reporting agencies which produce what are commonly called "credit reports", there are some smaller data furnishers which may choose to report only to one system. Some variance in product will always be evident in a competitive marketplace. However, while there are modest variances between nationwide consumer reporting agencies' databases, they all compete based on file quality and content and, thus, all are constantly seeking to ensure that their reports are complete and fully representative of the consumer about whom the report relates.

Note that credit repair can have a deleterious effect on the completeness of a consumer's credit report and, thus, where third-party file comparisons identify absences of data between files, this is in part attributable to credit repair. One of our members testified that more than 30 percent of all consumer disputes were generated by credit repair agencies, which commonly dispute accurate, derogatory information with the sole intention of having that information deleted from the file. In 1996, the Congress recognized the seriousness of the credit repair problems and enacted the Credit Services Organizations Act (Public Law 90-321, 82 Stat.164). That law prohibits the following with regard to credit repair activities and there is a continued need for even greater enforcement resources in order to ensure the effectiveness of the Act:

> SEC. 404. PROHIBITED PRACTICES. (7)
> (a) In General. --No person may--
> (1) make any statement, or counsel or advise any consumer to make any statement, which is untrue or misleading (or which, upon the exercise of reasonable care, should be known by the credit repair organization, officer, employee, agent, or other person to be untrue or misleading) with respect to any consumer's credit worthiness, credit standing, or credit capacity to--
>
> (A) any consumer reporting agency (as defined in section 603(f) of this Act);

Accuracy and Data Furnishing/Data Reporting Timing Issues: Some have reviewed reports about the same consumer obtained from more than one nationwide consumer credit reporting system and have suggested that differences in the status of a particular account (e.g., 30- v. 60-days delinquent) is an inaccuracy. The data are in fact accurate as of the date reported. There are a number of reasons for differences in the status of the same account on different "credit reports" produced by different credit reporting systems. For example, if a lender's data center is on the west coast and it ships physical media of accounts receivable information to each nationwide credit reporting systems, then the physical media may arrive on different days. The result is one of the nationwide systems may receive and load its update of a particular account sooner than the others. Thus, the status of a particular account is shown as sixty days delinquent on one system as of June

1, and on another the same account may, until the update is loaded, display the same account as thirty days delinquent (pending the update to sixty days as of June 1). Another reason may be that a data furnisher produced an incorrect set of data for one of the three systems and, via the credit reporting systems' audit controls, this physical media is sent back to the data furnisher for reprocessing and correction. Physical media are also, though infrequently, damaged in transit and have to be sent back to a data furnisher for reprocessing. Our members report success in migrating data furnishers from physical media reporting to electronic. One member reports that 90% of data is now reported electronically.

Accuracy and the Consumer – Perceptions and Realities: One of our members observed that items in a consumer's credit file may be accurate, but not in sync with the consumer's perspective. Consumers have a tendency to "dispute" such items that are not in sync with their perspective, even when the data is accurate. Below are a few examples[9]:

(1)Maiden name – A married woman obtains a copy of her file and sees that her married name is not on file. She calls to dispute this and the representative asks her if she has applied for any credit in her married name. She replies in the negative and offers that she and her husband are now starting to apply for joint credit accounts. She is advised that information in her file is reported to us by the credit grantors with whom that she holds accounts. Since she does not have any credit accounts in her married name, we would have no way of knowing that she has changed her name unless she reported this directly to us.

(2) A consumer sees an old, dormant account on his file and indicates that he had long ago instructed the credit grantor to close the account. He might have confused that request with a similar request to another credit grantor. Or maybe he might have instructed the credit grantor to close the account and they never did. The point is that the information on file is "accurate", because it is an open account.

(3) A consumer sees an account with General Electric Consumer Credit (GECC) on his file and swears that he never did business with GECC before. However, the account in question was with a retailer who subsequently outsourced their lending to GECC and the consumer never knew of that relationship or isn't aware that some retailers outsource their lending. In this case, the consumer will be adamant that the account is incorrect, but, in fact, it is accurate. Once they are made aware of the retailer's name (i.e. Home Depot for example), they acknowledge they do have a Home Depot account. The file was accurate.

(4) A consumer sees a previous address listed as the current address and vice versa. He cannot understand how the credit bureau could make that mistake. However, the consumer had failed to notify some of his credit grantors about the previous move, so some credit grantors are still reporting the old address as current. This hasn't been an

[9] These are actual examples are drawn from the industry experts who lead consumer relations/assistance units for the nation's largest consumer reporting agencies which maintain files on the majority of credit-active consumers.

issue for the consumer because the mail from those credit grantors is getting forwarded or the account is so inactive the credit grantors do not need to send him/her a billing statement very often.

(5) A consumer sees his or her name listed with an unrecognizable combination of personal initials they don't remember using. The consumer's inclination is to believe the credit bureau is responsible for this. However, the fact is that our members' systems are incapable of making up a name. That particular name was transmitted to us by the credit grantor. Either the consumer previously used that name with a credit grantor in the past or the credit grantor transmitted the erroneous name.

(6) Consumers also often find that employment data is not current on their file disclosures. This is due to the fact that many lenders do not report employment data any longer. Nonetheless, the FCRA requires that a consumer reporting agency disclose "all information in the file at the time of the request" and this includes dated employment data.

The previous examples have no bearing on the lender's risk decision. Yet, the consumer has questions about this data and regards these as "errors" by the credit reporting agency.

Accuracy and Divorce: One very significant challenge for CDIA's members is the problem lenders and consumer reporting agencies have with how credit obligations are handled incorrectly by divorce courts. A divorce decree does not supersede an original contract with a creditor and does not release a consumer from his or her legal responsibility on those accounts entered into jointly with the former spouse.

A consumer will see an item on his or her report and call to dispute the accuracy of it because they feel the divorce court adjudicated it. Despite the explanation that the debt is still owed the consumer will argue that her lawyer did not advise her at the time of her divorce that this would be the case. We explain to the consumer that it is ultimately his or her responsibility to contact creditors and seek a binding legal release of the debt obligations that have been incurred.

Accuracy and Expectations of Immediacy: Another very significant challenge is the perception by consumers that their credit reports should and can be updated nearly instantaneously. For example, consumers may review their credit reports and while data is accurate as of the date reported, they believe that recent payments should already be reflected showing a lower outstanding balance. A majority of data in the nationwide credit reporting systems is updated on a thirty-day cycle and this timing correlates with the thirty-day billing cycles for many types of contractually prescribed credit payments to creditors. A great many disputes are driven by a desire to update information, which is otherwise accurate.

Accuracy and Misunderstandings About the Law: Often enough our members report that consumers believe that when an account is delinquent and subsequently paid, that any negative information about the missed payments will be expunged from the record.

Similarly, consumers often believe that an item placed for collection should be expunged once paid. In fact, the law recognized that it is important for creditors to know when the account was paid and to also maintain a history of the timeliness of past payments for purposes of safety and soundness. Thus, the law permits adverse information to remain on the file, but for no more than seven years.[10]

We strongly believe that this context is essential. Anecdotes can be based on problems that are not real and in some cases are driven by perceptions or misconceptions about how the system does or should work and even how other laws work. Finally we caution against making the term "accuracy" synonymous with "consequential." Some inaccuracies are inconsequential to the consumer, such as a missing middle initial, and some inaccuracies may be very consequential, such as a lender incorrectly reporting a consumer as 30 days late on an account."

[10] Note that bankruptcies may stay on the file for as long as 10 years.

Appendix II – Background on E-OSCAR-web™

In 1993, CDIA's nationwide consumer credit reporting agency members voluntarily established an automated system to simplify and standardize the system of sending disputes to data furnishers. They recognized the importance of establishing a system which: (1) supported high response rates from data furnishers to disputes submitted by the consumer reporting agencies; (2) reduce the time for data furnishers to respond; (3) improve the quality of the responses received from data furnishers; and (4) lowered the cost of dispute processing for data furnishers and consumer reporting agencies.

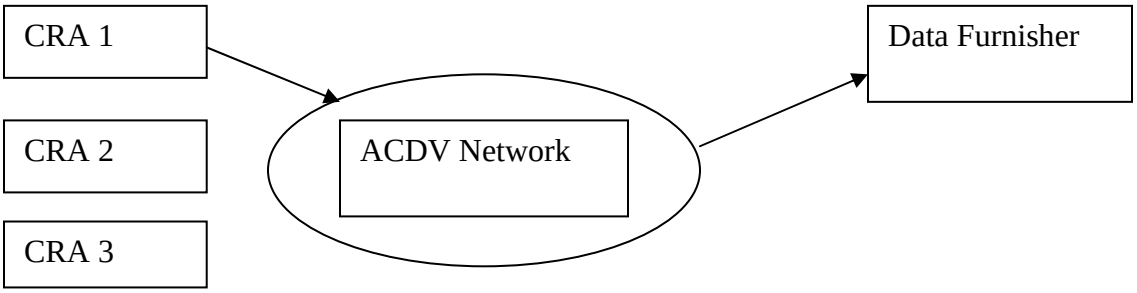
In 1996[11] Section 611 the Fair Credit Reporting Act[12] was amended to include Section 611(a)(5)(D) which requires that "…any consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall implement an automated system through which furnishers of information to the consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer's file to other such consumer reporting agencies." This amendment codified the 1993 voluntary initiative of the association's nationwide consumer credit reporting agency members. Below you will find an excerpt from CDIA's testimony before the Senate Banking Committee[13] which describes this system:

E-OSCAR-web™

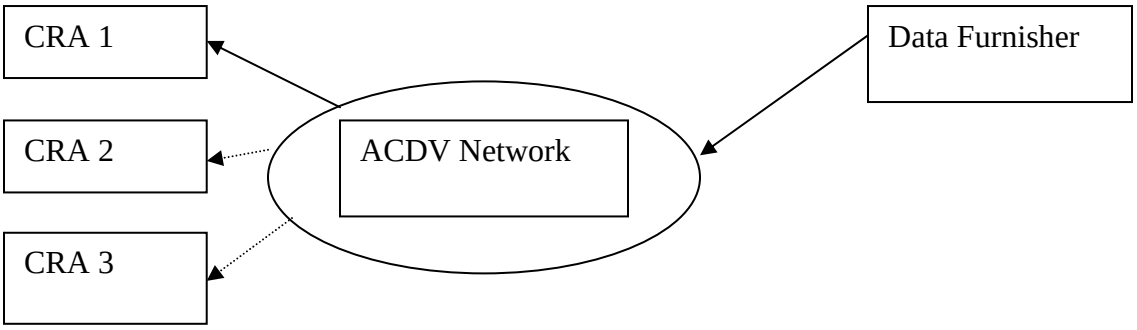
The consumer reporting industry, through the auspices of the industry association, came together in 1992 to build an Automated Consumer Dispute Verification (ACDV) process. This voluntary industry effort predated the FCRA amendments by a full five years. The network went live in November of 1993 and began growing quickly thereafter. Fully 50% of all consumer disputes sent by the consumer reporting industry to data furnishers were traveling through the ACDV process by 1996. From 1996 through 1998, the industry remained at that 50% market penetration. In 1998, we began a reengineering process to help capture additional users. We also took the opportunity to match up the ACDV process with the new Metro 2 Format. In 2001, we began beta testing the E-OSCAR-web™ network with data furnishers. We successfully went live in the early summer of 2001 and have retired our old network. The new network is secure, encrypted, and available to a larger number of companies because it is browser based. The industry has ambitious plans to encourage all of the data furnishers to migrate to the E-OSCAR network.

The essential process has remained the same since created in 1992, though recent technology innovations should encourage broader use of the system by smaller data furnishers. The consumer reporting agency receiving the dispute sends that dispute to the data furnisher.

[11] PL 104-208
[12] 15 U.S.C. 1681 *et seq.*
[13] Testimony of Stuart K. Pratt before the Senate Banking Committee, July 10, 2003, Pages 18-19.



The data furnisher researches the dispute, provides an answer and, if changing the account or deleting it, provides a copy of the dispute and the response to each of the consumer reporting agencies to which it reported the data originally.



Appendix III – Background on Voluntary Industry Data Reporting Standards

METRO FORMAT

More than 18,000 data furnishers provide approximately three billion updates of information per month to the nationwide credit reporting systems. No law requires any furnisher of information to provide data to a consumer reporting agency.

A data format standard becomes a very important part of how the industry can ensure greater precision in the reporting of information, particularly with such a wide diversity of data furnishers[14]. If each of these data furnishers can choose how to report data and what data goes into what fields or how to define the status of accounts, etc., then the files of any given consumer are likely to reflect a wide variety of approaches to reporting information making it far more difficult to properly and fairly assess a consumer's risk.

The original Metro format for credit reporting was first developed in the mid '70s. Over the years, it has gained in popularity and achieved a high level of use in the market place. By 1996, more than 95% of all data was received by the nationwide credit reporting systems in this format. In 1996, the credit reporting industry took advantage of the opportunity afforded by the Year 2000 data processing "bug" to completely reengineer the format for credit reporting. The Metro 2 format was introduced in 1997 and has been steadily gaining in use by the data furnisher community. At this time, more than half of all accounts are reported in this new format.

Both the original and the new Metro 2 formats are maintained by an industry task force of volunteers from each of the national systems. This group meets on a regular basis to develop industry-wide responses to questions from data furnishers and create new codes or fields as necessary. Annually this group creates and delivers training sessions on the Metro 2 format for data furnishers that have not yet converted to the new format. More of these training sessions are scheduled for 2006.

Typically, data furnishers report data on a regular basis, usually monthly. The industry does encourage those companies that bill their customers in cycles (e.g., every 30 days) to report that data to the consumer reporting agencies in cycles thus ensuring that the data is not only accurate as of the date reported but is also as current as possible.

The Metro 2 Format documentation is distributed within the industry by the Association. Data furnishers can obtain the document in hard copy or can download it from the CDIA website. The documentation is quite extensive and granular. For example, for the FCRA Compliance/Date of First Delinquency field, a full page is devoted to a description of each particular circumstance under which this date should be reported. A full definition of the field is provided. Procedures for reporting data in the field if the account should become current are discussed. In addition, the industry developed three detailed

[14] Examples of data furnishers include credit unions, savings and loans, thrifts, mortgage lenders, credit card issuers, collection agencies, retail installment lenders, auto/finance lenders and more.

examples showing exactly how to calculate this important date in different situations. We also provide the exact language of the Fair Credit Reporting Act detailing this requirement for the convenience of customers.

81.3 percent of all data is voluntarily furnished using the Metro 2 format. CDIA's members continue to encourage data furnishers to migrate their practices from the Metro Format to Metro 2 due to the added precision this reporting format offers.

February 15, 2008

Office of the Comptroller of the Currency
250 E Street, SW, Mail Stop 1-5
Washington, DC 20219
Attention: Docket Number OCC-2007-0019

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1300

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
RIN 3064-AC99

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2007-0022

Ms. Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428
Re: Proposed Rule Part 717

Federal Trade Commission
Office of the Secretary
Room 135 (Annex C)
600 Pennsylvania Avenue, NW

Washington, DC 20580
Re: Project No. R611017

To whom it may concern:

This comment letter is submitted by the Consumer Bankers Association ("CBA") in response to the Interagency Notice of Proposed Rulemaking ("Proposal") published by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Trade Commission (collectively, "Agencies") in the *Federal Register* on December 13, 2007. CBA is the recognized voice on retail banking issues in the nation's capital. CBA's member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. CBA was founded in 1919 to provide a progressive voice in the retail banking industry. CBA represents over 750 federally insured financial institutions that collectively hold more than 70% of all consumer credit held by federally insured depository institutions in the United States. CBA appreciates the opportunity to share its views on the Proposal with the Agencies.

In General

CBA believes the Proposal includes many worthwhile provisions regarding a furnisher's obligations under the federal Fair Credit Reporting Act ("FCRA"). We especially commend the Agencies for intending to avoid significant compliance burdens on furnishers. As the Agencies are well aware, no furnisher is required by law to furnish information to a consumer reporting agency ("CRA"). Furnishing is a voluntary activity that provides clear and demonstrable benefits to consumers, creditors, and others. Like the Agencies, we believe that furnishers should furnish information as accurately as reasonably possible. We note, however, that there is a limit as to the burdens that can be imposed on furnishers before such burdens reduce the benefits of our consumer reporting system. Our members have told us that there are circumstances in which they have not furnished information to CRAs as a result of the *existing* burdens on furnishers under the FCRA. We believe that the Proposal could impose additional burdens that would have the unintended effect of further diminishing the amount of quality and reliable information furnished to CRAs. Such an effect would mean less accurate information in consumer files at CRAs, less reliable information in the hands of users of consumer reports, and increased costs of credit to compensate for the resulting additional risk.

We recognize that there are tradeoffs the Agencies must consider when issuing rules under Section 623(e) (accuracy and integrity) and Section 623(a)(8)(A) (direct disputes) of the FCRA. CBA offers its comments below on how the Agencies could reduce the additional compliance burdens associated with the Proposal without sacrificing consumer benefits or protections.

Definitions in Regulation or Guidelines

The Proposal provides two alternatives with respect to defining the terms "accuracy" and "integrity." One approach involves defining the terms as part of the regulation requiring furnishers to have written policies and procedures regarding the accuracy and integrity of the information they furnish. The other approach would define the terms in the guidelines accompanying the regulations. CBA believes it would be more appropriate for the Agencies to define "accuracy" and "integrity" in the guidelines accompanying the regulation. In so doing, the Agencies would avoid suggesting that policies and procedures that do not result in 100% accuracy or integrity (however such terms are defined) would be deficient. We understand this was not the Agencies' intent, but we are concerned that others may attempt to use a regulatory definition of a term such as "accuracy" in litigation or other proceedings outside the scope of the Agencies' enforcement. It would be unfortunate for furnishers if unnecessary legal risk attached to furnishers as a result of defining these terms in the regulation when the same policy objectives can be achieved by defining the terms in the guidelines. Moreover, it would be unfortunate for consumers to create such a disincentive to furnish information to CRAs.

Definition of "Accuracy"

The definition of "accuracy" in the Proposal is the same regardless of whether the Agencies propose to define it in the regulation or the guidelines. The Agencies propose the term to mean that the information furnished to a CRA "reflects without error the terms of and liability for the account or other relationship and the consumer's performance and other conduct with respect to the account or other relationship." The Supplementary Information states that the definition "is intended to require that furnishers have reasonable procedures in place to ensure that the information they provide to CRAs is factually correct."

CBA agrees with the Agencies that furnishers should have reasonable policies and procedures in place to provide information as accurately as reasonably possible. The Proposal, however, establishes a goal that simply cannot be met. Despite all best efforts, a furnisher will not be able to "ensure" that every piece of information provided is factually correct. For example, a furnisher may be the unknowing victim of an account fraud, and not know that the information does not relate to the consumer listed on the account. Or the furnisher may have a new product line, the features of which do not line up perfectly with the METRO 2 format, and the furnisher may be forced to fit a square peg in a round hole by matching its information to the METRO 2 fields. By suggesting that furnishers have policies and procedures designed to meet an objective they cannot meet, the Agencies have created ambiguity for bank examiners, bank compliance teams, and others who may attempt to enforce the Agencies' final rule. We believe it would be more appropriate to require furnishers to have reasonable policies and procedures designed to furnish information as accurately as reasonably possible.

The Agencies specifically ask whether the definition of "accuracy" should include updating information as necessary to ensure that information furnished is current. We do not believe this is necessary based on the existing requirements in the FCRA and those proposed by the Agencies. CBA is also concerned that such a definition could imply that a furnisher must furnish data to a CRA on a continuous basis as opposed to furnishing on a periodic basis.

Definition of "Integrity"

The Agencies propose two alternative definitions of "integrity"—one in the regulation and one in the guidelines. The regulatory definition states that the term means any information a furnisher furnishes to a CRA "does not omit any term, such as a credit limit or opening date, of that account or other relationship, the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user of a consumer report of the consumer's creditworthiness" or other specified characteristics. CBA strongly urges the Agencies to reject this definition and to adopt one similar to that provided in the guidelines.

The proposed regulatory definition of "integrity" does not have apparent bounds in terms of information that a furnisher should provide to a CRA. For example, a furnisher would be required to furnish the "terms" of the account. This would appear to include the interest rate, collateral, and perhaps even promotional issues (*e.g.*, the interest rate on the home equity line is 6.5% instead of 7% because the consumer has a checking account with the bank and has agreed to automatic debits to make payments on the equity line). However, because the Agencies provide an example of a "term" that is not commonly considered a "term" of an account—namely, the opening date of the account—it is unclear what types of information a furnisher is expected to furnish.

Given that the definition suggests that any and all information a furnisher has may be of the type the Agencies expect it to furnish, a furnisher would need to rely on the second half of the definition to attempt to understand the scope of its compliance requirements. However, it is not for the furnisher to know whether the absence of any given term may contribute to an incorrect evaluation by a user of a consumer report of the consumer's creditworthiness. The furnisher may suspect that a user could be interested in the interest rate on the account, the fact that a late payment a year ago was the result of a temporary medical problem and not an issue relating to future risk, or that the consumer does not revolve credit on a revolving account.[1] A furnisher would also need to survey commercial credit scoring firms and other creditors to see whether it is providing *all* of the variables that could *possibly* be used by more than a handful of creditors to avoid the compliance risk imposed by the definition.

CBA also notes that there may be legitimate competitive issues that could cause a furnisher to reconsider whether it will furnish any information if in doing so it might reveal its business model or strategy. For example, some furnishers may not want to furnish pricing information if such information would reveal too much about a furnisher's pricing strategy. It may be that ten, fifteen, or twenty years from now a popular scoring model is used that includes an entirely new input, one which many furnishers may consider proprietary. This Proposal should not force furnishers to choose between furnishing everything—and risking competitive disadvantages—and furnishing nothing.

Definition of "Furnisher"

[1] It is not clear how a furnisher would comply with the requirement in these circumstances since the CRA would likely not accept the information described, even if the furnisher attempted to provide it.

The Agencies' definition of "furnisher" appears to include *any* entity that furnishes information relating to a consumer to a CRA, except an entity providing such information to obtain a consumer report. This definition is unintentionally broad, and should be limited to an entity that furnishes personally identifiable information to a CRA if the furnisher intends for such information to be included in an individual consumer's file for purposes of generating consumer reports. As drafted, the definition is so broad that it could include the local telephone company (simply by virtue of providing a CRA with a local telephone directory of consumers' telephone numbers), a magazine publisher (if it sends a magazine to a CRA that includes information about individuals), or any other entity that may provide information about individuals to a CRA *for any reason*. We intend for these examples to be somewhat absurd to illustrate that the burden is on the Agencies to limit the scope of the definition while recognizing that precision is critical.

Requirement for Reasonable Policies and Procedures Regarding Accuracy and Integrity

The Proposal would require a furnisher to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of information it furnishes. The policies and procedures must be appropriate to the nature, size, complexity, and scope of each furnisher's activities. We believe this requirement is appropriate, and we urge the Agencies to retain it in the final rule. In particular, we applaud the Agencies for recognizing that not all furnishers will have programs of similar depth and complexity, depending on a variety of factors.[2]

CBA is also pleased that the Agencies indicate that a furnisher may be able to rely a great deal on its existing policies and procedures to comply with the proposed requirement. In fact, the Agencies have stated that it will take a furnisher approximately 21 hours to establish and maintain its written policies as envisioned by the Agencies.[3] This suggests that the Agencies recognize that most furnishers already furnish information with accuracy and integrity if they expect a furnisher to come into compliance based on a commitment that represents a single employee's work for less than three days. We strongly commend the Agencies for indicating that they do not intend the final rule to require significant changes for most furnishers who are reasonably diligent today.

Guidelines' Objectives

Generally speaking, CBA believes the Agencies have crafted objectives that are appropriate for furnishers to consider when developing a compliance program. In addition to our comments on "accuracy" and "integrity" above, we offer a few other suggestions. For example, with respect to the objective relating to the investigation of consumer disputes, we believe it should relate only to investigations of information the furnisher—and not some other party—furnished to a CRA. We also note that the objectives correctly note that a furnisher should "update" information in certain circumstances. However, as drafted, an examiner or other party could read the Proposal to suggest that instantaneous updating is necessary. We doubt the

[2] These expectations are also restated in the "Nature and Scope" portion of the guidelines, and they should be retained as well.

[3] The 21-hour estimate appears to exclude the Agencies' estimates for a furnisher to amend its procedures for handling direct disputes (four hours) and to implement the direct dispute requirement (four hours).

Agencies intended this, and we ask the Agencies to clarify that such updates may be included as part of a furnisher's normal furnishing practices and schedule.

FCRA Obligations

The guidelines include summaries of some furnisher obligations in the FCRA. These summaries do not add or subtract from the statutory obligations in the FCRA, and therefore are not necessary in the guidelines. We ask the Agencies to remove them from the guidelines because any time a statutory requirement is summarized or paraphrased, there is a risk that the summary will not mirror the exact nuances of the statute, thereby resulting in regulatory and legal confusion. For example, Section II.G. of the guidelines does not appear to be limited to notices of a dispute from a consumer reporting agency *pursuant to Section 611(a)(2) of the FCRA*, although the legal requirement summarized is limited to such disputes. The summaries in Sections II.A, B., and E. also have the potential to create ambiguities with respect to the Agencies' expectations under the FCRA.[4]

Establishing and Implementing Policies and Procedures

The Agencies list several actions a furnisher "should" take in establishing and implementing its compliance program. CBA agrees with the broad concepts outlined by the Agencies, such as that a furnisher should identify what it furnishes, evaluate its existing policies and procedures, and improve those policies and procedures as reasonably necessary. The Agencies include several suggestions in the guidelines as to how these concepts should be pursued. We ask the Agencies to reduce or eliminate these provisions, as they will likely become the blueprints for an examination handbook. It is not clear how each of these provisions could be considered and documented—much less how the actual program could be designed and implemented—in approximately 21 hours even for relatively small furnishers.

Even if the Agencies do not delete all of the suggestions, we believe some are particularly troubling. For example, the Agencies suggest that a furnisher *audit* its existing furnishing activities. It is not uncommon for examiners to treat such suggestions as requirements. It is not clear that any furnisher needs to audit its existing program to comply with the final rules. Furthermore, any suggestion of an audit of a furnisher's activities cannot be reconciled with the Agencies' clearly stated intention that compliance with the final rule should take approximately 21 hours. It would take more than 21 hours to conduct an audit of even a mid-sized furnisher, much less evaluate its results before beginning to draft a compliance program. Costs of an audit in the real world may also lead some institutions to not furnish information.

CBA also asks the Agencies to delete the suggestion that a furnisher obtain feedback from consumers, CRAs, or "other appropriate parties" when designing its compliance program. It is not clear how a furnisher would interact with consumers on such a matter, nor how consumers could possibly provide constructive feedback on a furnisher's regulatory compliance

[4] This is not to say that most of the Agencies could not issue rules implementing Section 623(a) of the FCRA. However, any such action should be done pursuant to such a rulemaking under the authority granted in Section 621(e) of the FCRA, not pursuant to one under the authority granted in Section 623(e) of the FCRA.

program.[5] We also doubt that CRAs would welcome the flood of calls from thousands of furnishers seeking feedback so the furnishers can "check a box" for the benefit of their examiners.

Components of Policies and Procedures

The Agencies list 13 components that a furnisher's compliance program "should" address. CBA concurs that furnishers should incorporate many of the items listed by the Agencies, and believes that most of the items are likely included in a furnisher's existing furnishing policies and procedures. The Agencies ask, however, whether they should require furnishers to retain records for a certain period of time for purposes of their furnishing obligations. CBA does not believe such a requirement is necessary or appropriate. First, had Congress intended Section 623(e) to morph into a recordkeeping requirement, we believe Congress would have addressed such an issue in Section 628 of the FCRA, which specifically relates to how certain entities dispose of records. Second, the Agencies have not articulated any consumer benefit associated with a record retention requirement. If a furnisher does not have the documentation to substantiate its position in a consumer dispute, the consumer's allegations are accepted. Although such recordkeeping requirements could produce marginally more accurate consumer files at CRAs, such marginal gains would likely not offset the enormous cost burdens that could be imposed on furnishers if they were required to store data they would not otherwise retain. Such burdens would also be a significant deterrent to becoming or remaining a furnisher.

CBA also encourages the Agencies to delete the suggestion that a furnisher must investigate a CRA's practices for purposes of evaluating the furnisher's own practices. The most a furnisher can be responsible for is the provision of data to a CRA. In most instances, such information will be transmitted in formats designated by the CRA as preferable (such as METRO 2) using technologies supported by the CRAs. A furnisher should not have the implied obligation to "investigate" further what each CRA does with such information, nor is it clear how a furnisher could conduct such investigation of each CRA. This implied obligation would also be difficult to implement given that each CRA does not necessarily have similar practices compared to every other CRA. Finally, the obligation also begs the question as to how any "dispute" regarding the CRA's practices should be resolved. The sole burden on the furnisher, in this regard, should be to provide information to the CRA in a manner acceptable to the CRA. Once this is done, the burden shifts to the CRA to incorporate the information appropriately.

Definition of Direct Dispute

The Proposal defines a "direct dispute" to be a "dispute submitted directly to a furnisher by a consumer concerning the accuracy of *any information contained in a consumer report* relating to a consumer." (Emphasis added.) CBA asks the Agencies to limit the scope of the definition to information the furnisher provided to a CRA, as a direct dispute should not include disputes of information the furnisher did not provide.

Direct Disputes and Credit Repair

[5] If the Agencies intend only that a furnisher would consider consumer complaints it has received regarding the accuracy of information furnished, such a requirement would be better placed in Section III.A.2.

The Agencies state that a furnisher does not have investigation obligations under the FCRA if the direct dispute "is submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to the consumer by, a credit repair organization" as defined in the Credit Repair Organizations Act ("CROA"). We believe this is an important exception, but ask the Agencies to revise it to give it effect. Specifically, a furnisher may not know that a dispute is submitted by a credit repair organization as defined in the CROA because the furnisher will not know whether the entity assisting the consumer was compensated. Yet, it should not matter if a consumer paid for use of a bogus dispute form, or whether the consumer simply found one on the Internet free of charge. In either case, the furnisher should be able to disregard the dispute. Therefore, CBA asks the Agencies to revise the exception to apply if the furnisher has reason to believe the dispute was submitted by, prepared by, etc. a credit repair organization.[6]

Direct Dispute Address

The statute states that a consumer who seeks to submit a dispute directly with a furnisher must submit the dispute "directly to such [furnisher] at the address specified by the [furnisher] for such notices."[7] The Proposal, however, would allow an individual to submit a direct dispute to *any business address* in many circumstances, even when the consumer has been provided the address of the furnisher as part of the individual's file disclosure from a CRA. We do not believe this is appropriate, nor is it consistent with the statutory requirements of the FCRA. CBA understands that a furnisher may not have an opportunity to provide a direct dispute address to individuals in all circumstances, such as those involving identity theft (as the furnisher would have been communicating with the criminal, not the victim). However, it does not seem as though a consumer should be disputing information contained in the consumer's credit report if the consumer has not actually observed that the information is incorrect through the consumer's review of his or her file disclosure from a CRA. Even if the consumer has had no contact with the furnisher, the consumer would still have an address at which to submit a dispute by virtue of the address provided in the file disclosure.

A furnisher's ability to rely on a central address is critical if it is to investigate a consumer's dispute efficiently and quickly. A central address ensures a stronger compliance program with more robust controls to serve the consumer quickly. On the other hand, if there are literally thousands of entry points (*e.g.*, any bank branch) into the direct dispute process, there is a much greater likelihood of a compliance breakdown. We also note that it becomes much more difficult to track dispute requests internally if such requests could have been handled by a variety of employees instead of those trained specifically in direct disputes. Further, if a consumer sends a dispute request to an address designed to receive bill payments, the furnisher may not have any practical way of handling the dispute. For example, it is not unusual for the mechanical

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[6] This exception would also address an item the Agencies do not otherwise address despite a congressional mandate to do so. Specifically, this would mitigate the costs on furnishers if credit repair organizations attempt to circumvent the statutory protections against their abuse of the system.

[7] This provision is in Section 623(a)(8)(D) of the FCRA—a provision that does not appear to be subject to rulemaking under Section 623(a)(8)(A), and therefore it is not clear to CBA the authority on which the Agencies are relying for purposes of this portion of the Proposal. The same is true for those provisions in the Proposal relating to direct dispute notice contents and to frivolous or irrelevant disputes.

processing of that mail received at that address to process only two items, a remittance slip and a payment, with additional materials being discarded.

We also note at least two unintended consequences of allowing a consumer to submit a dispute to any business address of the furnisher. First, the consumer may send a dispute to an affiliate of the furnisher, and not to the furnisher itself. For example, the consumer could send the dispute to FictionalBank, N.A. when the dispute may actually be with an affiliate, such as FictionalBank, FSB or Fictional Finance Company. This could easily result in a significant delay of any investigation of the dispute, if the dispute is investigated at all. Second, this requirement would result in major furnishers having to implement a direct dispute compliance program at potentially thousands of addresses and branches, at least to direct employees at those addresses to forward a direct dispute to a specific address. It does not seem reasonable that every bank teller needs to be trained with respect to direct dispute compliance matters.[8] (As we discuss below, these compliance problems become even more significant if a direct dispute notice does not need to clearly state that it is a dispute under Section 623 of the FCRA.) We raise this because, if this were the result, the cost associated with this requirement would be a significant disincentive for furnishers to continue furnishing. We also note that such a result would create compliance burdens that far exceed the Agencies' prediction that it will take a furnisher only four hours to amend its procedures to handle direct disputes the same way it handles disputes from CRAs.

Direct Dispute Notice Contents

The Agencies state that a direct dispute notice must include certain information, all of which CBA agrees should be required. CBA also believes it is important that the dispute notice contain some indication that the consumer wants to exercise his or her rights under Section 623(a)(8)—or be submitted on a specific form—so that the furnisher understands what is expected, both by the consumer and by the Agencies for purposes of regulatory compliance. For example, if a consumer writes a letter to a bank and states that he or she disagrees with the bank's determination that the consumer is in default on a loan, it is not clear that the consumer is disputing any information that may be in a consumer report. Indeed, the bank may not usually furnish the type of information being disputed, but may feel as though it has to investigate to determine whether, for whatever reason, it may have furnished such information because the consumer was not clear as to whether the letter was intended to be a direct dispute.

This issue is mitigated somewhat if the furnisher may designate a single address to which consumers must send direct disputes, and such address is different from other addresses to which consumers send correspondence. However, a furnisher may not want to designate a specific address only for direct disputes, but rather designate its general correspondence address for such purposes. Furthermore, as discussed above, the Proposal envisions consumers being able to walk into any bank branch, for example, and delivering a direct dispute notice to a teller. We do not believe every bank teller and manager should be expected to guess whether or not the consumer's correspondence should be handled as a direct dispute or not.

[8] An unintended consequence of this may be that a bank teller or branch manager becomes unwilling to handle relatively routine customer service inquiries for fear that such an inquiry *may* be a direct dispute, and therefore requiring the consumer to put the request in writing and to include the required information.

We believe it is reasonable to expect a consumer to indicate that the correspondence is a direct dispute because the consumer would be told to do so, either in connection with the provision of the direct dispute address by the furnisher or as part of the FCRA disclosures a CRA provides to a consumer in connection with a file disclosure. If the consumer were to use a form, such form could be provided by the CRA with the file disclosure and the form could also be available via the Internet. We note that such a requirement to specify that the correspondence is a direct dispute or to use a specific form will also benefit consumers, as it will help furnishers route the dispute in the proper manner. Otherwise, consumer disputes that are not clearly labeled as direct disputes may not be resolved efficiently, if they are resolved at all.

Frivolous or Irrelevant Disputes

The Agencies state that a furnisher may treat a dispute as "frivolous or irrelevant" if the "furnisher is not required to investigate the dispute." It is not clear why the Proposal would attempt to govern how a furnisher treats correspondence from a consumer that does not trigger obligations under Section 623(a)(8) of the FCRA. Of course, a furnisher *may* decide to contact the consumer for additional information to see if the consumer is attempting to make a dispute under Section 623(a)(8). If the furnisher is not required to investigate anything based on the correspondence, however, it is not clear why the furnisher would be obligated to send the consumer a notice stating such fact as would be required if the dispute were "frivolous or irrelevant." In short, if the dispute does not trigger any requirements under Section 623(a)(8), it is not clear how any regulations promulgated thereunder could or should apply.

Conclusion

Again, CBA appreciates the opportunity to comment on the Proposal. It is our hope that the Agencies adopt a final rule that addresses our concerns and preserves the robust consumer reporting system we have today. Please do not hesitate to contact Marcia Sullivan (703) 276-3873 or msullivan@cbanet.org if we may provide additional assistance.

Sincerely,

Marcia Sullivan

Leaders In Retail Banking | 1000 Wilson Boulevard Suite 2500 Arlington, VA 22209-3912 **Tel** 703-276-1750 **Fax** 703-528-1290 **Internet** www.cbanet.org

Subject: Fair Credit Reporting Act Guidelines

Date:	Feb 12, 2008
Proposal:	Proposed Rules and Guidelines that Address Accuracy and Integrity of Consumer Report Information and Rules to Allow Direct Disputes
Document ID:	R-1300
Document Version:	1
Release Date:	11/29/2007
Name:	Tracy Nicholas
Affiliation:	
Category of Affiliation:	Commercial
Address:	810 Hwy 6 South
City:	Houston
State:	TX
Country:	UNITED STATES
Zip:	77079
PostalCode:	

Comments:

Docket No. R-1305, this proposal is unfair to Mortgage Brokers, the fact is all lenders including Mortgage Bankers earn revenue from the sale of a mortgage loan. Brokers are required to disclose this upfront however Mortgage Bankers earn the same income but are not required to disclose it since they hold the loan and sell it shortly after closing but still receive the same revenue. This will damage small business owners and create an unfair playing field for Mortgage Bankers. Brokers originate about 70% of loans nationwide and this is something the bankers have been trying to get done for many years. Don't legislate a monopoly for Mortgage Bankers, beleive me they are already telling borrowers that Brokers charge more to close a loan when they know it is not true. If you are going to make Brokers disclose Yield Spread Premium then Bankers should have to do the same, they know exactly what they will earn when the loan is locked it's just not disclosed to the borrower. You require Mortgage Banker disclosure and watch them scream about how unfair it is. Don't destroy an industry I have put 23 years of my life into, stop this error in judgement caused only by market conditions that will work themselves out. If you think there have been serious job losses so far in the mortgage industry, pass this and the you will destroy the entire

industry and cause thousands more job losses. My government should protect this industry from lobbiest paid by Mortgage Bankers that will with out doubt cause massive industry job losses and potiential forclosures, you know Mortgage Brokers pay on mortgage loans too. In addition to the difficult market conditions we currently are faced with this will make an already devistated industry almost obsolite. The truth is with the Federal Reserve lowering Fed Funds and mortgage rates will follow who will be left to refinance all the outstanding loans? Think about it.

Comments of the World Privacy Forum regarding procedures to enhance the accuracy and integrity of information furnished to Consumer Reporting Agencies under Section 312 of the Fair and Accurate Credit Transactions Act

To

Federal Trade Commission
Project No. R611017

Board of the Governors of the Federal Reserve System
Docket No. R–1300

January 28, 2008

Re: Comments regarding Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies under Section 312 of the Fair and Accurate Credit Transactions Act, Project No. R611017

Dear Sir/Madam:

We are writing to comment on the proposed Regulations and Guidelines issued by the federal banking regulators and Federal Trade Commission (FTC) (collectively as "Regulators") under Section 312 of the Fair and Accurate Credit Transactions Act of 2003. We appreciate the efforts undertaken by the Regulators in drafting the proposal, but we believe that significant changes must be made in the proposal in order for it to (1) promote the furnishing of information that is accurate, timely, up to date, complete, and fully substantiated and to (2) provide a workable method for consumers to dispute information directly with the entity that furnished that information.

The changes which must be made include:

- The Regulations must clearly state that the purpose of the regulatory requirement for furnisher policies is to achieve accurate reporting of information which is timely, complete, up to date, and substantiated.
- The Regulations must define "accuracy" and "integrity." We support the "Regulatory Definition Approach" because it is more substantive in its requirements and because these key definitions are much too important to be relegated to flexible Guidelines which only inform a furnisher's policies.
- The definition of "accuracy" must require that information furnished to consumer reporting agencies (CRAs) be "complete."
- The Regulations should define "accuracy" to require that information furnished to CRAs be substantiated. In addition, the Guidelines should include requirements as to what kind of substantiation is required.

- The proposal should not artificially divide "accuracy" and "integrity," because that would prevent consumers from submitting valid disputes to furnishers about errors falling in the "integrity" category.
- "Accuracy" should require that information furnished to CRAs be updated so that it is, and remains, current.
- The direct dispute Regulations should require that the furnisher in fact conduct a reasonable investigation, including an attempt to seek documentation before rejecting a consumer's dispute.
- The Guidelines should require that records about the account should be kept at least as long as the account or other relationship with a furnisher is being reported.
- The Regulations and Guidelines should provide consumers with a workable, understandable, effective system to report and obtain correction of errors, by informing consumers of what types of disputes can be presented to the furnisher and where to submit those disputes. A key element of this is to require that a furnisher refer to a CRA any dispute that the furnisher declines to investigate because that dispute is of a type that the Regulations do not require it to consider.

Credit reports and credit scores are increasingly important in the determination of who gets credit and other economic opportunities, such as insurance, rental housing, and even jobs, as well as what prices consumers are offered for credit and services. There is an increased focus on credit quality during any economic downturn – the very time that access to jobs, services, and the price of credit take on special importance for families. These factors make it extremely important that the contents of consumer credit reporting files be accurate, complete, and up to date.

Even small inaccuracies in a credit report can have a significant impact on the economic opportunities offered to hardworking individuals and their families, because they can cause significant changes in a credit score. Thus, any standards for accuracy and integrity of information furnished to a CRA must examine not only the potential for an incorrect evaluation by a user of a credit report, but also the potential for an incorrect evaluation by the user of a credit score.

I. The Regulations Must Clearly State That the Purpose of the Regulatory Requirement for Furnisher Policies is to Achieve Accurate Reporting of Information.

The package of proposed Regulations and Guidelines has three parts. The Regulations describe what types of disputes the furnisher must resolve if reported directly to the furnisher. In addition, the Regulations require that furnishers establish and implement policies concerning the information which they furnish to consumer reporting agencies. Finally, the regulatory package contains proposed Guidelines to shape the content of those policies.

The regulatory text on furnisher policies is missing a key element – it does not require that the furnisher policies must be reasonably designed to accomplish the

objective that all information furnished in fact meet standards of accuracy and integrity. Instead, the Regulation simply requires that furnishers have policies "regarding" the accuracy and integrity of furnished information. The Regulation says that the policies "must be appropriate to the nature, size, complexity, and scope" of the furnisher's activities.

The regulatory section requiring furnisher policies should be amended to add the basic requirement that the policies must be reasonably designed to facilitate the reporting only of accurate, complete, up to date information which is fully substantiated and has no tendency to mislead users of a credit report or credit score. The statutory and regulatory requirement for policies should not be satisfied by policies that do not serve this goal, regardless of the nature or size of the furnisher.

II. Accuracy and Integrity Definitions

The Regulators have proposed two alternative approaches to define accuracy and integrity: the "Regulatory Definition Approach" and the "Guidelines Definition Approach." The key differences in these Approaches are:

- Where the definitions are placed, *i.e.*, in the Regulations vs. in the Guidelines, which affects their enforceability.
- The definition of "integrity" in the Regulatory Definition Approach includes a requirement that information is complete, *i.e.*, that it "not omit any term, such as credit limit or opening date, ...the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user..."
- In addition, Regulatory Definition Approach includes as an Objective in the Guidelines that information furnished to CRAs in general should "avoid misleading a consumer reports user."
- The Guidelines Definition Approach takes a more procedural approach to integrity, focusing on whether the procedure for reporting is likely to avoid error rather than on the quality of the information in fact reported or omitted.

We support the Regulatory Definition Approach, which requires that the information both be without error and not omit any term which can reasonably be expected to contribute to an incorrect evaluation by a user of a credit report. We suggest this definition should be augmented to also refer to a user of a credit score.

a. *The definition of accuracy rightfully requires information to be "reflected without error," but it should be clear that such reflection must be "objective."*

In both Approaches, "accuracy" is defined to mean that information provided to a CRA "reflect without error the terms of and liability for the account or other relationship and the consumer's performance and other conduct with respect to the account or other relationship."

We support the concept in the definition of accuracy that information furnished to a CRA should "reflect without error" the actual terms of, liability for, and other conduct about the account or relationship. It is fundamentally important that "accuracy" requires information to be accurate as a matter of fact, not simply requiring conformity between the furnisher's records and information in a CRA's database. We recommend making this absolutely clear by adding the word "objectively" before the world "reflects."

Furthermore, the definition of "accuracy" should also require that information reported to a CRA reflects without error the *furnisher's* performance or other conduct with respect to the account or other relationship.

b. *The definitions of "accuracy" and "integrity" should be set forth in the Regulations.*

We believe "accuracy" and "integrity" must be defined in the Regulations. The requirement that furnishers report information with accuracy and integrity should not be merely a goal or Guideline to be considered. It should be mandatory; indeed it should be the core purpose of a furnisher's credit reporting systems.

c. *The definition of "accuracy" must include "completeness."*

Accuracy must include a requirement that information furnished must be complete, *i.e.*, must not omit any important terms. If the failure of the furnisher to provide complete information creates a misleading evaluation of a consumer's creditworthiness, including a different credit score if the information were included, the furnisher has reported inaccurate information.

The Regulators have proposed either requiring completeness to be part of integrity (Regulatory Definition Approach) or omitting it altogether (Guidelines Definition Approach). The Guidelines Definition Approach is simply unacceptable. Information cannot be "without error" if its omission of critical terms creates a misleading evaluation or a different credit score. Indeed, the omission of a material term that creates a misleading impression is a form of deception under the FTC Act. If information could be considered "deceptive" under the FTC Act, how can it be "accurate" under the FCRA?

The Regulatory Definition Approach is not perfect either in that it separates completeness from accuracy, when the former is a necessary element of the other. We support a definition of "accuracy" that includes completeness. This point is critical, because nowhere else is "accuracy" defined in the Act or Regulations, yet the term is used several times in the FCRA, including requirements for CRAs to follow reasonable procedures to assure maximum possible accuracy. We do not want a definition of accuracy that inadvertently allows CRAs to have procedures that result in incomplete misleading information in their files.

In the alternative, if completeness is included in the definition of "integrity," rather than as part of accuracy, then at a minimum the Regulations should make clear that such a definition is applicable only to Section 1681s-2(e) of the FCRA and does not affect the meaning of the term "accuracy" under other parts of the FCRA which impose other duties with respect to accuracy.

d. Accuracy should include substantiation.

We support the Regulators' express recognition of the need for substantiation in the furnisher's records of all furnished information. However, we believe that substantiation should be part of the definition of "accuracy." Both Definition Approaches include a requirement for substantiation, but it is either stated as an Objective for the policies of a furnisher (Regulatory Definition Approach) or an element of integrity (Guidelines Definition Approach), not as a requirement for accuracy.

We support retaining and strengthening the requirement for substantiation by placing it in the Regulations, not just the Guidelines, and by locating it in the definition of accuracy. Substantiation should not merely be an objective, nor should it be something only in the Guidelines to be considered by furnishers as they develop their own policies. Instead, substantiation should be a core part of accuracy. Furnishers should be required to have in their possession documents that substantiate information they send to the CRAs. Furthermore, as discussed below, the Guidelines should include requirements as to what types of substantiation are required.

e. "Accuracy" and "integrity" should not be artificially separated.

The issues of whether "completeness" and "substantiation" should be elements of "accuracy" versus "integrity" points to another problem – that both the Regulatory Definition and the Guidelines Definition Approach artificially separate the two concepts, when they should be treated together. Integrity should be considered a subset of accuracy and not as a category separate and distinct from accuracy.

First, artificially separating accuracy and integrity does not make logical sense. Information provided without integrity will result in inaccuracies. If information is inaccurate, it lacks integrity.

Another reason that an artificial distinction between accuracy and integrity is problematic is that the statute contemplates direct disputes about accuracy, and the Regulations define a "direct dispute" which can be pursued directly with the furnisher as only those disputes which are about accuracy. Under the proposed Regulations, some types of errors by a furnisher constitute a lack of accuracy, while other types of errors are put in the category of lacking integrity. This means that some types of real errors by a furnisher can be directly disputed, but others cannot.

An artificial distinction between accuracy and integrity will be harmful to consumers if consumers can use the direct dispute process only for accuracy and not for

integrity disputes. Consumers should be able to seek and obtain direct corrections by a furnisher of erroneous information regardless of where the error falls on an artificial line between the definitions of accuracy and integrity. A simple way to do this is to treat integrity as an element or subset of accuracy, rather than as some wholly separate category to which no right of direct dispute can attach.

f. *Accuracy requires that information be updated so that it is, and remains, current.*

The Regulators ask whether the definition of "accuracy" should include updating information as necessary to ensure that information furnished is current. Our answer is an unequivocal "yes". Similar to the issue of completeness, requiring information to be updated so that it is factually correct must be an inherent element of accuracy. Stale or out of date information cannot be accurate, especially when there is a subsequent material change in the status of the account.

The Regulators should include a requirement that accuracy requires information be updated as necessary to ensure that it is current. In addition, the Regulators should require that information should be updated when the consumer requests it or disputes the current status of information. Finally, the Regulators should include recommendations in the Guidelines on how regularly information should be updated to ensure it is current.

III. The Direct Dispute Regulations Should Require that the Furnisher in Fact Conduct a Reasonable Investigation, Including an Attempt to Seek Documentation Before Rejecting a Consumer's Dispute.

Some important aspects of the steps a furnisher must take when it receives a direct dispute are relegated to the Guidelines. These requirements belong in the direct dispute Regulations.

a. The requirement for a reasonable investigation of a direct dispute should be in the Regulations.

The Regulators have included the reasonable investigation standard for direct disputes only in the Guidelines, not in the proposed Regulations that will actually set the legal requirements for furnisher conduct in handling a direct dispute. Relegating the important obligation to investigate a direct dispute to Guidelines that merely inform the furnisher's policies is illogical and troubling. Under current law, furnishers are required to conduct a reasonable investigation for disputes submitted to a CRA. A consumer dispute should not be subject to a lower, vague, or non-binding standard with respect to the investigation merely because the consumer submits the dispute directly to the furnisher instead of submitting it through a CRA.

b. *The Regulations, not merely the Guidelines, should include the requirement that a furnisher seek documentation of a consumer's dispute before rejecting it.*

The Regulators have proposed including in the Guidelines a provision that a furnisher attempt to obtain necessary documentation from a consumer before rejecting a consumer's dispute as frivolous or irrelevant. We support this provision; however, we believe it should be a requirement in the Regulations, not just something to be considered in Guidelines about the content of the furnisher's policies. The direct dispute option will have little meaning for consumers if the furnisher can comply with the Regulations by rejecting a dispute before asking the consumer for the information that the furnisher believes is missing and essential.

IV. Substantiation and Recordkeeping Are Essential

As stated above, we strongly support a requirement in the Regulations that furnishers substantiate the information they initially furnish, and remove any disputed information that cannot be substantiated at the time of the dispute. In addition, we believe the Guidelines should include requirements as to what kind of substantiation is required. Otherwise, a furnisher may claim it has substantiation merely because its electronic records reflect the same information which it furnished to the CRAs.

To prevent any misunderstanding, the Guidelines should specify that certain documents must be in the possession of the furnisher to constitute substantiation. For example, credit card companies should be required to have in their possession account applications, agreements, and billing statements. Most importantly, debt buyers should be required to have certain evidence (that the consumer is the current individual liable on the account, account agreements and billing statements) in their possession, and to have reviewed such information before furnishing to a CRA.

The Regulators have asked whether the Guidelines should specify a time period for furnishers to retain records. We support a requirement that records should be kept at least as long as the account or other relationship with a furnisher is being reported. There should not be a specific time limit; the standard should be "as long as necessary to substantiate information reported."

V. The Regulations and Guidelines Should Provide Consumers with a Workable, Understandable, and Effective System to Report and Obtain Correction of Errors.

Effective notice and efficient referral are key elements to making the direct dispute process more than an empty procedure. In particular, when a dispute is rejected because it is of a type that should have been filed with the CRA rather than the furnisher, it is inherently misleading for a furnisher to reject the dispute without telling the consumer that the consumer can send the dispute to the CRA, and that this will start a process in which the furnisher will have to investigate a dispute that it was not required to consider as a direct dispute.

The Regulations should require that:

1. Each furnisher must communicate effectively to the public, including on its web site:

- The address(es) for filing a direct dispute;
- A description of the types of disputes that the consumer can file with the furnisher; and
- A clear and conspicuous statement that other types of disputes can be filed directly with the CRAs, along with the addresses to do so, and a plain statement that the filing of a dispute with the CRA can trigger a process leading to an investigation by the furnisher even if the dispute has been rejected by the furnisher as not appropriate under the direct dispute process.

2. Each furnisher must forward directly to any CRA to whom it furnishes information any dispute which the furnisher rejects because it is of a type not required to be considered by the furnisher, excluding only disputes that the furnisher determines to be substantively frivolous or irrelevant for reasons other than that the dispute should have been filed with the CRA rather than with the furnisher. A regulatory interpretation may be required so that CRAs must treat those referred disputes as if they had been filed by the consumer with the CRA.

3. When a furnisher rejects a dispute on the ground that the dispute is of a type that the furnisher is not required to consider, the furnisher must be required to provide with that rejection a clear written statement advising the consumer that he or she may dispute this information with the CRA, providing the address to do so, and stating that the furnisher will have an obligation to investigate the dispute once the CRA forwards the consumer's dispute to the furnisher. Without this disclosure, consumers can be misled into thinking that it would be pointless to file a dispute with a CRA after the furnisher has rejected that dispute. Where the reason for the rejection was "wrong place of filing," nothing could be further from the truth.

4. Each furnisher must make public, on its web site and on request of any member of the public, its policies for furnishing information to CRAs and for handling disputes about that information.

VI. Conclusion

It is essential that the Regulators prescribe strong Regulations and Guidelines for furnishers that promote the initial reporting only of accurate, timely, complete and up-to-date information which is fully substantiated by the furnisher's own files. The dispute Regulations should serve this same goal. They should provide an effective, easy-to-use avenue for consumers to obtain corrections; should provide a true self-help method to ensure that information meets these standards; and should provide a method to effectively dispute information which is contradicted by independent evidence provided by the consumer. Finally, the direct dispute process must require furnishers to engage in a real investigation and to fix errors shown by the consumer or otherwise revealed through the dispute process.

Respectfully submitted,

Pam Dixon
World Privacy Forum

NATIONAL CONSUMER LAW CENTER

February 4, 2008

Federal Trade Commission
Project No. R611017

Board of the Governors of the Federal Reserve System
Docket No. R–1300

Office of the Comptroller of the Currency
Docket No. OCC-2007-0019

Federal Deposit Insurance Corporation
RIN 3064-AC99

Office of Thrift Supervision
Docket No. OTS-2007-0022

National Credit Union Administration
12 CFR Part 717

Re: Comments regarding Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies under Section 312 of the Fair and Accurate Credit Transactions Act, Project No. R611017

Dear Sir/Madam:

The National Consumer Law Center, on behalf of its low-income clients, is writing to comment on the proposed Regulations and Guidelines issued by the federal banking regulators and Federal Trade Commission (FTC) (collectively as "Regulators") under Section 312 of the Fair and Accurate Credit Transactions Act of 2003.[1] We appreciate the efforts undertaken by the Regulators in drafting the proposal, but we believe that significant changes must be made in the proposal in order for it to (1) promote the furnishing of information that is accurate, timely, up to date, complete, and

[1] **The National Consumer Law Center** is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit transactions to determine appropriate claims and defenses their clients might have. As a result of our daily contact with these practicing attorneys, we have seen numerous examples of invasions of privacy, embarrassment, loss of credit opportunity, employment and other harms that have hurt individual consumers as the result of violations of the Fair Credit Reporting Act. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. *Fair Credit Reporting* (6th ed. 2006) is one of the eighteen practice treatises that NCLC publishes and annually supplements. These comments were written by Chi Chi Wu, Staff Attorney. They are submitted on behalf of the Center's low-income clients.

fully substantiated and to (2) provide a workable method for consumers to dispute information directly with the entity that furnished that information.

The changes which must be made include:

- The Regulations must clearly state that the purpose of the regulatory requirement for furnisher policies is to achieve accurate reporting of information which is timely, complete, up to date, and substantiated.
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and integrity of information furnished to a CRA must examine not only the potential for an incorrect evaluation by a user of a credit report, but also the potential for an incorrect evaluation by the user of a credit score.

I. The Regulations Must Clearly State That the Purpose of the Regulatory Requirement for Furnisher Policies is to Achieve Accurate Reporting of Information.

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The regulatory text on furnisher policies is missing a key element – it does not require that the furnisher policies must be reasonably designed to accomplish the objective that all information furnished in fact meet standards of accuracy and integrity. Instead, the Regulation simply requires that furnishers have policies "regarding" the accuracy and integrity of furnished information. The Regulation says that the policies "must be appropriate to the nature, size, complexity, and scope" of the furnisher's activities.

The regulatory section requiring furnisher policies should be amended to add the basic requirement that the policies must be reasonably designed to facilitate the reporting only of accurate, complete, up to date information which is fully substantiated and has no tendency to mislead users of a credit report or credit score. The statutory and regulatory requirement for policies should not be satisfied by policies that do not serve this goal, regardless of the nature or size of the furnisher.

II. Accuracy and Integrity Definitions

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We support the Regulatory Definition Approach, which requires that the information both be without error and not omit any term which can reasonably be expected to contribute to an incorrect evaluation by a user of a credit report. We suggest this definition should be augmented to also refer to a user of a credit score.

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In both Approaches, "accuracy" is defined to mean that information provided to a CRA "reflect without error the terms of and liability for the account or other relationship and the consumer's performance and other conduct with respect to the account or other relationship."

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Furthermore, the definition of "accuracy" should also require that information reported to a CRA reflects without error the *furnisher's* performance or other conduct with respect to the account or other relationship.

b. *The definitions of "accuracy" and "integrity" should be set forth in the Regulations.*

We believe "accuracy" and "integrity" must be defined in the Regulations. The requirement that furnishers report information with accuracy and integrity should not be merely a goal or Guideline to be considered. It should be mandatory; indeed it should be the core purpose of a furnisher's credit reporting systems.

c. *The definition of "accuracy" must include "completeness."*

Accuracy must include a requirement that information furnished must be complete, *i.e.*, must not omit any important terms. If the failure of the furnisher to provide complete information creates a misleading evaluation of a consumer's creditworthiness, including a different credit score if the information were included, the furnisher has reported inaccurate information.

The Regulators have proposed either requiring completeness to be part of integrity (Regulatory Definition Approach) or omitting it altogether (Guidelines

Definition Approach). The Guidelines Definition Approach is simply unacceptable. Information cannot be "without error" if its omission of critical terms creates a misleading evaluation or a different credit score. Indeed, the omission of a material term that creates a misleading impression is a form of deception under the FTC Act. If information could be considered "deceptive" under the FTC Act, how can it be "accurate" under the FCRA?

The Regulatory Definition Approach is not perfect either in that it separates completeness from accuracy, when the former is a necessary element of the other. We support a definition of "accuracy" that includes completeness. This point is critical, because nowhere else is "accuracy" defined in the Act or Regulations, yet the term is used several times in the FCRA, including requirements for CRAs to follow reasonable procedures to assure maximum possible accuracy. We do not want a definition of accuracy that inadvertently allows CRAs to have procedures that result in incomplete misleading information in their files.

In the alternative, if completeness is included in the definition of "integrity," rather than as part of accuracy, then at a minimum the Regulations should make clear that such a definition is applicable only to Section 1681s-2(e) of the FCRA and does not affect the meaning of the term "accuracy" under other parts of the FCRA which impose other duties with respect to accuracy.

d. Accuracy should include substantiation.

We support the Regulators' express recognition of the need for substantiation in the furnisher's records of all furnished information. However, we believe that substantiation should be part of the definition of "accuracy." Both Definition Approaches include a requirement for substantiation, but it is either stated as an Objective for the policies of a furnisher (Regulatory Definition Approach) or an element of integrity (Guidelines Definition Approach), not as a requirement for accuracy.

We support retaining and strengthening the requirement for substantiation by placing it in the Regulations, not just the Guidelines, and by locating it in the definition of accuracy. Substantiation should not merely be an objective, nor should it be something only in the Guidelines to be considered by furnishers as they develop their own policies. Instead, substantiation should be a core part of accuracy. Furnishers should be required to have in their possession documents that substantiate information they send to the CRAs. Furthermore, as discussed below, the Guidelines should include requirements as to what types of substantiation are required.

e. "Accuracy" and "integrity" should not be artificially separated.

The issues of whether "completeness" and "substantiation" should be elements of "accuracy" versus "integrity" points to another problem – that both the Regulatory Definition and the Guidelines Definition Approach artificially separate the two concepts,

when they should be treated together. Integrity should be considered a subset of accuracy and not as a category separate and distinct from accuracy.

First, artificially separating accuracy and integrity does not make logical sense. Information provided without integrity will result in inaccuracies. If information is inaccurate, it lacks integrity.

Another reason that an artificial distinction between accuracy and integrity is problematic is that the statute contemplates direct disputes about accuracy, and the Regulations define a "direct dispute" which can be pursued directly with the furnisher as only those disputes which are about accuracy. Under the proposed Regulations, some types of errors by a furnisher constitute a lack of accuracy, while other types of errors are put in the category of lacking integrity. This means that some types of real errors by a furnisher can be directly disputed, but others cannot.

An artificial distinction between accuracy and integrity will be harmful to consumers if consumers can use the direct dispute process only for accuracy and not for integrity disputes. Consumers should be able to seek and obtain direct corrections by a furnisher of erroneous information regardless of where the error falls on an artificial line between the definitions of accuracy and integrity. A simple way to do this is to treat integrity as an element or subset of accuracy, rather than as some wholly separate category to which no right of direct dispute can attach.

f. *Accuracy requires that information be updated so that it is, and remains, current.*

The Regulators ask whether the definition of "accuracy" should include updating information as necessary to ensure that information furnished is current. Our answer is an unequivocal "yes". Similar to the issue of completeness, requiring information to be updated so that it is factually correct must be an inherent element of accuracy. Stale or out of date information cannot be accurate, especially when there is a subsequent material change in the status of the account.

The Regulators should include a requirement that accuracy requires information be updated as necessary to ensure that it is current. In addition, the Regulators should require that information should be updated when the consumer requests it or disputes the current status of information. Finally, the Regulators should include recommendations in the Guidelines on how regularly information should be updated to ensure it is current.

III. The Direct Dispute Regulations Should Require that the Furnisher in Fact Conduct a Reasonable Investigation, Including an Attempt to Seek Documentation Before Rejecting a Consumer's Dispute.

Some important aspects of the steps a furnisher must take when it receives a direct dispute are relegated to the Guidelines. These requirements belong in the direct dispute Regulations.

a. The requirement for a reasonable investigation of a direct dispute should be in the Regulations.

The Regulators have included the reasonable investigation standard for direct disputes only in the Guidelines, not in the proposed Regulations that will actually set the legal requirements for furnisher conduct in handling a direct dispute. Relegating the important obligation to investigate a direct dispute to Guidelines that merely inform the furnisher's policies is illogical and troubling. Under current law, furnishers are required to conduct a reasonable investigation for disputes submitted to a CRA. A consumer dispute should not be subject to a lower, vague, or non-binding standard with respect to the investigation merely because the consumer submits the dispute directly to the furnisher instead of submitting it through a CRA.

b. *The Regulations, not merely the Guidelines, should include the requirement that a furnisher seek documentation of a consumer's dispute before rejecting it.*

The Regulators have proposed including in the Guidelines a provision that a furnisher attempt to obtain necessary documentation from a consumer before rejecting a consumer's dispute as frivolous or irrelevant. We support this provision; however, we believe it should be a requirement in the Regulations, not just something to be considered in Guidelines about the content of the furnisher's policies. The direct dispute option will have little meaning for consumers if the furnisher can comply with the Regulations by rejecting a dispute before asking the consumer for the information that the furnisher believes is missing and essential.

IV. Substantiation and Recordkeeping Are Essential

As stated above, we strongly support a requirement in the Regulations that furnishers substantiate the information they initially furnish, and remove any disputed information that cannot be substantiated at the time of the dispute. In addition, we believe the Guidelines should include requirements as to what kind of substantiation is required. Otherwise, a furnisher may claim it has substantiation merely because its electronic records reflect the same information which it furnished to the CRAs.

To prevent any misunderstanding, the Guidelines should specify that certain documents must be in the possession of the furnisher to constitute substantiation. For example, credit card companies should be required to have in their possession account applications, agreements, and billing statements. Most importantly, debt buyers should be required to have certain evidence (that the consumer is the current individual liable on the account, account agreements and billing statements) in their possession, and to have reviewed such information before furnishing to a CRA.

The Regulators have asked whether the Guidelines should specify a time period for furnishers to retain records. We support a requirement that records should be kept at least as long as the account or other relationship with a furnisher is being reported. There

should not be a specific time limit; the standard should be "as long as necessary to substantiate information reported."

V. The Regulations and Guidelines Should Provide Consumers with a Workable, Understandable, and Effective System to Report and Obtain Correction of Errors.

Effective notice and efficient referral are key elements to making the direct dispute process more than an empty procedure. In particular, when a dispute is rejected because it is of a type that should have been filed with the CRA rather than the furnisher, it is inherently misleading for a furnisher to reject the dispute without telling the consumer that the consumer can send the dispute to the CRA, and that this will start a process in which the furnisher will have to investigate a dispute that it was not required to consider as a direct dispute.

The Regulations should require that:

1. Each furnisher must communicate effectively to the public, including on its web site:

- The address(es) for filing a direct dispute;
- A description of the types of disputes that the consumer can file with the furnisher; and
- A clear and conspicuous statement that other types of disputes can be filed directly with the CRAs, along with the addresses to do so, and a plain statement that the filing of a dispute with the CRA can trigger a process leading to an investigation by the furnisher even if the dispute has been rejected by the furnisher as not appropriate under the direct dispute process.

2. Each furnisher must forward directly to any CRA to whom it furnishes information any dispute which the furnisher rejects because it is of a type not required to be considered by the furnisher, excluding only disputes that the furnisher determines to be substantively frivolous or irrelevant for reasons other than that the dispute should have been filed with the CRA rather than with the furnisher. A regulatory interpretation may be required so that CRAs must treat those referred disputes as if they had been filed by the consumer with the CRA.

3. When a furnisher rejects a dispute on the ground that the dispute is of a type that the furnisher is not required to consider, the furnisher must be required to provide with that rejection a clear written statement advising the consumer that he or she may dispute this information with the CRA, providing the address to do so, and stating that the furnisher will have an obligation to investigate the dispute once the CRA forwards the consumer's dispute to the furnisher. Without this disclosure, consumers can be misled into thinking that it would be pointless to file a dispute with a CRA after the furnisher has rejected that dispute. Where the reason for the rejection was "wrong place of filing," nothing could be further from the truth.

4. Each furnisher must make public, on its web site and on request of any member of the public, its policies for furnishing information to CRAs and for handling disputes about that information.

VI. Conclusion

It is essential that the Regulators prescribe strong Regulations and Guidelines for furnishers that promote the initial reporting only of accurate, timely, complete and up-to-date information which is fully substantiated by the furnisher's own files. The dispute Regulations should serve this same goal. They should provide an effective, easy-to-use avenue for consumers to obtain corrections; should provide a true self-help method to ensure that information meets these standards; and should provide a method to effectively dispute information which is contradicted by independent evidence provided by the consumer. Finally, the direct dispute process must require furnishers to engage in a real investigation and to fix errors shown by the consumer or otherwise revealed through the dispute process.

February 4, 2008

Federal Trade Commission
Project No. R611017

Board of the Governors of the Federal Reserve System
Docket No. R–1300

Office of the Comptroller of the Currency
Docket No. OCC-2007-0019

Federal Deposit Insurance Corporation
RIN 3064-AC99

Office of Thrift Supervision
Docket No. OTS-2007-0022

National Credit Union Administration
12 CFR Part 717

Re: Comments regarding Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies under Section 312 of the Fair and Accurate Credit Transactions Act, Project No. R611017

Dear Sir/Madam:

We are writing to comment on the proposed Regulations and Guidelines issued by the federal banking regulators and Federal Trade Commission (FTC) (collectively as "Regulators") under Section 312 of the Fair and Accurate Credit Transactions Act of 2003. We appreciate the efforts undertaken by the Regulators in drafting the proposal, but we believe that significant changes must be made in the proposal in order for it to (1) promote the furnishing of information that is accurate, timely, up to date, complete, and fully substantiated and to (2) provide a workable method for consumers to dispute information directly with the entity that furnished that information.

The changes which must be made include:

- The Regulations must clearly state that the purpose of the regulatory requirement for furnisher policies is to achieve accurate reporting of information which is timely, complete, up to date, and substantiated.
- The Regulations must define "accuracy" and "integrity." We support the "Regulatory Definition Approach" because it is more substantive in its requirements and because these key definitions are much too important to be relegated to flexible Guidelines which only inform a furnisher's policies.

- The definition of "accuracy" must require that information furnished to consumer reporting agencies (CRAs) be "complete."
- The Regulations should define "accuracy" to require that information furnished to CRAs be substantiated. In addition, the Guidelines should include requirements as to what kind of substantiation is required.
- The proposal should not artificially divide "accuracy" and "integrity," because that would prevent consumers from submitting valid disputes to furnishers about errors falling in the "integrity" category.
- "Accuracy" should require that information furnished to CRAs be updated so that it is, and remains, current.
- The direct dispute Regulations should require that the furnisher in fact conduct a reasonable investigation, including an attempt to seek documentation before rejecting a consumer's dispute.
- The Guidelines should require that records about the account should be kept at least as long as the account or other relationship with a furnisher is being reported.
- The Regulations and Guidelines should provide consumers with a workable, understandable, effective system to report and obtain correction of errors, by informing consumers of what types of disputes can be presented to the furnisher and where to submit those disputes. A key element of this is to require that a furnisher refer to a CRA any dispute that the furnisher declines to investigate because that dispute is of a type that the Regulations do not require it to consider.

Credit reports and credit scores are increasingly important in the determination of who gets credit and other economic opportunities, such as insurance, rental housing, and even jobs, as well as what prices consumers are offered for credit and services. There is an increased focus on credit quality during any economic downturn – the very time that access to jobs, services, and the price of credit take on special importance for families. These factors make it extremely important that the contents of consumer credit reporting files be accurate, complete, and up to date.

Even small inaccuracies in a credit report can have a significant impact on the economic opportunities offered to hardworking individuals and their families, because they can cause significant changes in a credit score. Thus, any standards for accuracy and integrity of information furnished to a CRA must examine not only the potential for an incorrect evaluation by a user of a credit report, but also the potential for an incorrect evaluation by the user of a credit score.

I. The Regulations Must Clearly State That the Purpose of the Regulatory Requirement for Furnisher Policies is to Achieve Accurate Reporting of Information.

The package of proposed Regulations and Guidelines has three parts. The Regulations describe what types of disputes the furnisher must resolve if reported directly to the furnisher. In addition, the Regulations require that furnishers establish and implement policies concerning the information which they furnish to consumer reporting

agencies. Finally, the regulatory package contains proposed Guidelines to shape the content of those policies.

The regulatory text on furnisher policies is missing a key element – it does not require that the furnisher policies must be reasonably designed to accomplish the objective that all information furnished in fact meet standards of accuracy and integrity. Instead, the Regulation simply requires that furnishers have policies "regarding" the accuracy and integrity of furnished information. The Regulation says that the policies "must be appropriate to the nature, size, complexity, and scope" of the furnisher's activities.

The regulatory section requiring furnisher policies should be amended to add the basic requirement that the policies must be reasonably designed to facilitate the reporting only of accurate, complete, up to date information which is fully substantiated and has no tendency to mislead users of a credit report or credit score. The statutory and regulatory requirement for policies should not be satisfied by policies that do not serve this goal, regardless of the nature or size of the furnisher.

II. Accuracy and Integrity Definitions

The Regulators have proposed two alternative approaches to define accuracy and integrity: the "Regulatory Definition Approach" and the "Guidelines Definition Approach." The key differences in these Approaches are:

- Where the definitions are placed, *i.e.*, in the Regulations vs. in the Guidelines, which affects their enforceability.
- The definition of "integrity" in the Regulatory Definition Approach includes a requirement that information is complete, *i.e.*, that it "not omit any term, such as credit limit or opening date, …the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user…"
- In addition, Regulatory Definition Approach includes as an Objective in the Guidelines that information furnished to CRAs in general should "avoid misleading a consumer reports user."
- The Guidelines Definition Approach takes a more procedural approach to integrity, focusing on whether the procedure for reporting is likely to avoid error rather than on the quality of the information in fact reported or omitted.

We support the Regulatory Definition Approach, which requires that the information both be without error and not omit any term which can reasonably be expected to contribute to an incorrect evaluation by a user of a credit report. We suggest this definition should be augmented to also refer to a user of a credit score.

a. The *definition of accuracy rightfully requires information to be "reflected without error," but it should be clear that such reflection must be "objective."*

In both Approaches, "accuracy" is defined to mean that information provided to a CRA "reflect without error the terms of and liability for the account or other relationship and the consumer's performance and other conduct with respect to the account or other relationship."

We support the concept in the definition of accuracy that information furnished to a CRA should "reflect without error" the actual terms of, liability for, and other conduct about the account or relationship. It is fundamentally important that "accuracy" requires information to be accurate as a matter of fact, not simply requiring conformity between the furnisher's records and information in a CRA's database. We recommend making this absolutely clear by adding the word "objectively" before the world "reflects."

Furthermore, the definition of "accuracy" should also require that information reported to a CRA reflects without error the *furnisher's* performance or other conduct with respect to the account or other relationship.

b. *The definitions of "accuracy" and "integrity" should be set forth in the Regulations.*

We believe "accuracy" and "integrity" must be defined in the Regulations. The requirement that furnishers report information with accuracy and integrity should not be merely a goal or Guideline to be considered. It should be mandatory; indeed it should be the core purpose of a furnisher's credit reporting systems.

c. *The definition of "accuracy" must include "completeness."*

Accuracy must include a requirement that information furnished must be complete, *i.e.*, must not omit any important terms. If the failure of the furnisher to provide complete information creates a misleading evaluation of a consumer's creditworthiness, including a different credit score if the information were included, the furnisher has reported inaccurate information.

The Regulators have proposed either requiring completeness to be part of integrity (Regulatory Definition Approach) or omitting it altogether (Guidelines Definition Approach). The Guidelines Definition Approach is simply unacceptable. Information cannot be "without error" if its omission of critical terms creates a misleading evaluation or a different credit score. Indeed, the omission of a material term that creates a misleading impression is a form of deception under the FTC Act. If information could be considered "deceptive" under the FTC Act, how can it be "accurate" under the FCRA?

The Regulatory Definition Approach is not perfect either in that it separates completeness from accuracy, when the former is a necessary element of the other. We support a definition of "accuracy" that includes completeness. This point is critical, because nowhere else is "accuracy" defined in the Act or Regulations, yet the term is used several times in the FCRA, including requirements for CRAs to follow reasonable

procedures to assure maximum possible accuracy. We do not want a definition of accuracy that inadvertently allows CRAs to have procedures that result in incomplete misleading information in their files.

In the alternative, if completeness is included in the definition of "integrity," rather than as part of accuracy, then at a minimum the Regulations should make clear that such a definition is applicable only to Section 1681s-2(e) of the FCRA and does not affect the meaning of the term "accuracy" under other parts of the FCRA which impose other duties with respect to accuracy.

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We support retaining and strengthening the requirement for substantiation by placing it in the Regulations, not just the Guidelines, and by locating it in the definition of accuracy. Substantiation should not merely be an objective, nor should it be something only in the Guidelines to be considered by furnishers as they develop their own policies. Instead, substantiation should be a core part of accuracy. Furnishers should be required to have in their possession documents that substantiate information they send to the CRAs. Furthermore, as discussed below, the Guidelines should include requirements as to what types of substantiation are required.

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The issues of whether "completeness" and "substantiation" should be elements of "accuracy" versus "integrity" points to another problem – that both the Regulatory Definition and the Guidelines Definition Approach artificially separate the two concepts, when they should be treated together. Integrity should be considered a subset of accuracy and not as a category separate and distinct from accuracy.

First, artificially separating accuracy and integrity does not make logical sense. Information provided without integrity will result in inaccuracies. If information is inaccurate, it lacks integrity.

Another reason that an artificial distinction between accuracy and integrity is problematic is that the statute contemplates direct disputes about accuracy, and the Regulations define a "direct dispute" which can be pursued directly with the furnisher as only those disputes which are about accuracy. Under the proposed Regulations, some types of errors by a furnisher constitute a lack of accuracy, while other types of errors are

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f. *Accuracy requires that information be updated so that it is, and remains, current.*

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III. The Direct Dispute Regulations Should Require that the Furnisher in Fact Conduct a Reasonable Investigation, Including an Attempt to Seek Documentation Before Rejecting a Consumer's Dispute.

Some important aspects of the steps a furnisher must take when it receives a direct dispute are relegated to the Guidelines. These requirements belong in the direct dispute Regulations.

a. The requirement for a reasonable investigation of a direct dispute should be in the Regulations.

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the investigation merely because the consumer submits the dispute directly to the furnisher instead of submitting it through a CRA.

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V. The Regulations and Guidelines Should Provide Consumers with a Workable, Understandable, and Effective System to Report and Obtain Correction of Errors.

Effective notice and efficient referral are key elements to making the direct dispute process more than an empty procedure. In particular, when a dispute is rejected because it is of a type that should have been filed with the CRA rather than the furnisher, it is inherently misleading for a furnisher to reject the dispute without telling the consumer that the consumer can send the dispute to the CRA, and that this will start a

process in which the furnisher will have to investigate a dispute that it was not required to consider as a direct dispute.

The Regulations should require that:

1. Each furnisher must communicate effectively to the public, including on its web site:

- The address(es) for filing a direct dispute;
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- A clear and conspicuous statement that other types of disputes can be filed directly with the CRAs, along with the addresses to do so, and a plain statement that the filing of a dispute with the CRA can trigger a process leading to an investigation by the furnisher even if the dispute has been rejected by the furnisher as not appropriate under the direct dispute process.

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3. When a furnisher rejects a dispute on the ground that the dispute is of a type that the furnisher is not required to consider, the furnisher must be required to provide with that rejection a clear written statement advising the consumer that he or she may dispute this information with the CRA, providing the address to do so, and stating that the furnisher will have an obligation to investigate the dispute once the CRA forwards the consumer's dispute to the furnisher. Without this disclosure, consumers can be misled into thinking that it would be pointless to file a dispute with a CRA after the furnisher has rejected that dispute. Where the reason for the rejection was "wrong place of filing," nothing could be further from the truth.

4. Each furnisher must make public, on its web site and on request of any member of the public, its policies for furnishing information to CRAs and for handling disputes about that information.

VI. Conclusion

It is essential that the Regulators prescribe strong Regulations and Guidelines for furnishers that promote the initial reporting only of accurate, timely, complete and up-to-date information which is fully substantiated by the furnisher's own files. The dispute Regulations should serve this same goal. They should provide an effective, easy-to-use avenue for consumers to obtain corrections; should provide a true self-help method to ensure that information meets these standards; and should provide a method to effectively

dispute information which is contradicted by independent evidence provided by the consumer. Finally, the direct dispute process must require furnishers to engage in a real investigation and to fix errors shown by the consumer or otherwise revealed through the dispute process.

Sincerely,

Maria Benjamin
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of North Richmond
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INDEPENDENT COMMUNITY BANKERS of AMERICA

JAMES P. GHIGLIERI, JR.
Chairman
CYNTHIA BLANKENSHIP
Chairman-Elect
R. MICHAEL MENZIES
Vice Chairman
KEN F. PARSONS, SR.
Treasurer
WILLIAM C. ROSACKER
Secretary
TERRY J. JORDE
Immediate Past Chairman

CAMDEN R. FINE
President and CEO

February 8, 2008

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 1-5
Washington, DC 20219
Docket Number OCC-2007-0019

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
RIN 3064-AC99

Jennifer J. Johnson, Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Docket No. R-1300

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2007-0022

Mary Rupp, Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Federal Trade Commission
Office of the Secretary
Room 159-H (Annex C)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Accuracy and Integrity of Information Furnished to Credit Bureaus

Dear Sir or Madam:

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to comment on the interagency proposal that will establish guidelines to ensure the accuracy and integrity of consumer information maintained by credit reporting

[1] The Independent Community Bankers of America represents nearly 5,000 community banks of all sizes and charter types throughout the United States and is dedicated exclusively to representing the interests of the community banking industry and the communities and customers we serve. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever-changing marketplace.

With nearly 5,000 members, representing more than 18,000 locations nationwide and employing over 268,000 Americans, ICBA members hold more than $908 billion in assets, $726 billion in deposits, and more than $619 billion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at www.icba.org.

agencies. This proposal is another step to implement provisions of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act). The statute requires the agencies to issue guidelines on accuracy and integrity of information furnished to consumer reporting agencies as well as provide guidance for resolving direct disputes between consumers and furnishers of information.

In developing this proposal, the agencies have stressed they are particularly sensitive to the voluntary nature of information sharing and their desire to avoid burdens that would become a barrier to data submission. In drafting the proposal, the agencies evaluated information from a variety of sources, including comments from a 2006 advanced notice of proposed rulemaking. The agencies have now proposed a rule with three components: (1) rules on accuracy and integrity; (2) proposed guidelines to help implement the rules; and (3) proposed direct dispute resolution rules.

Overview of ICBA Comments

Generally, ICBA supports the proposed steps and applauds the agencies' efforts to provide flexible guidance that encourages rather than creates hurdles to information reporting. With the current turmoil in credit markets, particularly consumer credit markets, vibrant information sharing and transparency is important to ensuring continuing availability of credit for consumers. ICBA firmly believes that it is important to avoid a one-size-fits-all approach to the accuracy and integrity of information reporting.

An informal survey of ICBA members finds that most community banks report customer data to credit reporting agencies on a monthly basis. They submit the information electronically, either directly or through a third-party processor. However, ICBA concurs with the need for sensitivity by regulators when developing rules that impact credit reports to avoid impeding the flow of data. For example, one community bank that does not report states that additional requirements and increased regulatory burden would definitely be a barrier to changing this practice.

Not all community banks have written policies and procedures for reporting customer data. However, since the information is submitted and processed electronically, community banks follow established instructions from the credit reporting agencies or third party processors for submitting the information which in effect become the written procedures. ICBA encourages the agencies to take this into account when issuing the final rules.

ICBA agrees it is important to establish guidelines for accuracy and integrity of information furnished to consumer reporting agencies. Nearly every community bank in our informal survey reported finding errors in consumer files they obtained from credit reporting agencies. Usually, these involved inaccurate data from other companies. Typical errors include collection accounts not updated to show payment; duplicate student loan data; or misfiled data, especially where customers have similar names such as a father and son or mother and daughter living at the same address. Community banks

have also experienced customers' credit reports showing a second unknown spouse or customers erroneously reported as deceased.

When a customer contacts a community bank regarding a credit report error, the bank will typically research the information if it involves data that the bank provided and make corrections as appropriate, often through E-Oscar. If the bank did not furnish the data, it will refer the customer to the appropriate furnisher to correct the problem. Community banks generally let customers take the necessary steps to correct information involving other companies but also find that it can be a slow process to get credit bureaus to correct the data.

The Proposal

Definitions

Accuracy and Integrity. The FACT Act does not define "accuracy" or "integrity." According to the legislative history, the intent is to focus on the quality of information furnished rather than its completeness.[2] The proposal would define "accuracy" as information furnished to a credit bureau without error, including details about the account such as terms and liability along with information about the consumer's performance on the account. "Integrity" would be defined by the proposal as information about an account or other relationship that does not omit details, such as a credit limit or opening date, where the omission could contribute to an incorrect evaluation of the credit report.

The proposal offers two alternative approaches: a Regulatory Definition Approach and a Guidelines Definition Approach. The definition of "accuracy" is virtually identical under both alternatives, with slight differences in how "integrity" is defined. The key distinction is whether the definitions are in the rule or the supplemental guidelines.

The Regulatory Definition Approach is designed to ensure furnished information accurately identifies the consumer, the terms of accounts or other relationships and the consumer's performance. This approach outlines six objectives:

- Ensure information accurately identifies the consumer and accurately reports account terms and conduct with the furnisher;
- Avoid presenting information in a way that might mislead a user;
- Conduct reasonable investigations of consumer disputes;
- Update information as needed;
- Minimize the likelihood that information, though accurate, might be erroneously reflected in a consumer report; and
- Ensure information is substantiated by the furnisher's records.

[2] See, e.g., remarks of House Financial Services Committee Chairman Michael Oxley (R-OH) at 149 Cong. Rec. E2512, E 2516 (Nov. 4, 2003).

Under the Guidelines Definition Approach, the definition of accuracy would be the same but integrity would mean information is reported in a form and manner designed to minimize the likelihood that the information, though accurate, may be erroneously reflected in a consumer report. In addition, reported information must be substantiated by the furnisher's own records. This approach would establish four objectives for furnishers:

- Ensure information is accurate, i.e., reflects without error the terms of and conduct involving the account;
- Present information with integrity, i.e., report information in a way designed to minimize the chance the information is inaccurately presented in a consumer report;
- Conduct reasonable investigations of consumer disputes; and
- Update information as necessary.

ICBA believes either a regulatory or a guidelines approach would be acceptable but prefers the guidelines approach. Essentially, both proposals achieve the same ultimate goal. However, since revising regulations can be more difficult than updating guidelines and since flexibility and adaptability are critical, ICBA prefers the Guidelines Definition Approach.

ICBA believes the final rule should require information to be updated *as necessary* to ensure it is current. All users want reliable credit report information and current updated information is important to ensure reliability. However it is important that the final rule clarify that "updating" should be consistent with standard business practices. In other words, to be certain information is current, a furnisher should only be required to update information with its regular submission to a credit bureau.

ICBA agrees it is appropriate to define "integrity" to mean that information is presented in a way to ensure it is not misleading. ICBA also recommends that the final rule recognize that as long as a furnisher submits data in "good faith" it meets this standard. If a furnisher submits data that is current and complete to the best of its own records and does not selectively edit data it submits, that should be deemed acceptable.

Reasonable Policies and Procedures

The proposal would require furnishers to establish written policies and procedures to ensure the accuracy and integrity of information submitted to credit bureaus. The policies and procedures would have to be appropriate to the nature, size, complexity and scope of the furnisher's activities. Based on the premise that most community banks already have procedures that meet these requirements, the agencies do not believe this will be burdensome.

Not all community banks currently have written policies and procedures for submitting data to credit reporting agencies. While they follow instructions from credit bureaus or third party processors for submitting data, requiring banks to establish additional policies and procedures could be burdensome, contrary to the understanding of the agencies. While small reporters should be *encouraged* to implement written policies

and procedures, and while it may be appropriate to identify this as an *optional best practice*, ICBA is concerned that making this a mandate could discourage smaller reporters, including community banks, from reporting. In other words, rather than creating a new set of policies and procedures, smaller companies could find it easier to simply discontinue reporting. Therefore, **ICBA recommends that the final rule clarify that instructions established by credit reporting agencies or third party processors for data submission is acceptable** to meet this element of the proposal, as long as the instructions are designed to ensure accurate data.[3]

Elements of Policies and Procedures. When developing policies and procedures, the proposal would require furnishers to consider the accompanying guidelines to the rules. Furnishers would be expected to:

- Periodically review their policies and procedures, updating and revising them as needed to maintain their effectiveness;
- Conduct reasonable investigations of consumer disputes about the accuracy or integrity of information in consumer reports and taking appropriate action based on the outcome of such investigations; and
- Include policies and procedures reasonably designed to ensure information is updated as necessary to reflect the current status of a consumer's account, including any transfer of an account to a third party and any cure of a consumer's failure to abide by the terms of the account or relationship.

The rule would impose three steps for furnishers to take when establishing accuracy and integrity policies and procedures: (1) identify practices or activities that might compromise the accuracy and integrity of information; (2) evaluate the effectiveness of existing policies and procedures; and (3) evaluate the effectiveness of specific methods, including technology, used to provide information about consumers to credit bureaus.

Generally, ICBA finds these steps appropriate. ICBA agrees it is important for information furnishers to take steps to ensure information they submit is accurate. However, ICBA also strongly recommends the agencies incorporate flexibility to encourage smaller reporters to continue submitting data. That is, the final rule should reflect the fact that one size does *not* fit all and provide that the steps and processes taken by individual reporters should be commensurate with their size, operations, market area, and product offerings.

Where a community bank has policies and procedures, ICBA recommends that another *optional best practice* would be to encourage – not mandate – that the bank review the policies and procedures regularly, possibly annually, to ensure they remain current.

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[3] An added benefit to letting smaller entities rely on existing instructions will be consistency across furnishers of consumer data.

Again, it is important the agencies recognize that any mandate will be seen as another burden and cost that can add to elements that might discourage reporting. One of the critical components stressed by the agencies in developing this proposal is the desire to avoid burdens that could discourage reporting. Because examiners have been known to interpret guidance or best practices as mandates, **ICBA believes it is critical that examination procedures stress the flexibility of these steps and the fact that they are not designed as a checklist banks must follow.** If examiners start applying these as required elements, community banks will re-assess the benefits of reporting. In other words, eliminating reporting could become a proxy for reducing regulatory burden if examiners are inflexible.

Specific Components of Policies and Procedures. The proposal also outlines specific elements furnishers must address in developing policies and procedures, including:

- Developing a system appropriate to the nature, size, complexity and scope of the furnisher's business operations;
- Using standard data reporting formats and procedures;
- Maintaining appropriate records on information reported;
- Establishing appropriate internal controls for furnishing information;
- Training staff as appropriate;
- Providing appropriate and effective oversight of relevant service providers whose activities might affect the accuracy and integrity of information provided to credit bureaus;
- Furnishing information following mergers or sales to prevent errors through re-aging of information, duplicate reporting, or other problems that might affect the accuracy or integrity of information;
- Obtaining appropriate information from a consumer before making a final determination that a dispute is frivolous or irrelevant;
- Conducting investigations of direct disputes in a way that promotes efficient resolution of the dispute;
- Ensuring technology and other means of communication avoid errors;
- Providing credit bureaus with sufficient information to properly identify consumers; and
- Conducting periodic evaluations.

ICBA agrees that steps that encourage standard data formats are useful. This will help ensure information is reported in a manner that can be easily understood by all users, thereby increasing transparency and facilitating use of the data. It will also simplify submitting data if all companies are using the same approach. This is another reason to let data furnishers use or adapt instructions from credit reporting agencies and third party processors to meet any requirement for written policies and procedures.

ICBA generally supports the requirement that reporters should maintain records that can be used to substantiate the data. Furnishers need to maintain the information to research and resolve disputes. However, the final rule should clarify that this does not require a furnisher to maintain data other than what it would maintain in the

normal course of business nor does it add a new record retention requirement. Moreover, the final rule should permit a furnisher to arrange with a third party provider, such as a service bureau, to maintain records. And, it should be clarified that record retention practices should be reasonable and that the provision does not require a furnisher to maintain records indefinitely.

ICBA agrees it is helpful to incorporate a *recommendation* in the guidelines that appropriate internal controls are beneficial. However, ICBA is concerned that setting this as mandatory would be burdensome and discourage small reporters from continuing to submit data. Most community banks have procedures for auditing and reviewing internal controls and internal control practices of banks are regularly examined by the federal banking agencies. Therefore, including this as mandatory for this proposal is redundant and unnecessary for banks.

ICBA agrees training appropriate staff is useful for the guidelines. However, ICBA does not believe that additional detail is needed, such as who should be trained, how often training should be conducted or how it should be provided. Instead, to ensure the final rule has sufficient flexibility and does not become overly burdensome, it should allow each data furnisher to develop its own training mechanisms, letting it build on existing policies and procedures to ensure staff has appropriate knowledge and expertise.

Finally, the proposal would require furnishers to include appropriate and effective oversight of third-party service providers in their policies and procedures. **ICBA agrees this is appropriate**. Existing interagency guidelines and procedures require banks to take appropriate caution and conduct due diligence when evaluating and dealing with any third-party vendor or service provider.[4] It also reflects the importance of permitting smaller companies, especially community banks, to rely on outside vendors and service agencies.

Direct Disputes

Another important component of the proposed rule would govern direct disputes between information furnishers and consumers. As noted by the agencies, many community banks already investigate direct disputes as a matter of good customer relations and sound business practices. The proposal would *require* a furnisher to investigate matters involving a consumer's liability for a credit account or other debt with the furnisher, the terms of the account, the consumer's performance on the account, and any other information in a consumer account involving the relationship between the furnisher and the consumer.

The proposal would also outline exceptions to this requirement. Furnishers would not be required to investigate disputes involving a consumer's identifying information; the identity of past or present employers; information derived from public records; or information related to fraud alerts or active duty alerts. Perhaps more important,

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[4] See, e.g., FDIC- Division of Supervision and Consumer Protection Risk Management Examination Manual for Credit Card Activities Chapter XX, THIRD-PARTY RELATIONSHIPS, pages 186 to 194, March 2007.

furnishers would not be required to investigate information prepared or submitted by a credit repair organization.

ICBA agrees with the proposed parameters for when a furnisher must investigate a direct dispute and the proposed exceptions. ICBA also agrees the dispute should come directly from a consumer and not from a credit repair organization. The requirement will help ensure consumers monitor and understand their credit reports, thereby also helping to encourage financial literacy. Requiring consumers to submit the information will also discourage less scrupulous credit repair schemes by directly involving the consumer.

Address. The proposal would restrict the address where a consumer could submit a direct dispute and only require a furnisher to investigate if the dispute is delivered to:

(1) The address provided by the furnisher that is included on a consumer report;
(2) An address clearly and conspicuously specified by the furnisher as the address where it will accept direct disputes; or
(3) Any business address of the furnisher *if* the furnisher has not otherwise specified an address for direct disputes.

ICBA supports this element of the proposal. This will help eliminate confusion and ensure disputes are handled expeditiously and efficiently. It will also avoid unnecessary duplication of effort by preventing disputes from being delivered to more than one office at a bank, thereby helping minimize confusion and potential burden.

Content of the Notice. Before a furnisher would be required to investigate a dispute, the consumer would have to provide:

- His or her name, address and telephone number;
- Sufficient information to identify the account of other relationship in dispute;
- Specific information that the consumer is disputing and an explanation of the basis for the dispute; and
- All supporting documentation or other information reasonably required by the furnisher to substantiate the basis of the dispute.

ICBA supports this requirement. Outlining these elements in the rule will help avoid disputes about what is needed to trigger an investigation. It also will help clarify the specifics of the dispute and therefore help focus an investigation. Moreover, by setting the parameters of the information necessary to trigger an investigation, the rule will help expedite the investigation.

Frivolous or Irrelevant Disputes. As proposed, furnishers would not be required to investigate a frivolous or irrelevant dispute. Under the statute, these include disputes where a consumer fails to furnish sufficient information for an investigation or a dispute is substantially similar to one previously submitted and investigated. If a consumer does not provide enough information, the proposal would require the furnisher to make a good faith effort to obtain that information before concluding the dispute is frivolous or

irrelevant. However, once a furnisher determines a dispute is frivolous or irrelevant, it must notify the consumer, including an explanation about why the dispute is deemed frivolous or irrelevant.

ICBA believes the parameters outlining a frivolous or irrelevant dispute are helpful. ICBA also recommends the final rule limit how far back a furnisher should be required to investigate a dispute; certainly, furnishers should not be required to investigate a dispute for which it no longer is required to retain records. ICBA also believes furnishers should be able to refuse to investigate disputes from customers who have abused the process, such as those who constantly dispute minor discrepancies. ICBA does agree it is appropriate to encourage furnishers to make a good faith effort to obtain additional information not initially provided by a customer, although the final rule should clearly recognize the customer's responsibility to furnish that information. If the customer is not cooperating or refuses to provide the information, the final rule should specifically provide that that the furnisher has no further obligation.

Finally, **ICBA believes that communications about disputed information should be written**. While oral communications may be helpful during the process, to avoid misunderstandings and disagreements, the official customer notice and the final resolution notice from a furnisher should be in writing.

Regulatory Burden

The agencies believe the proposal will ease the potential burdens of the new requirements in a number of ways. First, the agencies believe many furnishers already are likely to have policies and procedures in place and so the new requirements will only require updating those policies. Second, the agencies believe many furnishers already investigate direct disputes as a matter of good customer relations, sound business practices or because they are required to do so under other consumer protection statutes. Moreover, the proposed exceptions from mandatory investigation of direct disputes, including an exception for irrelevant and frivolous disputes, should alleviate burden. Finally, while the agencies are not authorized to grant an exception for smaller entities, the requirement is designed to be flexible, encouraging furnishers to tailor their policies and procedures to their own size and operations.

ICBA supports the flexibility in the proposal that allows a furnisher to tailor its procedures to its own size and operations. However, as noted above, not all furnishers have established policies and procedures. This is especially true with smaller entities, including community banks. Therefore, the final rule should permit furnishers to adapt or rely on the instructions of credit reporting agencies or service providers in lieu of establishing policies and procedures.

Time for Compliance. The agencies also are required to estimate the amount of time needed to meet the requirements of the proposed rule. Generally, the agencies estimate it will require 21 hours on average to implement the written policies and procedures on accuracy and integrity, including training appropriate staff on the changes. An additional four hours is estimated to adjust procedures for handling complaints received directly from consumers and another four hours to implement the new dispute

notice requirement. The agencies also estimate it will take approximately five minutes to send each notice.

ICBA seriously questions these estimates. Until furnishers actually begin to implement the elements of the proposal, it will be impossible to verify whether it will take more time to implement the final rule. Moreover, until a final rule is published, it is impossible to estimate how long it will take to comply. However, it is probably unreasonable to believe it will only take five minutes to prepare and send a notice since it is likely to take much longer than that merely to review and investigate a dispute.

Conclusion

ICBA commends the agencies for putting forth guidelines that will help ensure the accuracy and integrity of information in consumer credit reports. Community banks rely on that information to extend credit and open accounts with consumers, and the accuracy and integrity of that information is critically important. However, as the agencies recognize, the credit reporting system is entirely voluntary. To encourage reporting, therefore, it is important to ensure that individual furnishers can adapt the guidelines in the final rule to reflect their own unique and individual circumstances, including size, market and products and services offered.

ICBA strongly encourages the agencies to ensure that the final rule retains this flexibility. Moreover, ICBA recommends that any examination procedures that the banking agencies develop for these rules clearly reflect this flexibility so that examiners do not treat the elements as a mandatory checklist. Otherwise, the burdens imposed could become a barrier to continued reporting, thereby diminishing the value of the information and sapping the vitality of the credit reporting process.

Thank you for the opportunity to comment. If you have any questions or need additional information, please contact the undersigned by telephone at 202-659-8111 or by e-mail at robert.rowe@icba.org.

Sincerely,

Robert G. Rowe, III
Senior Regulatory Counsel

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Docket No. OCC–2007–0019

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Board of Governors of the Federal Reserve System
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Washington, DC 20551
Attention: Docket No. R-1300

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation,
550 17th Street, NW
Washington, DC 20429
Attention: RIN 3064-AC99

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: No. 2007–0022

Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314-3428

Federal Trade Commission
Office of the Secretary
Room 159–H (Annex C),
600 Pennsylvania Avenue, NW
Washington, DC 20580
Attention: RIN 3084–AA94

8 February 2008

Ladies and Gentlemen,

Re: Proposed Rule
Section 312 of the Fair Credit Reporting Act
Related to information furnished to consumer reporting agencies
Vol. 72 No. 239 *Federal Register* 70944, 13 December 2007

The American Bankers Association (ABA) appreciates the opportunity to provide our comments to the proposed regulation and guidelines issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit

Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Federal Trade Commission. (collectively, the Agencies). The proposed regulation/guidelines would implement Section 312 of the Fair and Accurate Credit Transactions Act (FACT Act), which amended the Fair Credit Reporting Act (FCRA).

Pursuant to that section, the Agencies must: 1) establish guidelines for use by persons that furnish information to consumer reporting agencies (furnishers) regarding the accuracy and integrity of the consumer information that they furnish to those agencies; and 2) prescribe regulations that require furnishers to establish reasonable policies and procedures for implementing the guidelines. Section 312 also requires the Agencies jointly to prescribe regulations that identify the circumstances under which a furnisher shall be required to reinvestigate a dispute concerning the accuracy of information contained in a consumer report on a consumer based on a direct request of the consumer.

The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members - the majority of which are banks with less than $125 million in assets - represent over 95 percent of the industry's $12.7 trillion and assets and employ over 2 million men and women.

Overview and Summary.

As we emphasized in our 19 May 2006 letter to the Agencies' Advance Notice of Proposed Rulemaking, we believe that the consumer reporting system generally works effectively and efficiently for both financial institutions and their customers to maximize the availability and affordability of credit. Indeed the Federal Reserve Board concluded in a recent study that credit history scores based on the credit reports produced by the three national credit-reporting agencies "are predictive of credit risk for the population as a whole and for all major demographic groups."[1] Given the predictive value and efficiency of the current system, final rules should acknowledge and be based on the premise that the current system functions well rather than on the false premise that there are major issues or shortcomings to be corrected. This will allow our current dynamic system to continue to innovate and improve. The false premise - that the system is broken - will result in rigid and uncertain rules that could indeed introduce significant shortcomings into that system that will harm rather than benefit the current system – and the consumers and businesses that rely upon it.

As outlined in our 19 May 2006 letter, we are concerned that onerous compliance burdens and costs as well as concomitant potential liability will discourage depository institutions, particularly small institutions with limited staff and resources, from reporting to consumer reporting agencies or prompt them to report only on a selected basis. The

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[1] *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit,* Board of Governors of the Federal Reserve System (August 2007), p. S-1.

regulatory burdens include reviewing, interpreting, and implementing the regulation, continuing auditing and monitoring compliance requirements, employee training, and preparing for and responding to bank examiners. In addition, there are the costs of responding to frivolous disputes. An additional risk is the potential liability due to violations, including the possibility that the regulations may be used as a basis for lawsuits alleging unfair or deceptive acts and practices, for example.

Some institutions report that they already limit their reporting due to the associated costs. Some, for example, report only to one of the three nationwide credit reporting agencies in order to reduce risk and the cost of reporting and resolving disputes. Some only report certain loans, e.g. mortgage loans, or only negative information. Some do not report at all. Additional risks and costs will further discourage reporting to consumer reporting agencies. The result of any diminished reporting is that the consumer reports become less robust and less predictive.

The Agencies ask whether they should specifically encourage the voluntary furnishing of information. We worry that efforts to do so may be like trying to push on a string. We strongly suggest that the most effective incentive for institutions to furnish information is *avoidance* of regulations that impose onerous and unnecessary costs, compliance burdens, and liability risks, in other words, the removal of disincentives to the furnishing of information.

We generally support the proposal and strongly urge adoption of the "Guidelines Definition Approach." We believe that this approach, especially its definitions, will make compliance more predictable, clear, and objective, but allow appropriate flexibility to respond to unanticipated situations. The rigidity and subjectivity of the "Regulatory Definitions Approach" will make compliance uncertain and risky and prone to unpredictable interpretations by users of reports, courts, and regulators. The burdens and risks will prompt some depository institutions to decline to furnish information to consumer reporting agencies, harming the usefulness and predictive value of consumer reports.

We also believe that the Agencies would encourage institutions to furnish information to consumer reporting agencies and promote the accuracy of reports by giving furnishers appropriate tools to deal with credit repair organizations and frivolous and irrelevant disputes, and we urge the Agencies to take those steps. Reducing the burdens and costs of handling these disputes that are intended to manipulate the process in order to delete accurate but adverse information will improve the likelihood that institutions will furnish information to consumer reporting agencies.

Specific comments.

Part 334 – Fair Credit Reporting.

The proposal includes two substantive provisions:

- Accuracy and Integrity Regulations and Guidelines; and

- Requirements that permit consumers to dispute information contained in a consumer report directly with the furnisher of that information.

The Agencies offer for comment two approaches:

The "Regulatory Definition" approach which would include specific definitions for the terms "accuracy" and "integrity" in the regulation itself. In addition, under this approach, the Agencies would include in the guidelines six objectives for ensuring accuracy and integrity.

The "Guidelines Definition" approach which would define the terms accuracy and integrity in the guidelines rather than in the regulations, with reference to the objectives that the policies should be designed to accomplish. Under this approach, there would be four objectives pertaining to the accuracy and integrity of information.

Under the Regulatory Definition Approach, the definitions are included in the regulation and—

> ***Accuracy*** means that any information that a furnisher provides to a consumer reporting agency about an account or other relationship with the consumer that reflects without error the terms of and liability for the account or other relationship and the consumer's performance and other conduct with respect to the account or other relationship.
>
> ***Integrity*** means that any information that a furnisher provides to a consumer reporting agency about an account or other relationship with the consumer does not omit any term, such as a credit limit or opening date, of that account or other relationship, the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user of a consumer reporting agency of a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.

Under the Guidelines Definition Approach the definitions are included in the Appendix guidelines:

> ***Accuracy*** is defined as in the regulatory approach.
>
> ***Integrity*** means that any information that a furnisher provides to a CRA about an account or other relationship with the consumer is:
>
> > (i) Reported in a form and a manner that is designed to minimize the likelihood that the information, although accurate, may be erroneously reflected in a consumer report, for example, by ensuring that the information is ;
> >
> > > (A) Reported with appropriate identifying information about the consumer to whom it pertains;

(B) Reported in a standardized and clearly understandable form and manner; and

(C) Reported with a date specifying the time period to which the information pertains; and

(ii) Substantiated by the furnisher's own records.

The terms accuracy and integrity are relevant—

- For policies and procedures regarding the accuracy and integrity of information furnished to consumer reporting agencies;
- When investigating disputes;
- For reviewing historical records;
- For evaluating effectiveness of existing policies;
- For evaluating effectiveness of providing information to agencies;
- For internal controls;
- During mergers; and
- For evaluating technological means of communicating with consumer reporting agencies.

ABA strongly endorses the "Guidelines Definition Approach," including the definition of integrity as proposed under that approach. We agree with the proposal to install the definitions in the guidelines rather than in the regulation. Under this structure, furnishers have clear direction and confidence about compliance, but retain flexibility to respond appropriately and rationally to particular circumstances or changes in the consumer reporting environment, especially those not yet apparent or contemplated.

We also strongly urge the Agencies to adopt the definition of integrity contained in the Guidelines Definition Approach. Under the definition of "integrity" in the proposed Regulatory Definition Approach, furnishers are subject to a more rigid but unclear standard, that they may not omit information "the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user of a consumer reporting agency. . ." Furnishers would have little certainty about how that term will be interpreted and what information they must furnish. They risk being challenged and held accountable for information the absence of which users and others subjectively believe "can reasonably be expected to contribute to an incorrect evaluation." For example, it is arguable that the failure to furnish information about the frequency of overdrafts or the average daily balance of a checking account could "reasonably be expected to contribute to an incorrect evaluation" by a depository institution using a consumer report in deciding whether to open a checking account for an applicant.

The variety of information required to be reported grows uncontrollably and is constantly changing, subjective, unpredictable, and dependant on knowing and predicting what information users will deem useful. To emphasize the point, we note that credit reports are not only used to evaluate creditworthiness but also to determine eligibility for other products, such as insurance and leases, and for employment. How can consumer reporting agencies and furnishers of information possibly predict what they will have to report given the variety of uses and users of consumer reports? There

are simply no constraints on what information must be furnished other than the subjective "reasonably expected to contribute to an incorrect evaluation." We do not believe that it was Congress's intent to bestow on users of consumer reports the power to dictate what information must be furnished and reported.

Moreover, if it is alleged or determined that the absence of certain information can "reasonably be expected to contribute to an incorrect evaluation by a user," must furnishers, regardless of cost or difficulty, alter their policies and systems for gathering and furnishing information to gather this new information in order to be able to continue furnishing information? Must consumer reporting agencies also alter their systems and policies to adjust to such determinations?

If the Regulatory Definition Approach definition of integrity is adopted, the lack of certainty and potential for violations and liability, whether determined by an examiner or court, will be a weighty factor in determining whether and how much depository institutions will choose to furnish information to consumer reporting agencies.

For these reasons, we endorse the definition contained in the Guidelines Definition Approach as it is more definitive and is clearer. We believe that the current incentives for furnishers and consumer reporting agencies to promote the most efficient and predictive reporting system will ensure that information is furnished and reported appropriately.

If the Guidelines Definition Approach definition is adopted, we suggest that the Agencies use in the definition the term "furnished" or "provided" rather than "reported," as proposed, in order to avoid confusion and ambiguity. "Furnish" or "provide" is generally used to refer to furnishers giving information to consumer reporting agencies, and "report" is used to refer to consumer reporting agencies giving the information to users. Clearly, in this context, the guidelines are referring to the information provided by furnishers to consumer reporting agencies. We also suggest that the final guidelines make clear that furnishing information in a "standardized" form or manner does not refer to content.

334.41 Definitions.
(e) Direct dispute.

Under both approaches "direct dispute" means a dispute submitted directly to a furnisher by a consumer concerning the accuracy of any information contained in a consumer report relating to the consumer. We agree with the proposed definition, but suggest that the final definition clarify that the information subject to the dispute must be information "provided by furnisher." Clearly, furnishers can only be expected to investigate and correct information related to information they furnish. However, consumers have a tendency when denied credit, for example, to dispute with the creditor denying the credit information contained in the report which factored in the adverse credit decision, but which in fact was furnished by an unrelated creditor.

§ 334.43 Direct disputes.

(a) General rule.

Under the proposal, furnishers must generally investigate a direct dispute if it relates to "the consumer's liability for a credit account or other debt with the furnisher,

such as direct disputes relating to whether . . . the consumer is an authorized user of a credit account."

We suggest that the final guidelines clarify that this only applies in so far as creditors are required to furnish the names of authorized users pursuant to Section 202.10(a) of Regulation B (Equal Credit Opportunity Act), that is, authorized users who are spouses.

Under Regulation B, creditors must "designate (1) any new account to reflect the participation of both spouses if the applicant spouse is permitted to use or is contractually liable on the account . . . and (2) any existing account to reflect such participation, within 90 days after receiving a written request to do so from one of the spouses." Thus, creditors are required to furnish information about authorized users who are spouses. However, there is no requirement to furnish the names of non-spouse users, and the guidelines should not invent such a requirement nor suggest that there is such a requirement.

In addition, we are concerned about recent attempts of credit applicants with low credit scores to inflate artificially their credit scores by "renting" trade lines of borrowers with good credit histories. Typically, the "authorized user" in these cases is a stranger to the customer and, as a practical matter, is not able to use the account at all. Nor is the authorized user contributing in any fashion to managing the account in the way that spouses are more likely to do. While creditors may choose to furnish information about non-spousal authorized users, they should not be obligated to do so or to respond to disputes that they have not done so, especially when the reason for adding an authorized user to an account is to manipulate the system so that borrowers will appear more creditworthy than they actually are, compromising the integrity and reliability of the system.

(b) Exceptions.

Under the proposal, the requirements of paragraph (a) do not apply to a furnisher if the direct dispute "is submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to the consumer by, a credit repair organization, as defined in 15 U.S.C. 1679a(3), or an entity that would be a credit repair organization, but for 15 U.S.C. 1679a(3)(B)(i)." We agree with this exception but strongly suggest that the final guidelines be revised to provide that the exception applies if the furnisher "reasonably believes" that the dispute is submitted by, is prepared on behalf of the consumer. . . by a credit repair organization. . ."

Depository institutions report that today they receive disputes that appear to be connected to consumer repair organizations. For example, the signatures on multiple documents or disputes from a single customer are not consistent. Identical forms and identical language describing the basis of the dispute are used by multiple, unrelated customers. The basis for disputes has no possible connection to the account at issue (e.g. a dispute that could only involve an open-end credit account is used as the basis for a dispute related to a closed-end credit account). While it is reasonable in these circumstances to conclude that the disputes are linked to credit repair organizations, the

furnishers may still be ***challenged*** on the basis that it is not absolutely conclusive or definitive. Accordingly, the rule should allow flexibility to avoid the costs and burdens of investigating and responding to disputes where it is reasonable to conclude the involvement of a credit repair organization.

In addition, the provision should allow flexibility so credit repair organizations are not emboldened to use it in order to have correct but adverse information removed from consumer reports. A common strategy of credit repair organizations today is to file multiple disputes with consumer reporting agencies (and furnishers), alleging a different basis each time, relying on the chance that one of the parties involved will become overwhelmed and/or miss a deadline, which is more likely when there are multiple disputes. In these cases, accurate but negative information is often removed from consumer reports.

The opportunity to dispute information with the furnisher directly provides credit repair organizations yet another channel to use the same strategy to compromise the integrity and reliability of consumer reports. We can expect them to use it. Indeed, the Consumer Data Industry Association testified in June 2007 that in the experience of consumer reporting agencies, "No less than 30% of disputes are tied to credit repair."[2] This potential increase in the volume of direct disputes connected to credit repair organizations and the related costs and burdens of responding in a timely fashion are additional factors, among others, for depository institutions, particularly small institutions, to consider in deciding whether to furnish information to consumer reporting agencies. The final guidelines should reduce the opportunity for abuse and the unnecessary waste of furnisher resources (that can significantly discourage furnishing of information to consumer reporting agencies) by adding flexibility so that furnishers are not subject to the provisions if they reasonably believe the involvement of a credit repair organization.

(e) Frivolous or irrelevant disputes.

Under the proposal, furnishers are not required to investigate a direct dispute if the furnisher has reasonably determined that the dispute is frivolous or irrelevant. The proposal then offers three scenarios when a dispute may be frivolous or irrelevant:

> (i) The consumer did not provide sufficient information to investigate the disputed information;
>
> (ii) The direct dispute is substantially the same as a dispute previously submitted by or on behalf of the consumer, either directly to the furnisher or through a consumer reporting agency, with respect to which the furnisher has already satisfied the applicable requirements of the Act or this section; provided, however, that a direct dispute is not substantially the same as a dispute previously submitted if the dispute includes information listed in paragraph (d)

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[2] Testimony of StuartK. Pratt before the Committee on Financial Services House of Representatives, June 19, 2007, p.20.

[related to direct dispute notice content requirements] of this section that had not previously been provided to the furnisher; or

(iii) The furnisher is not required to investigate the direct dispute under this section.

The final guidelines should make clear that the listed scenarios are examples only. There may be other reasons beyond those listed that a dispute is frivolous.

Time to complete investigation.

Under Section 623(a)(8)(E) of FCRA, furnishers must report the results of their investigation to the consumer "before the expiration of the period under section 611(a)(1) within which a consumer reporting agency could be required to complete its action if the consumer had elected to dispute the information under that section." In addition, that section requires that if the furnisher determines the information reported was inaccurate, it must "promptly notify" each consumer reporting agency to which it provided information. We recommend that the Agencies include these provisions in the final regulation for compliance ease and certainty. In addition, the regulations should recognize that providing corrections in the monthly files sent to consumer reporting agencies may take up to 60 days. For example, the furnisher may conclude that a correction is appropriate mid-month, too late to be reflected in the files sent at the end of the month. The correction would be included in the files provided the following month.

Appendix E to Part 334 – Interagency Guidelines Concerning the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies.

The proposal requires furnishers to consider the proposed Guidelines in establishing and implementing policies and procedures concerning the accuracy and integrity of the information it furnishes to consumer reporting agencies. We recommend that the Agencies use language more appropriate for and consistent with the nature of Guidelines. For example, proposed Section I states that policies and procedures "should reflect. . .", and under proposed Section II furnishers "should address", compliance with requirements of FCRA. Section III states that a "furnisher should," and Section IV provides that policies and procedures "should address." As guidelines, the use of "should consider" is more appropriate than the more compulsive "should." Otherwise, the Guidelines become a burdensome checklist and compliance trap.

I. Nature, Scope, and Objectives of Policies and Procedures.

B. Objectives.

Under both the proposed Regulatory Definition approach and the proposed Guidelines Definition Approach of the proposed Guidelines, furnishers should have written policies and procedures "reasonably designed" to accomplish certain listed objectives. Each of the listed objectives must "ensure" particular results. We suggest that the Agencies delete "ensure," as it seems inconsistent with the nature of guidelines and with "reasonably designed." It is sufficient that the policies and procedures are reasonably designed simply to accomplish objectives as listed.

We strongly endorse the Guidelines Definition Approach. We oppose the proposed Regulatory Definition Approach, whereby furnishers must ensure that the information they furnish "about accounts or other relationships with a consumer avoids misleading a consumer report user as to the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." We strongly object to this approach for reasons explained in our comments to the proposed definition of "integrity" contained in the Regulatory Definitions Approach. As discussed in those comments, furnishers cannot predict or be expected to predict what will "mislead" a consumer report user, especially given the variety of users and uses of consumer reports. Compliance could never be certain or even predictable, but alleged violations would be. Indeed, such a vague, subjective, and ever-changing standard presents yet additional arguments for depository institutions not to furnish information to consumer reporting agencies. For these reasons, we urge the Agencies to adopt the Guidelines Definition Approach or delete this provision from the Regulatory Definition Approach if it is adopted.

Under both the Regulatory and Guidelines Definition Approaches, a furnisher must have policies and procedures reasonably designed to "[e]nsure that it conducts reasonable investigations of consumer ***disputes*** about the accuracy ***or integrity*** of information in consumer reports . . ." (Emphasis added.) We strongly recommend deletion of "integrity." There is no such requirement to investigate disputes related to integrity either in the statute or in the proposed rule. Under Section 623(a)(8) of FCRA, the Agencies must prescribe regulations regarding when "a furnisher shall be required to reinvestigate a dispute concerning the accuracy of information contained in a consumer report on the consumer, based on a direct request of a consumer." There is no reference to "integrity" as there is in other provisions of the statute. In addition, proposed section 334.41(e) defines "direct dispute" as a dispute "concerning the ***accuracy*** of any information contained in a consumer report. . ." (Emphasis added.) Accordingly, "integrity" should be deleted.

Both the proposed Regulatory and Guidelines Definitions approaches require furnishers to update information they furnished. We agree that furnishers should update information, but the Supplementary Information should acknowledge that updates may be delayed and may take, for example, up to 60 days to be reflected in the information furnished to the consumer reporting agency. Customer activity may take place, for example, mid-month, and not in time to be reflected in the end of the month information furnished to consumer reporting agencies. The update would be reflected in the following months' information.

The alternate proposals also require that the updates reflect "any cure of the consumer's failure to abide by the terms of the account or other relationship." We agree that furnishers should provide updated information related to customers' activity such as payments. However, the final rule should make clear that this requirement to update to reflect any "cure" does not mean furnishers must delete or omit historically accurate information such as late payments and original defaults because the customer has become current or repaid the debt. Customers often assert that negative information such as the fact that they were late or failed to repay a debt should be deleted if they ultimately pay, even though, in fact, deleting the information would make the report inaccurate and less reliable. In addition, the final Guidelines should make clear that

furnishers are under no obligation to *update* information about accounts that they have sold. Obviously, once an account is sold, they are not in a position to know or furnish such information about the account, including whether or not the borrower has paid the debt.

III. Establishing and Implementing Policies and Procedures.

Under this part of the proposal, in establishing and implementing their policies, furnishers should identify practices or activities of the furnisher that can compromise the accuracy and integrity of information furnished to consumer reporting agencies such as by "[o]btaining feedback from consumer reporting agencies, consumers, the furnisher's staff, or other appropriate parties."

The word "obtaining" suggests that banks have an affirmative responsibility to seek out or survey their staff, consumer reporting agencies, customers, and noncustomers on a periodic basis for their opinions about how the furnisher provides information to consumer reporting agencies. This would be an enormous task with questionable value. It should be sufficient for furnishers to monitor or review complaints and suggestions they receive from customers and recommendations they receive from consumer reporting agencies. This allows more targeted, relevant feedback.

Many consumers, including customers, will be unaware of the accuracy and integrity of the information provided by a financial institution unless there is or was a problem and it is clearly the institution's fault. In these cases, they typically notify or complain to the furnisher. Reviewing those complaints is the most effective means for identifying areas for improvement. Equally, furnishers rely on consumer reporting agencies' standards, formatting requirements, and notices and should be able to rely on them to notify them of any problem areas without soliciting their feedback.

Conclusion.

ABA urges the Agencies to proceed with rulemaking acknowledging that the consumer reporting system works remarkably well for both the industry and consumers by providing reliable and predictive information in an efficient manner. It enables depository institutions efficiently to provide customers appropriate financial products and terms. Approaching rulemaking with the notion that there are major flaws to be addressed risks harming the system – and consumers. In addition, the final rules should be drafted to encourage institutions to furnish information by adopting flexible requirements that are not subject to uncertain interpretations and unnecessary costs and burdens.

Sincerely,

Nessa Eileen Feddis

From: ROGER DAVIS <rogerd445@prodigy.net> on 02/11/2008 11:10:04 AM

Subject: Fair Credit Reporting Act Guidelines

February 11, 2008

Federal Trade Commission
Project No. R611017

Board of the Governors of the Federal Reserve System
Docket No. R–1300

Office of the Comptroller of the Currency
Docket No. OCC-2007-0019

Federal Deposit Insurance Corporation
RIN 3064-AC99

Office of Thrift Supervision
Docket No. OTS-2007-0022

National Credit Union Administration
12 CFR Part 717

Re: Comments regarding Procedures to Enhance the Accuracy and Integrity of

Information Furnished to Consumer Reporting Agencies under Section 312 of

the Fair and Accurate Credit Transactions Act, Project No. R611017

Dear Sir/Madam:

I are writing to comment on the proposed Regulations and Guidelines issued by the federal banking regulators and Federal Trade Commission (FTC) (collectively as "Regulators") under Section 312 of the Fair and Accurate Credit Transactions Act of 2003. I appreciate the efforts undertaken by the Regulators in drafting the proposal, but I believe that significant changes must be made in the proposal in order for it to (1)promote the furnishing of information that is accurate, timely, up to date, complete, and fully substantiated and to (2) provide a workable method for consumers to dispute information directly with the entity that furnished that information.

The changes which must be made include:

• The Regulations must clearly state that the purpose of the regulatory requirement for furnisher policies is to achieve accurate reporting of information which is timely, complete, up to date, and substantiated.

• The Regulations must define "accuracy" and "integrity." I support the

"Regulatory Definition Approach" because it is more substantive in its requirements and because these key definitions are much too important to be relegated to flexible Guidelines which only inform a furnisher's policies.

• The definition of "accuracy" must require that information furnished to consumer reporting agencies (CRAs) be "complete."

• The Regulations should define "accuracy" to require that information furnished to CRAs be substantiated. In addition, the Guidelines should include requirements as to what kind of substantiation is required.

• The proposal should not artificially divide "accuracy" and "integrity," because that would prevent consumers from submitting valid disputes to furnishers about errors falling in the "integrity" category.
• "Accuracy" should require that information furnished to CRAs be updated so that it is, and remains, current.

• The direct dispute Regulations should require that the furnisher in fact conduct a reasonable investigation, including an attempt to seek documentation before rejecting a consumer's dispute.

• The Guidelines should require that records about the account should be kept at least as long as the account or other relationship with a furnisher is being reported.

• The Regulations and Guidelines should provide consumers with a workable, understandable, effective system to report and obtain correction of errors, by informing consumers of what types of disputes can be presented to the furnisher and where to submit those disputes. A key element of this is to require that a furnisher refer to a CRA any dispute that the furnisher declines to investigate because that dispute is of a type that the Regulations do not require it to consider.

Credit reports and credit scores are increasingly important in the determination of who gets credit and other economic opportunities, such as insurance, rental housing, and even jobs, as well as what prices consumers are offered for credit and services.
There is an increased focus on credit quality during any economic downturn – the very time that access to jobs, services, and the price of credit take on special importance for families. These factors make it extremely important that the contents of consumer credit reporting files be accurate, complete, and up to date.

Even small inaccuracies in a credit report can have a significant impact on the economic opportunities offered to hardworking individuals and their families, because they can cause significant changes in a credit score. Thus, any standards for

accuracy
and integrity of information furnished to a CRA must examine not only the potential
for an incorrect evaluation by a user of a credit report, but also the potential for
an incorrect evaluation by the user of a credit score.

I. The Regulations Must Clearly State That the Purpose of the Regulatory Requirement
for Furnisher Policies is to Achieve Accurate Reporting of Information.

The package of proposed Regulations and Guidelines has three parts. The Regulations describe what types of disputes the furnisher must resolve if reported
directly to the furnisher. In addition, the Regulations require that furnishers
establish and implement policies concerning the information which they furnish to
consumer reporting agencies. Finally, the regulatory package contains proposed Guidelines to shape the content of those policies.

The regulatory text on furnisher policies is missing a key element – it does not
require that the furnisher policies must be reasonably designed to accomplish the
objective that all information furnished in fact meet standards of accuracy and
integrity. Instead, the Regulation simply requires that furnishers have policies
"regarding" the accuracy and integrity of furnished information. The Regulation says
that the policies "must be appropriate to the nature, size, complexity, and scope"
of the furnisher's activities.

The regulatory section requiring furnisher policies should be amended to add the
basic requirement that the policies must be reasonably designed to facilitate the
reporting only of accurate, complete, up to date information which is fully substantiated and has no tendency to mislead users of a credit report or credit score.
The statutory and regulatory requirement for policies should not be satisfied by
policies that do not serve this goal, regardless of the nature or size of the furnisher.

II. Accuracy and Integrity Definitions

The Regulators have proposed two alternative approaches to define accuracy and integrity: the "Regulatory Definition Approach" and the "Guidelines Definition Approach." The key differences in these Approaches are:

• Where the definitions are placed, i.e., in the Regulations vs. in the Guidelines,
which affects their enforceability.

• The definition of "integrity" in the Regulatory Definition Approach includes a
requirement that information is complete, i.e., that it "not omit any term,

such as
credit limit or opening date, …the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user…"

• In addition, Regulatory Definition Approach includes as an Objective in the Guidelines that information furnished to CRAs in general should "avoid misleading a
consumer reports user."

• The Guidelines Definition Approach takes a more procedural approach to integrity, focusing on whether the procedure for reporting is likely to avoid error
rather than on the quality of the information in fact reported or omitted.
I support the Regulatory Definition Approach, which requires that the information both
be without error and not omit any term which can reasonably be expected to contribute
to an incorrect evaluation by a user of a credit report. I suggest this definition
should be augmented to also refer to a user of a credit score.

a. The definition of accuracy rightfully requires information to be "reflected without error," but it should be clear that such reflection must be "objective."

In both Approaches, "accuracy" is defined to mean that information provided to a CRA "reflect without error the terms of and liability for the account or

other relationship and the consumer's performance and other conduct with respect
to the account or other relationship."

I support the concept in the definition of accuracy that information furnished to a CRA should "reflect without error" the actual terms of, liability for, and
other conduct about the account or relationship. It is fundamentally important that "accuracy" requires information to be accurate as a matter of fact,not simply
requiring conformity between the furnisher's records and information in a CRA's
database. I recommend making this absolutely clear by adding the word "objectively"
before the world "reflects."

Furthermore, the definition of "accuracy" should also require that information reported to a CRA reflects without error the furnisher's performance or other conduct with respect to the account or other relationship.

b. The definitions of "accuracy" and "integrity" should be set forth in the Regulations. I believe "accuracy" and "integrity" must be defined in the Regulations. The requirement that furnishers report information with accuracy

and integrity should not be merely a goal or Guideline to be considered. It

should be mandatory; indeed it should be the core purpose of a furnisher's

credit reporting systems.

c. The definition of "accuracy" must include "completeness." Accuracy must

include a requirement that information furnished must be complete, i.e., must not omit any important terms. If the failure of the furnisher to provide complete information creates a misleading evaluation of a consumer's creditworthiness, including a different credit score if the information were included, the furnisher has reported inaccurate information.

The Regulators have proposed either requiring completeness to be part of integrity (Regulatory Definition Approach) or omitting it altogether (Guidelines Definition Approach). The Guidelines Definition Approach is simply unacceptable. Information cannot be "without error" if its omission of critical terms creates a misleading evaluation or a different credit score.Indeed, the omission of a material term that creates a misleading impression is a form of deception under the FTC Act. If information could be considered "deceptive" under the FTC Act, how can it be "accurate" under the FCRA?

The Regulatory Definition Approach is not perfect either in that it separates completeness from accuracy, when the former is a necessary element of the other. I support a definition of "accuracy" that includes completeness. This point is critical,because nowhere else is "accuracy" defined in the Act or Regulations, yet the term is used several times in the FCRA, including requirements for CRAs to follow reasonable procedures to assure maximum possible accuracy. I do not want a definition of accuracy that inadvertently allows CRAs to have procedures that result in incomplete misleading information in their files.

In the alternative, if completeness is included in the definition of "integrity," rather than as part of accuracy, then at a minimum the Regulations should make clear that such a definition is applicable only to Section 1681s-2(e) of the FCRA and does not affect the meaning of the term "accuracy" under other parts of the FCRA which impose other duties with respect to accuracy.

d. Accuracy should include substantiation. I support the Regulators' express recognition of the need for substantiation in the furnisher's records of all furnished information. However, I believe that substantiation should be part of the definition of "accuracy." Both Definition Approaches include a requirement for substantiation, but it is either stated as an Objective for the policies of a furnisher (Regulatory Definition Approach) or an element of integrity (Guidelines Definition Approach), not as a requirement for accuracy.

I support retaining and strengthening the requirement for substantiation by placing it in the Regulations, not just the Guidelines, and by locating it in the definition of accuracy. Substantiation should not merely be an objective,

nor should it be something only in the Guidelines to be considered by furnishers as they develop their own policies. Instead, substantiation should be a core part of accuracy. Furnishers should be required to have in their possession documents that substantiate information they send to the CRAs. Furthermore, as discussed below, the Guidelines should include requirements as to what types of substantiation are required.

e. “Accuracy” and “integrity” should not be artificially separated. The issues of whether “completeness” and “substantiation” should be elements of “accuracy” versus “integrity” points to another problem – that both the Regulatory Definition and the Guidelines Definition Approach artificially separate the two concepts, when they should be treated together. Integrity should be considered a subset of accuracy and not as a category separate and distinct from accuracy.

First, artificially separating accuracy and integrity does not make logical sense. Information provided without integrity will result in inaccuracies. If information is inaccurate, it lacks integrity.

Another reason that an artificial distinction between accuracy and integrity is problematic is that the statute contemplates direct disputes about accuracy, and the Regulations define a “direct dispute” which can be pursued directly with the furnisher as only those disputes which are about accuracy. Under the proposed Regulations, some types of errors by a furnisher constitute a lack of accuracy, while other types of errors are put in the category of lacking integrity. This means that some types of real errors by a furnisher can be directly disputed, but others cannot.

An artificial distinction between accuracy and integrity will be harmful to consumers if consumers can use the direct dispute process only for accuracy and not for integrity disputes. Consumers should be able to seek and obtain direct corrections by a furnisher of erroneous information regardless of where the error falls on an artificial line between the definitions of accuracy and integrity. A simple way to do this is to treat integrity as an element or subset of accuracy, rather than as some wholly separate category to which no right of direct dispute can attach.

f. Accuracy requires that information be updated so that it is, and remains, current. The Regulators ask whether the definition of “accuracy” should include updating information as necessary to ensure that information furnished is current. Our answer is an unequivocal “yes”. Similar to the issue of completeness, requiring information to be updated so that it is factually correct must be an inherent element of accuracy. Stale or out of date information cannot be accurate, especially when there is a subsequent material change in the status of the account.

The Regulators should include a requirement that accuracy requires information

be updated as necessary to ensure that it is current. In addition,the Regulators should require that information should be updated when the consumer requests it or disputes the current status of information. Finally, the Regulators should include recommendations in the Guidelines on how regularly information should be updated to ensure it is current.

III. The Direct Dispute Regulations Should Require that the Furnisher in Fact Conduct a Reasonable Investigation, Including an Attempt to Seek Documentation Before Rejecting a Consumer's Dispute. Some important aspects of the steps a furnisher must take when it receives a direct dispute are relegated to the Guidelines. These requirements belong in the direct dispute Regulations.

a. The requirement for a reasonable investigation of a direct dispute should

be in the Regulations. The Regulators have included the reasonable investigation standard for direct disputes only in the Guidelines, not in the proposed Regulations that will actually set the legal requirements for furnisher conduct in handling a direct dispute. Relegating the important obligation to investigate a direct dispute to Guidelines that merely inform the furnisher's policies is illogical and troubling. Under current law, furnishers are required to conduct a reasonable investigation for disputes submitted to a CRA. A consumer dispute should not be subject to a lower,vague, or non-binding standard with respect to the investigation merely because the consumer submits the dispute directly to the furnisher instead of submitting it through a CRA.

b. The Regulations, not merely the Guidelines, should include the requirement that a furnisher seek documentation of a consumer's dispute before rejecting it.
The Regulators have proposed including in the Guidelines a provision that a furnisher attempt to obtain necessary documentation from a consumer before rejecting a consumer's dispute as frivolous or irrelevant. I support this provision; however, I believe it should be a requirement in the Regulations, not just something to be considered in Guidelines about the content of the furnisher's policies. The direct dispute option will have little meaning for consumers if the furnisher can comply with the Regulations by rejecting a dispute before asking the consumer for the information that the furnisher believes is missing and essential.

IV. Substantiation and Recordkeeping Are Essential

As stated above, I strongly support a requirement in the Regulations that furnishers substantiate the information they initially furnish, and remove any disputed information that cannot be substantiated at the time of the dispute. In addition, I believe the Guidelines should include requirements as to what kind of substantiation is required. Otherwise, a furnisher may claim it has substantiation merely because its electronic records reflect the same information which it furnished to the CRAs.

To prevent any misunderstanding, the Guidelines should specify that certain documents must be in the possession of the furnisher to constitute substantiation.
For example, credit card companies should be required to have in their possession
account applications, agreements, and billing statements. Most importantly, debt
buyers should be required to have certain evidence (that the consumer is the current
individual liable on the account, account agreements and billing statements) in their
possession, and to have reviewed such information before furnishing to a CRA.

The Regulators have asked whether the Guidelines should specify a time period for furnishers to retain records. I support a requirement that records should be kept
at least as long as the account or other relationship with a furnisher is being
reported. There should not be a specific time limit; the standard should be "as long
as necessary to substantiate information reported."

V. The Regulations and Guidelines Should Provide Consumers with a Workable, Understandable, and Effective System to Report and Obtain Correction of Errors.
Effective notice and efficient referral are key elements to making the direct dispute process more than an empty procedure. In particular, when a dispute is rejected because it is of a type that should have been filed with the CRA rather than
the furnisher, it is inherently misleading for a furnisher to reject the dispute
without telling the consumer that the consumer can send the dispute to the CRA, and
that this will start a process in which the furnisher will have to investigate a
dispute that it was not required to consider as a direct dispute.

The Regulations should require that:

1. Each furnisher must communicate effectively to the public, including on its web site:

• The address(es) for filing a direct dispute;

• A description of the types of disputes that the consumer can file with the furnisher; and

• A clear and conspicuous statement that other types of disputes can be filed directly with the CRAs, along with the addresses to do so, and a plain statement that the filing of a dispute with the CRA can trigger a process leading
to an investigation by the furnisher even if the dispute has been rejected by the furnisher as not appropriate under the direct dispute process.

2. Each furnisher must forward directly to any CRA to whom it furnishes information
any dispute which the furnisher rejects because it is of a type not required to be
considered by the furnisher, excluding only disputes that the furnisher determines to

be substantively frivolous or irrelevant for reasons other than that the dispute should have been filed with the CRA rather than with the furnisher. A regulatory interpretation may be required so that CRAs must treat those referred disputes as if they had been filed by the consumer with the CRA.

3. When a furnisher rejects a dispute on the ground that the dispute is of a type that the furnisher is not required to consider, the furnisher must be required to provide with that rejection a clear written statement advising the consumer that he or she may dispute this information with the CRA, providing the address to do so, and stating that the furnisher will have an obligation to investigate the dispute once the CRA forwards the consumer's dispute to the furnisher. Without this disclosure, consumers can be misled into thinking that it would be pointless to file a dispute with a CRA after the furnisher has rejected that dispute. Where the reason for the rejection was "wrong place of filing," nothing could be further from the truth.

4. Each furnisher must make public, on its web site and on request of any member of the public, its policies for furnishing information to CRAs and for handling disputes about that information.

VI. Conclusion

It is essential that the Regulators prescribe strong Regulations and Guidelines for furnishers that promote the initial reporting only of accurate, timely, complete and up-todate information which is fully substantiated by the furnisher's own files. The dispute Regulations should serve this same goal. They should provide an effective, easy-to-use avenue for consumers to obtain corrections; should provide a true self-help method to ensure that information meets these standards; and should provide a method to effectively dispute information which is contradicted by independent evidence provided by the consumer. Finally, the direct dispute process must require furnishers to engage in a real investigation and to fix errors shown by the consumer or otherwise revealed through the dispute process.

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BEFORE THE:

DEPARTMENT OF THE TREASURY
Office of Comptroller of the Currency
Docket ID OCC-2007-0019; RIN 1557-AC89
and
Office of Thrift Supervision
Docket No. OTS-2007-0022; RIN 1550-AC01

FEDERAL RESERVE SYSTEM
Docket No. R-1300

FEDERAL DEPOSIT INSURANCE CORPORATION
RIN 3064-AC99

NATIONAL CREDIT UNION ADMINISTRATION
12 CFR Part 717

FEDERAL TRADE COMMISSION
Project No. R611017, RIN 3084-AA94

INTERAGENCY NOTICE OF PROPOSED RULEMAKING: PROCEDURES TO ENHANCE THE ACCURACY AND INTEGRITY OF INFORMATION FURNISHED TO CONSUMER REPORTING AGENCIES UNDER SECTION 312 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT

COMMENTS SUBMITTED BY THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

JAMES J. JOHNSTON
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February 11, 2008

I. INTRODUCTION

A. Procedural Statement

These comments are submitted by the Owner-Operator Independent Drivers Association, Inc. ("OOIDA" or "Association") in response to an Interagency Notice of Proposed Rulemaking: Procedures To Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act. The Notice was published in the Federal Register on December 13, 2007.

B. The Interest of the Owner-Operator Independent Drivers Associations, Inc.

OOIDA is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators and professional drivers on all issues that affect small business truckers. The more than 161,000 members of OOIDA are small business men and women located in all 50 states and Canada who collectively own and operate more than 241,000 individual heavy-duty trucks. Many of OOIDA's members are also small business motor carriers who have DOT authority to operate in interstate commerce. The mailing address of the Association is:

Owner-Operator Independent Drivers Association, Inc.
P.O. Box 1000
1 NW OOIDA Drive
Grain Valley, Missouri 64029
www.ooida.com

The Association actively promotes the views of small business truckers and professional drivers through its interaction with state and federal government agencies, legislatures, the courts, other trade associations, and private businesses to advance an equitable and safe

environment for commercial drivers. OOIDA is active in all aspects of highway safety and transportation policy, and represents the positions of small business truckers in numerous committees and various forums on the local, state, national, and international levels. Many of OOIDA's members are the subject of consumer reports, governed by the Fair Credit Reporting Act, that contain statements purporting to be descriptions of their employment history. The principles governing the quality of such descriptive statements submitted by their former employers, who are the providers of the statements that are the subject of this rulemaking, potentially have an enormous impact on both their ability to find employment in the trucking industry and the ability of motor carriers to reliably screen employment applications and therefore employ qualified drivers. All those working in the trucking industry, as well as the public at large and interstate commerce, are well served by "accuracy" in the descriptions of drivers. None are well served by ambiguity, vagueness, imprecision or incompleteness tending to mislead.

II. SUMMARY OF COMMENTS OF THE ASSOCIATION

The agencies either a) must limit the application of the definition of accuracy in the proposed rule to only credit reports (and similar reports of financial transactions), and not to descriptions of the characteristics of individuals or their employment histories, or b) should adopt as the criteria for the accuracy of a statement to a consumer reporting agency the following:

> An accurate statement in a consumer report about a consumer or about a transaction involving a consumer is a statement that, from the perspective of its reader, is reasonably meaningful, reasonably concrete, reasonably complete, reasonably precise, and true, so as not to tend to mislead.

Such a definition, being more comprehensive than what is in the proposed rulemaking, is suitable

for both financial transactions and descriptions of individuals. The definition of accuracy proposed by the Association is implicit in the 10th Circuit's decision in Cassara v. DAC Services and explicit in instructions to the jury in OOIDA v. DAC Services. The proposed rulemaking presents a definition that may be suitable for statements about financial and other quantitative transactions, but fails to provide appropriate guidance for the large number of qualitative descriptions coming within the ambit of the Fair Credit Reporting Act.

III. COMMENTS OF THE ASSOCIATION

On May 22, 2006, the Association submitted comments in response to the advance notice of proposed rulemaking (Comments: 522110-00084 to 89). Those comments and appended exhibits are incorporated herein by reference.

To avoid significant difficulties in application, the proposed regulation needs to be limited in application to those types of transactions, commonly the subject of consumer reports, which are objective in nature and expressed in quantitative measures, like time and money. The regulation, as written, should not apply to statements in consumer reports "bearing on a consumer's credit worthiness, credit standing, [or] credit capacity..." if the statements are qualitative or necessarily subjective in nature. The regulation should not apply at all to statements about "character, general reputation, personal characteristics, or mode of living" which of necessity must be qualitative or subjective in nature.

The population of transactions and events within the ambit of the Fair Credit Reporting Act is broad. Perhaps the most numerous are those dealing with the payment of money. Those transactions are by their nature objective and quantitative. What is typically of interest to those reading about such transactions is whether a given amount of money was delivered by a given

point in time. Both an amount of money and a point in time are objectively and quantitatively determined. These comments do not address any such financial transactions.

The definition of "accuracy" proposed in the notice of proposed rulemaking is as follows:

> "Accuracy means that any information that a furnisher provides to a consumer reporting agency about an account or other relationship with the consumer reflects without error the terms of and liability for the account or other relationship and the consumer's performance and other conduct with respect to the account or other relationship."

If read in the context of financial transactions, the phrase "information... reflects without error... the consumer's performance and other conduct with respect to the... relationship" is meaningful because such transactions are inherently objective. But when a consumer's "character" is the subject, this same phrase is meaningless. It simply begs the question. Instead of discerning whether a statement is "accurate," one must discern whether it is in "error." But no criteria for distinguishing "error" from "non-error" in statements describing a consumer's character is presented in the proposed regulation. This is not progress.

Subjective statements about the qualities of individuals come within the ambit of the Fair Credit Reporting Act. By way of example, many background reports used for employment screening contain more than the identities of prior employers and the dates of employment. Some contain qualitative descriptors of the employees' work histories.

An employment screening report was the subject of the Cassara case, a copy of which is appended hereto as Exhibit 1. The Cassara dispute arose in the context of a system to receive and republish reports of truck driver employment histories. The system used a set of "canned" but ill-defined descriptors, e.g. "accident." Mr. Cassara disputed that some events in his history were not "accurately" described as "accidents." The Court decreed that because the term

"accident" was ill-defined, and because different persons preparing and reading such descriptions gave different meanings to the term, Mr. Cassara had presented a jury justiciable issue regarding whether the consumer report was "accurate." Because the definition was an integral part of the system for preparing consumer reports, the lack of a shared meaning presented the jury issue of whether the credit reporting agency had followed reasonable procedures to assure maximum possible accuracy. At the heart of the 10th Circuit's analysis was the idea that if a reader of a statement about a consumer does not obtain the knowledge of the author, it is "inaccurate." The underlying concept is that the "accuracy" of a statement is a question of the quality of the communication accomplished thereby, and not a question of the quality of the correspondence between a statement and the event it was intended to represent. What event is or is not an "accident" can be defined using objective quantitative meaningful criteria, but in the consumer reports at issue in Mr. Cassara's case, they were not so defined. Because of the poor quality of the descriptor, any attempt to apply the definition in the proposed rulemaking to the Cassara facts would be problematic at best. One can not undertake to discern "error" in a statement until after one has discerned its meaning. In the absence of shared meaning, a word has no meaning. Neither interstate commerce, nor consumers, nor the policies to be served by the Fair Credit Reporting Act are well served by rules that countenance the publication and transmission of meaningless statements.

A copy of the form more recently used by DAC Services (the defendant in the Cassara case) to collect descriptions of the work histories of truck drivers is appended as Exhibit 2. It is titled a Termination Record form. This is the form a former employer of a truck driver used to input work record descriptors into DAC Services' database. When a prospective employer later

purchased from DAC an Employment History Report on that same driver, the descriptors in DAC's database were bundled together and sold to the prospective employer. The Employment History Report was a "consumer report." The associated Guide to the Termination Record form, which sets forth DAC's definitions of the terms used in the Termination Record form, is appended as Exhibit 3.

DAC's Termination Record form, and specifically the Work Record descriptors therein, was the subject of litigation in the Federal District Court for the District of Colorado. There the plaintiffs alleged that DAC's Work Record descriptors such as "company policy violation," "cargo loss," "personal contract requested," and "other," on their face and as defined by DAC in its Guide, were denotatively meaningless but connotatively derogatory, and were therefore inherently inaccurate. The Plaintiffs alleged their use was a violation of the FCRA. In the context of that litigation the undersigned counsel for the plaintiffs hired an expert to address questions at the heart of the FCRA, the definitions of the terms used in DAC's Termination Record form later re-bundled as consumer reports describing truck drivers. Dr. Edward Schiappa was asked to address the terms used in DAC's Termination Record form. The report of Dr. Edward Schiappa is appended as Exhibit 4.

The proposed rulemaking does not address "meaning." It isn't necessary to do so for financial transactions. The meaning (as well as the precision) is implicit in the quantitative nature of the statements about them. But because the regulations do not address the criteria for "meaning" of subjective and qualitative statements, they should be limited in scope to those transactions that are not dependent upon "meaning" to determine "accuracy."

In the OOIDA v. USIS case, the Federal District Court agreed with the plaintiffs that

"truth" was **a** criteria, but not **the** criteria, for determining the accuracy of a qualitative subjective statement about a consumer. When it came time to instruct the jury on the meaning of terms in the FCRA, the Court addressed "accuracy" as follows:

> Certain words or phrases used in these instructions have a particular meaning. The following are definitions for these certain words or phrases.
> 1. Accurate (or any of its various forms, including "accuracy") The word "accurate," when used with regard to the **accuracy** of the information made the subject of the Fair Credit Reporting Act (FCRA), **means information that, from the perspective of the reader** of the published consumer report, **is reasonably meaningful, reasonably concrete, reasonably complete, reasonably precise, and true**, so as not to be misleading. (Emphasis added.)

As an aside, the Plaintiffs believe the final qualifier should be "so as not to tend to mislead," rather than, "so as not to be misleading," because the former properly makes the point of reference the publication and implicates the foresight of the author (the one with knowledge about the matter addressed), while the latter implicitly and wrongly references the reading and implicates a "hindsight analysis." Further, the Court's final qualifying criteria effectively subsumes the other criteria into a single was-anyone-misled criteria. Otherwise the Court was correct in its instruction. But, in order for a statement about a consumer to be "accurate," it must not only be true, it must also be reasonably meaningful, reasonably concrete, reasonably complete, and reasonably precise. None of these qualities of a statement describing a consumer, with the possible exception of completeness, are implicated in statements about the time and amount of payments by a consumer. None of these qualities of statements are implicated by the proposed rulemaking.

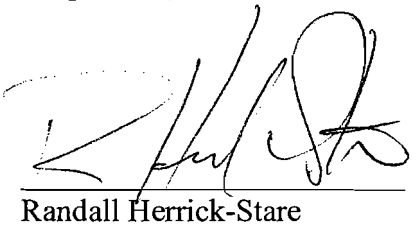
III. CONCLUSION

Because the proposed definition of "accuracy" fails to address questions of meaning,

concreteness, completeness, or precision, its application should be limited to transactions and relationships in which these qualities are inherent in the associated and commonly used descriptors. It is suggested that the scope of the regulations be limited to statements in consumer reports that, on their face and from the perspective of a reasonable reader, are quantitative or otherwise objective.

Alternatively, the regulation should dictate that a statement in a consumer report is an accurate statement only if it is, from the perspective of a reasonable reader, all of: reasonably meaningful, reasonably concrete, reasonably complete, reasonably precise, true, and not tending to mislead.

Respectfully submitted,



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February 11, 2008

EXHIBIT 1

Westlaw.
276 F.3d 1210
(Cite as: 276 F.3d 1210)

United States Court of Appeals,
Tenth Circuit.

Joseph L. CASSARA,
Plaintiff-Appellant/Cross-Appellee,
v.
DAC SERVICES, INC.,
Defendant-Appellee/Cross-Appellant.

Nos. 00-5021, 00-5026.

Jan. 17, 2002.

Truck driver who was the subject of report provided to prospective employers regarding his prior accidents and employment history brought lawsuit against reporting agency for allegedly failing to adopt reasonable procedures to ensure accuracy of its reports, in violation of requirements of the Fair Credit Reporting Act (FCRA). The United States District Court for the Northern District of Oklahoma, Thomas R. Brett, J., granted agency's motion for summary judgment on truck driver's claims, but refused to award it attorney fees, and both sides appealed. The Court of Appeals, Jenkins, United States Senior District Judge for the District of Utah, sitting by designation, held that: (1) commercial carriers may investigate driver employment histories and driving records of truck drivers who apply for employment beyond the minimum standards established by Federal Motor Carrier Safety Regulations (FMCSR); but (2) genuine issues of material fact, as to accuracy of reports provided by consumer reporting agency regarding truck driver's prior "accidents," and as to whether agency had followed reasonable procedures to ensure the accuracy of its reports by culling them from information provided by member employers using their own unique, nonstandardized definitions of what qualified as reportable "accident," precluded entry of summary judgment for reporting agency.

Affirmed in part, and vacated and remanded in part.

West Headnotes

[1] Federal Courts 776
170Bk776 Most Cited Cases

[1] Federal Courts 802
170Bk802 Most Cited Cases

On appeal, Court of Appeals reviews district court's grant of summary judgment de novo, considering evidence and all reasonable inferences drawn therefrom in light most favorable to nonmoving party.

[2] Federal Civil Procedure 2544
170Ak2544 Most Cited Cases

Where party moving for summary judgment does not bear ultimate burden of persuasion at trial, it may satisfy its burden at summary judgment stage by identifying lack of evidence for nonmovant on essential element of nonmovant's claim; to avoid summary judgment, nonmovant must establish, at a minimum, an inference of presence of each element essential to its case. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[3] Credit Reporting Agencies 3
108Ak3 Most Cited Cases

To prevail in private civil action under section of the Fair Credit Reporting Act (FCRA) requiring consumer reporting agencies, in preparing consumer reports, to follow reasonable procedures to ensure maximum possible accuracy of information concerning the individual to whom report relates, plaintiff must establish: (1) that consumer reporting agency failed to follow reasonable procedures to assure the accuracy of its reports; (2) that report in question was, in fact, inaccurate; (3) that plaintiff suffered injury; and (4) that agency's failure caused plaintiff's injury. Consumer Credit Protection Act, § 607(b), as amended, 15 U.S.C.A. § 1681e(b).

[4] Federal Civil Procedure 2491.8
170Ak2491.8 Most Cited Cases
(Formerly 170Ak2481)

Genuine issues of material fact, as to accuracy of reports provided by consumer reporting agency regarding truck driver's prior "accidents," and as to whether agency had followed reasonable procedures to ensure the accuracy of its reports by culling them from information provided by member employers using their own unique, nonstandardized definitions of what qualified as reportable "accident," precluded entry of summary judgment for reporting agency in lawsuit that was brought under the Fair Credit Reporting Act

(FCRA) by truck driver who was subject of reports. Consumer Credit Protection Act, § 607(b), as amended, 15 U.S.C.A. § 1681e(b).

[5] Automobiles 116
48Ak116 Most Cited Cases

Commercial carriers may investigate driver employment histories and driving records of truck drivers who apply for employment beyond the minimum standards established by the Federal Motor Carrier Safety Regulations (FMCSR), which, purely in interests of public safety, require carriers to investigate driving records and employment histories of prospective employees being hired to drive large trucks, and in inquiring as to prior "accidents" in which job applicant has been involved, carriers are not limited by narrow definition of "accident" set forth in the FMCSR. 49 C.F.R. §§ 390.1- 390.37, 391.1-391.69 (2000).

***1212** David F. Barrett, (R. Deryl Edwards, Jr. with him on the brief), Joplin, Missouri, for the Plaintiff-Appellant/Cross-Appellee.

Larry D. Henry, (Patrick W. Cipolla with him on the brief) of Gable & Gotwals, Tulsa, OK, for the Defendant-Appellee/Cross-Appellant.

Before HENRY and BRISCOE, Circuit Judges, and JENKINS, Senior District Judge. [FN*]

FN* The Honorable Bruce S. Jenkins, United States Senior District Judge for the District of Utah, sitting by designation.

JENKINS, Senior District Judge.

Plaintiff Joseph L. Cassara brought this civil action under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (2000) ("FCRA"), alleging that DAC Services, Inc. ("DAC"), a "consumer reporting agency" under the FCRA, has violated 15 U.S.C. § 1681e(b) (2000) [FN1] by failing to adopt appropriate procedures ensuring the accuracy of the reporting of his employment history in a DAC-prepared report furnished to prospective employers, and that DAC has failed to disclose to Cassara the identity of all of the recipients of that report, a violation of 15 U.S.C. § 1681g(a)(3)(A)(I) (2000). [FN2] DAC answered by denying liability and pleading a counterclaim alleging that Cassara's claims were frivolous and filed in bad faith.

FN1. 15 U.S.C. § 1681e(b) requires that "[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."

FN2. Cassara abandoned his § 1681g(a)(3)(A)(i) claim prior to any substantive ruling by the district court. (*See* Aplee. App. vol. II, at 372.)

On December 30, 1999, the district court denied Cassara's motion for partial summary judgment as to liability, dismissed DAC's counterclaim, and granted DAC's motion for summary judgment. Judgment was entered on January 3, 2000. Cassara filed a notice of appeal on February 2, 2000.

[1][2] We have jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 (1994). On appeal, the district court's grant of summary judgment is reviewed *de novo*, considering the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Cooperman v. David*, 214 F.3d 1162, 1164 (10th Cir.2000). Summary judgment is proper if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When, as in this case, the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its burden at the summary judgment stage by identifying "a lack of evidence for the nonmovant on an essential element of the nonmovant's claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir.1998). To avoid summary judgment, the nonmovant must establish, at a minimum, an inference of the presence of each element essential to the case. *Hulsey v. Kmart, Inc.*, 43 F.3d 555, 557 (10th Cir.1994).

***1213 FACTUAL AND REGULATORY BACKGROUND**

The Federal Motor Carrier Safety Regulations

In an effort to promote greater safety in the operation of large trucks on the Nation's highways, in 1970 the United States Department of Transportation promulgated the Federal Motor Carrier Safety Regulations ("FMCSR") establishing minimum qualifications for commercial motor vehicle drivers and requiring employers to investigate the driving record and employment history of prospective employees

being hired to drive large trucks. 49 C.F.R. §§ 390.1-390 .37, 391.1-391.69 (2000). The investigation of an applicant's driving record must include inquiries to "the appropriate agency of every State in which the driver held a motor vehicle operator's license or permit" during the preceding three years. 49 C.F.R. § 391.23(a)(1) (2000). The investigation of the applicant's employment record for the preceding three years "may consist of personal interviews, telephone interviews, letters, or any other method of obtaining information that the carrier deems appropriate," but the employer must maintain a written record as to each past employer that was contacted. 49 C.F.R. § 391.23(c) (2000).

The regulations require that drivers applying for employment likewise must disclose detailed information, including the "nature and extent of the applicant's experience in the operation of motor vehicles," a list of "all motor vehicle accidents in which the applicant was involved" during the three years preceding the application, "specifying the date and nature of each accident and any fatalities or personal injuries it caused," and a list of "all violations of motor vehicle laws or ordinances ... of which the applicant was convicted or forfeited bond" during the three years preceding the application. 49 C.F.R. § 391.21(b)(6)-(8) (2000). A driver applicant must detail "the facts and circumstances of any denial, revocation or suspension of any license, permit, or privilege to operate a motor vehicle that has been issued to applicant," as well as furnish a list "of the applicant's employers during the 3 years preceding the date the application is submitted" indicating the term and reason for leaving employment. 49 C.F.R. § 391.21(b)(9), (10) (2000).

As used in these regulations, "accident" means:

> an occurrence involving a commercial motor vehicle operating on a highway in interstate or intrastate commerce which results in:
> (i) A fatality;
> (ii) Bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or
> (iii) One or more vehicles incurring disabling damage as a result of the accident, requiring the motor vehicles to be transported away from the scene by a tow truck or other motor vehicle.

49 C.F.R. § 390.5 (2000). The definition expressly excludes an "occurrence involving only boarding and alighting from a stationary motor vehicle" or "only the loading or unloading of cargo." *Id.*

These FMCSR requirements establish a *minimum* standard for the evaluation of driver qualifications. The regulations also provide that trucking companies may enforce "more stringent requirements relating to safety of operation" than the general requirements found in the federal motor carrier safety regulations, 49 C.F.R. § 390.3(d) (2000), and may require driver applicants to provide information in addition to that required to be disclosed by the regulations. 49 C.F.R. § 391.21(c) (2000).

***1214 DAC and FMCSR Investigations**

As often is the case, the federal regulation of one commercial activity gave birth to another new business opportunity--in this case, the gathering and reporting of drivers' records and employment histories for a fee. DAC was formed in 1981 to exploit that opportunity, first by building a database of truck driver employment histories. Beginning in 1983, DAC offered employment histories, employee driving records, and other reports to its trucking industry members nationwide, augmenting its database with information reported by its participating employers.

In its own words, DAC acts as a "file cabinet," storing employment histories on terminated drivers for over 2,500 truck lines and private carriers from across the country. Participating member employers can access the DAC database, which currently contains over four million records, to gather key employment history information. DAC advertises that its employment history files comply with the federal regulations and are accepted by the United States Department of Transportation to satisfy Section 391.23(c) of the Federal Motor Carrier Safety Regulations, governing investigations of driver applicants' employment history.

Cassara and DAC

Joseph L. Cassara worked as a truck driver for Watkins Shepard Trucking, Inc. ("WST") from March to October 1994, and then for Trism Specialized Carriers ("Trism") from December 1994 through December 1996. After Cassara left employment with these companies, each company made reports to DAC concerning Cassara's driving record and employment history. DAC compiled this information into a report. It then furnished the report to other companies inquiring about Cassara.

WST initially reported two accidents involving Cassara. [FN3] According to WST, on June 28, 1994, Cassara struck another truck while trying to back his equipment into a customer's dock, causing $1,942.26 in damage to the other truck. (Aplee. App. vol. II, at 358.) The WST Safety Department reviewed the accident and determined it to be preventable. (*Id.*) On October 19, 1994, Cassara damaged a ladder while backing at a customer's place of business, an accident which WST's Safety Department determined also to be preventable. (*Id.* at 359.)

FN3. WST submitted its information concerning Cassara to DAC on November 17, 1994. (Aplee. App. vol. II, at 441.)

Based on the WST information, DAC's report on Cassara read as follows:

OF ACCIDENTS (EQUIPMENT WAS INVOLVED IN AN ACCIDENT OR DAMAGED WHILE ASSIGNED TO THE DRIVER REGARDLESS OF FAULT):2
* * * *
ELIGIBLE FOR REHIRE: NO
REASON FOR LEAVING: DISCHARGED OR COMPANY TERMINATED LEASE
STATUS: COMPANY DRIVER
DRIVING EXPERIENCE: MOUNTAIN DRIVING
EQUIPMENT OPERATED: VAN
LOADS HAULED: GEN. COMMODITY
WORK RECORD: COMPLAINTS OTHER

(Aplee.App. at 441.)

Similarly, DAC reported the following accident data based upon information submitted by Trism: [FN4]

FN4. Trism submitted its information to DAC on June 27, 1997. (*Id.* vol. I, at 18.)

***1215** # OF ACCIDENTS (EQUIPMENT WAS INVOLVED IN AN ACCIDENT OR DAMAGED WHILE ASSIGNED TO THE DRIVER REGARDLESS OF FAULT):6
* * * *
ELIGIBLE FOR REHIRE: REVIEW REQUIRED BEFORE REHIRING
REASON FOR LEAVING: RESIGNED/QUIT OR DRIVER TERMINATED LEASE
STATUS: COMPANY DRIVER
DRIVING EXPERIENCE: MOUNTAIN DRIVING OVER THE ROAD
EQUIPMENT OPERATED: FLAT BED
LOADS HAULED: GEN. COMMODITY
MACHINERY
OVERSIZED LOADS
PIPE
WORK RECORD: COMPANY POLICY VIOLATION

(*Id.* at 442.) At Cassara's request, Trism provided him with a list of the six reported accidents in a letter dated August 26, 1997:

On 8-26-95 backing out of the tractor shop at NIE Maryland terminal right side of tractor hit a parked trailer. $889.90 posted as collision damage.
On 3-1-96 near Laural, Montana, hit a deer, $604.40 posted as damage.
On 8-6-96 near Cleveland, Tennessee, turning around on parking lot damaging surface of parking lot. To date no claim for damage has been paid.
On 10-17-96, Ft. Worth, Texas, backing and struck a utility pole. You have indicated that an employee of the Consignee was acting as a flagger for you on that occasion. A claim for $719.53 is posted as damages.

On 11-21-96 at Pekin IL, drove over lawn to exit parking lot and bottomed out blocking street. To date no claim for damage has been paid.
On 11-26-96 at Harrisburg, PA, pulling into parking space and rear of trailer cut trailer tire on another vehicle. To date, no claim for damage has been paid.

(*Id.* at 360.)

In February 1997, and again in September 1997, Cassara contacted DAC, first disputing the accuracy of the WST information, and later, the Trism information reflected in the DAC report. [FN5] DAC contacted WST and Trism to verify the disputed entries. WST verified its report on March 19, 1997, and Trism did so on October 7, 1997. (Aplee. App. vol. I, at 17; *see id.* vol. II, at 461-62.) WST amended its report on April 15, 1997, deleting one of the two "accidents" initially reported because WST did not have to pay a claim arising out of the event. (*Id.* vol. I, at 28.)

FN5. On February 26, 1997, Cassara placed this consumer statement in his DAC file: "I was not involved in an accident. I am not aware of any complaints. I am not aware of what the term 'other' refers to." (*Id.* vol. II, at 437; *id.* vol. I, at 16-17.)

Upon further inquiry by DAC based upon Cassara's continuing dispute of its report, WST again verified its reported information, this time by letter dated October 16, 1997, detailing the reported accidents as well as a litany of company policy violations and disciplinary write-ups. (Aplee. App., vol. II, at 358-59.) As to the accidents, WST advised DAC that "WST's policy as it relates to accidents (was and continues to be) is to report all accidents to DAC which involve third party property damage if the accident is determined to be preventable." (*Id.* at 359.) WST also recounted several other occasions on which Cassara's vehicle had been damaged, including a "non-preventable accident" resulting in "damage (of unknown ***1216** sources) to his driver side mirror of his assigned tractor." (*Id.* at 358.) [FN6]

FN6. WST also addressed the reference to

"other" in DAC's report of Cassara's work record:

Finally, with regard to the word "other" as part of his work record, Mr. Cassara had problems following procedure as it relates to equipment inspection, dispatch communication and safety. This resulted in numerous complaints by the departments involved. Maybe Mr. Cassara would prefer to have a more specific definition of work record that would state that he failed to follow company policy despite repeated oral and written warning. If DAC changes the work record designation, I would suggest such language be used. (*Id.*)

As the district court pointed out in granting summary judgment, Cassara acknowledges that each of the *events* reported by WST and by Trism did occur. Those events remain uncontroverted facts for purposes of this appeal.

Cassara does not argue with history. Instead, he disputes DAC's reporting of these events as *accidents.* Reporting of accidents, Cassara urges, should be standardized by applying the definition found in 49 C.F.R. § 390.5 (2000). If the C.F.R. definition was applied to his own driving history, then no accidents would have been reported by either WST or Trism.

The District Court's Ruling

The district court granted summary judgment in favor of DAC, concluding that Cassara's complaint about inconsistent reporting of accidents "unsuccessfully attempts to circumvent the fact that the reports concerning his driving are, in fact, accurate," and that DAC "has established it followed reasonable procedures to insure maximum possible accuracy," entitling DAC to summary judgment on Cassara's claims brought pursuant to 15 U.S.C. § 1681e(b). (Order, entered January 3, 2000, at 11.) The district court rejected Cassara's contention that DAC should be applying the C.F.R. definition of "accident," noting that "public safety is best protected by the broadest possible interpretation and reporting." [FN7] (*Id.* at 11 & n. 1.)

FN7. The district court discussed *Fomusa v. Energy Sharing Resources*, No. 96-C-50410, 1999 WL 436596 (N.D.Ill. June 28, 1999), in which another district court had concluded that "DAC has shown it followed reasonable procedures to insure maximum accuracy" in its reporting of driver employment history records to its member employers. *Id.* at *4. Plaintiff in *Fomusa* complained about DAC's use of the phrase "failed to report accident" to characterize his 90-minute delay in telephoning his employer to report a trailer fire. *Id.* at *2. The *Fomusa* court observed that "[a]ll of these terms have a specific meaning as DAC's standard report format and uniform terms were created in conjunction with members of the trucking industry." *Id.*

The district court's summary judgment ruling also denied--implicitly, at least--DAC's counterclaim against Cassara for costs and attorney's fees pursuant to 15 U.S.C. §§ 1681n-1681o (2000) for having to defend claims brought in bad faith or for purposes of harassment. The district court ordered that DAC was awarded its costs, but that "[e]ach party is to bear its own attorney fees." [FN8] (*Id.* at 12.) DAC has cross-appealed from that ruling.

FN8. In response to a letter from DAC counsel seeking clarification, the district court entered an order on February 7, 2000 stating that "the Court concluded Plaintiff's claim was not frivolous by awarding attorney fees as set forth in the Order." (Order, filed February 7, 2000, Aplt.App. vol I, at 158.)

CASSARA'S FAIR CREDIT REPORTING ACT CLAIMS

DAC acknowledges that its reporting activities are governed by the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (2000), and that its employment history reports are considered to be "consumer reports" governed by FCRA. (Aplee. App. vol. I, at 3 (Affidavit of Richard ***1217** Wimbish, dated October 24, 1999, at 3 ¶ 8).) Section 607(b) of the FCRA, 15 U.S.C.A. § 1681e(b), reads: "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."

The official Federal Trade Commission commentary elaborates upon the language of § 607(b):

The section does not require error free consumer reports. If a consumer reporting agency accurately transcribes, stores and communicates consumer information received from a source that it reasonably believes to be reputable, and which is credible on its face, the agency does not violate this section simply by reporting an item of information that turns out to be inaccurate. However, when a consumer reporting agency learns or should reasonably be aware of errors in its reports that may indicate systematic problems

(by virtue of information from consumers, report users, from periodic review of its reporting system, or otherwise) it must review its procedures for assuring accuracy. Examples of errors that would require such review are the issuance of a consumer report pertaining entirely to a consumer other than the one on whom a report was requested, and the issuance of a consumer report containing information on two or more consumers (e.g., information that was mixed in the file) in response to a request for a report on only one of those consumers.

16 C.F.R. Part 600 App. (2000).

[3] To prevail in a private civil action under § 607(b), a plaintiff must establish that (1) the consumer reporting agency failed to follow reasonable procedures to assure the accuracy of its reports; (2) the report in question was, in fact, inaccurate; (3) the plaintiff suffered an injury; and (4) the consumer reporting agency's failure caused the plaintiff's injury. *See, e.g.*, *Whelan v. Trans Union Credit Reporting Agency*, 862 F.Supp. 824, 829 (E.D.N.Y.1994).

[4] Cassara urges reversal of the district court's grant of summary judgment, arguing that the district court weighed and determined fact issues still in genuine dispute. Cassara contends that as to "accident," DAC defines the term "so loosely ... that there is absolutely no way of predicting what is or is not recorded on DAC's reports," that "DAC reported that Cassara had been involved in eight accidents ... when he had arguably been involved in none," and that when asked, DAC "failed to conduct any substantial factual investigation" of the factual basis for its report. (Aplt. Br. at 46.) Cassara further contends that this court should grant judgment in his favor on the question of liability and remand the matter to the district court "only on the issue of damages and attorney fees." (*Id.* at 47.)

Cassara complains that DAC accepts employers' reporting of accident data without taking adequate steps to ensure that the events reported as "accidents" are accurately and consistently characterized as such. He asserts that DAC's reporting system is flawed because DAC "allows differences in reporting standards by different companies, making a driver employed by one company look worse than a driver employed by another for no other reason than the employer [s'] disparate reporting policies." (Aplt. Br. at 8.)

DAC offers some broad-brush guidance to its member employers as to what events should be reported as accidents, but otherwise leaves to the employers the determination whether a particular event should be characterized as an "accident." Cassara argues that DAC's passive approach to the problem of definition results in serious ***1218** inconsistencies among the reporting practices of various member employers. One employer's reportable "accident" may be another employer's unreported non-chargeable loss. Without uniformity in reporting, a driver working for one employer may have several accidents reported, while a driver working for another employer may have fewer--or none-- reported, even where the drivers' histories are equivalent. The difference is not one of driving record; it is a matter of employer reporting practices. This disparity, Cassara submits, proves unfairly misleading and renders the reporting inaccurate.

To resolve this problem, Cassara asserts that only those events that qualify as "accidents" under 49 C.F.R. § 390.5 (2000) should be reported as "accidents" by DAC. By limiting reporting of "accidents" to the C.F.R. definition, the reporting process gains uniformity. Enforcing the C.F.R. definition would eliminate misleading inconsistencies among employers reporting to DAC, resulting in even-handed treatment of driver histories concerning accidents.

DAC responds that its reporting procedures assure maximum accuracy of the data reported to its members; that its report concerning Cassara was accurate; that DAC investigated the underlying facts in a fashion that satisfies the requirements of the FCRA; [FN9] and that the district court erred in dismissing DAC's counterclaim against Cassara seeking costs and attorney's fees for Cassara's filing an FCRA action in "bad faith" or "for the purposes of harassment." (Aplee. Br. at 12-13, 48.)

FN9. DAC asserts that Cassara never presented his improper investigation claim before the district court, and should not be raising it for the first time on appeal. (Aplee. Br. at 13.)

DAC contends that there is a common understanding in the trucking industry of what an accident is, and that DAC is justified in relying on the employers' application of that common understanding in their reporting of employee driving histories. The C.F.R. definition, DAC insists, proves too narrow, omitting many incidents in a driver's history that prospective employers want to know about. Applying the commonly understood meaning to the events of Cassara's employment history, DAC insists that both WST and Trism reported accurate information concerning Cassara's accidents, that the information is reflected accurately in DAC's report, and that if the report is accurate, "then the procedures utilized by the

consumer reporting agency to create the report become irrelevant," and the court's inquiry need go no further. (Aplee. Br. at 15.)

DAC'S REPORT ON CASSARA: WAS IT ACCURATE?

Accepting DAC's suggestion that the "initial focus of this Court's inquiry is the accuracy of the report after DAC investigated Cassara's dispute," (Aplee. Br. at 16), we start from the uncontroverted premise that the events referred to in the verified WST and Trism reports did in fact occur. The events *as events* are not in dispute.

The dispute concerns the manner in which these events have been characterized--whether each event has been placed in the proper *category:* "accident" or "other." To speak in a meaningful way about whether the placement of events in a specific category is "accurate," we must first apprehend the criteria that define the content and limits of the category. [FN10]

FN10. Originally, the Greek "noun *kat;egorí;a* was applied by Aristotle to the enumeration of all classes of things that can be named--hence, 'category.' " John Ayto, *Dictionary of Word Origins* 101 (1990).

***1219 What is an "accident?"**

DAC's approach to the reporting of driver accident data has been evolving in recent years, but at all times pertinent to this appeal, DAC has consistently treated "accident" as a self-evident term. DAC's September 1993 *Guide to Termination Record Form* instructed employers to "[r]ecord [the] total number of accidents, whether preventable or nonpreventable; chargeable or nonchargeable. The number of accidents does not necessarily reflect fault on the part of the driver involved." (Aplee. App. vol. II, at 435; *see also id.* at 396-97 (Deposition of Kent Ferguson at 29:8-30:4).)

DAC has since developed a more detailed reporting option, one made available to members beginning in April of 1997. (Aplee. App. at 433-34.) In the more detailed version, DAC's "accidents" category is divided into two more categories: "DOT recordable accidents" and "non-DOT accidents/incidents." A DOT recordable accident is an accident within the meaning of 49 C.F.R. § 390.5--the kind of accident that the federal regulations require to be listed in the employer's own records, and that Cassara agrees should be reported. A "non-DOT accident/incident" is an event that falls outside the C.F.R. definition, but nevertheless is still thought of as an "accident" or an "incident." (Aplee. App. vol. II, at 434.) [FN11]

FN11. Neither WST nor Trism used the more detailed form in reporting about Cassara.

By 1998, DAC had modified its driver employment history reporting format to read:

> The equipment was involved in an accident or damaged while assigned to the driver regardless of fault during the period of employment referenced above
> Number of Accidents/Incidents: 06
> No additional accident/incident information available

(*Id.* at 438.) This statement indicates that while employed by Trism, Cassara was involved in six reported events--either "accidents," however defined, or "incidents" involving damage to his equipment. But to say that the "equipment was involved in an accident" does not describe or explain what an accident is, or how to tell whether someone has had one.

Apart from the more recent reference to "DOT recordable accidents," and some generalized guidance as to the immateriality of fault, DAC has left the meaning of "accident" to be defined by its reporting employers:

> A. I don't know that we normally get involved with discussing what a particular company's description of what an accident is. We allow them a means to certainly give this information out.... They are the ones determining--
> Q. What an accident is?
> A. --what an accident is, what goes in that particular section of the form.

(Aplee.App. vol. II, at 399 (Deposition of Kent Ferguson at 32:13-21).)

Words, Meanings, Categories, Criteria

Common use of a common word invokes implicit criteria. Absent common agreement, however, no implicit criteria come into play, and if the word is to have useful meaning--and if the category is to have a meaningful scope--some explicit criteria must be supplied to define the word, and to limit the category. Without common, agreed-upon criteria defining the scope of the category, "accident" may mean something different to each reporting employer.

Absent a common understanding or explicitly stated criteria, the reporting of numerical data grouped into the "accident" category necessarily would lack the precision ***1220** needed to assure consistency. Richard Wimbish, DAC's President, acknowledges this: "For

the DAC report to be effective, it is best to have uniform terms in order to compare apples to apples." (Aplee. App. vol. I, at 2 (Affidavit of Richard Wimbish at 2 ¶ 5).) Without consistency, the accuracy of the reporting is cast into doubt.

DAC recognized this problem in 1991, when it considered language to be added to its *Guide* indicating that "accident" included "preventable or nonpreventable; chargeable or nonchargeable" accidents without regard to fault:

> [S]ome companies were only putting chargeable accidents, some only preventable, some everything that occurred. So we were getting very wide variance of what was included in that particular category. So the definition was being expanded to try and cover all that was being reported there, which was difficult.

(Aplee.App. at 410-11 (Deposition of Kent Ferguson at 58:21-59:2) .) DAC revisited the problem in 1997 when it incorporated "incidents" into the category of reportable "accidents" in order to address the lack of agreement with many drivers as to what an "accident" is. As explained by DAC's President:

> [W]e have added the word "incident" along with the word "accident" and our report now states the number of "accidents/incidents". Our definition of "accident" to our customer has not changed.... The word "incident" was added because we have learned over the years that some drivers like to refer to minor accidents as "incidents" and that, to them, accidents were occurrences of a more serious nature. Further, there is no clear line or distinction between what is an "incident" or an "accident" and I believe that line normally depended upon the opinion of the driver in question with his attempt to limit what was an accident. Because of this mind set among many drivers, our consumer department received many driver disputes relating to the listing of accidents in their employment history reports. This created substantial work for that department.... We decided that the drivers might better understand that the report covered all "accidents" whether minor or major if we added "incident" to the term "accident". We did this and it seems to have lessened the number of disputes in this area and the workload of our consumer department.

(Aplee.App. vol I, at 11-12 (Affidavit of Richard Wimbish, dated October 24,1999, at 11-12 ¶ 22).) Thus, the inclusion of "incident" in the reporting of "accidents" used "a term on the face of the report that was familiar" to drivers and "better communicated what was being reported" by the employers, *viz.*, a broader usage of the term "accident" than many drivers had previously understood. [FN12] (*Id.*)

FN12. As John Wilson explains, "it does not matter what words we use to describe what, provided that we agree about the uses...." JOHN WILSON, LANGUAGE AND THE PURSUIT OF TRUTH 43 (1960).

Even with these efforts by DAC to clarify, member employers still rely largely upon their own criteria for reporting "accidents," "incidents," and "other" events worthy of note, and these criteria vary. Cassara asserts that WST "reports accidents that involve third party property damage that is determined to be preventable." WST itself avers that "[o]ur company chooses to report accidents that we deem to be preventable, or where the driver was at fault." (Aplee. App. vol. I, at 30 (Affidavit of Tom Walter at 4 ¶ 13).) Cassara asserts that Trism, on the other hand, "believes in reporting and considering ***1221** all accidents, big and small, regardless of fault." (Reply Br. at 2.)

Cassara argues that this kind of variation is widespread. DAC responds that among its members, the meaning of "accident" is commonly understood. As one DAC representative explained, "accident is a very general term. Most people know what an accident is...." (Aplee. App. vol. II, at 401 (Deposition of Kent Ferguson at 39:22-23).)

"In order for words to function in communication, they must *mean* something." ROBERT T. HARRIS & JAMES L. JARRETT, LANGUAGE AND INFORMAL LOGIC 113 (1956) (emphasis in original). If the meaning of "accident" is commonly understood, as DAC suggests, then what *is* that commonly understood meaning?

Dictionary definitions offer some guidance. *Webster's* says an accident is "[a] happening that is not expected, foreseen, or intended," or "an unpleasant and unintended happening, sometimes resulting from negligence, that results in injury, loss damage, etc." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 8 (4th ed.1999); *see also* WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 71 (1984) ("An unexpected and undesirable event."). [FN13] *Black's Law Dictionary* defines "accident" as an "unintended and unforeseen injurious occurrence." BLACK'S LAW DICTIONARY 15 (7th ed.1999). According to one insurance law treatise, where "in the act which precedes an injury, something unforeseen or unusual occurs which produces the injury, the injury results through accident." 1A JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 360, at 455 (rev.vol.1981).

FN13. Etymologically, an accident is simply 'something which happens'--'an event.' That is what the word originally meant in English, and it was only subsequently that the senses 'something which happens by chance' and 'mishap' developed. It comes from the Latin verb *cadere* 'fall'.... The addition of the prefix *ad*-'to' produced *accidere*, literally 'fall to,' hence 'happen to.' Its present participle was used as an adjective in the Latin phrase *r?s accid?ns*, 'thing happening,' and *accid?ns* soon took on the role of a noun on its own, passing (in its stem form *accident*-) into Old French and thence into English.
JOHN AYTO, DICTIONARY OF WORD ORIGINS 4 (1990).

DAC's President suggests that "[t]he term 'accident' is used in its ordinary sense in the motor carrier and insurance industries, i.e., an unexpected occurrence." (Aplee. App. vol I, at 11 (Affidavit of Richard Wimbish, dated October 24, 1999, at 11 ¶ 21) .) Another affiant avers that "an 'accident' as used in the motor carrier industry is merely an unanticipated event as defined by the National Safety Council." (Aplee. App. vol. I, at 33 (Affidavit of David M. Kuehl, dated September 9, 1999, at 2 ¶ 4).)

In fact, the National Safety Council has formulated an American National Standard *Manual on Classification of Motor Vehicle Traffic Accidents*, now in its sixth edition. *See* National Safety Council, *ANSI D16.1-1996 Manual on Classification of Motor Vehicle Traffic Accidents* (American National Standards Institute, Inc. 6th ed.1996) (hereinafter "*ANSI D16.1-1996* "). According to *ANSI D16.1-1996*, "An accident is an unstabilized situation which includes at least one harmful event." *Id.* at 13 ¶ 2.4.6. An "unstabilized situation" is defined as "a set of events not under human control. It originates when control is lost and terminates when control is regained or, in the absence of persons who are able to regain control, when all persons and property are at rest." *Id.* at 12 ¶ 2.4.4. A "harmful event" refers to an occurrence of injury or damage." *Id.* at 11 ¶ 2.4.1. *ANSI D16.1-1996* also refers to a "collision accident," that is, a "road vehicle accident other than an overturning accident ***1222** in which the first harmful event is a collision of a road vehicle in transport with another road vehicle, other property or pedestrians," and a "noncollision accident," meaning "any road vehicle accident other than a collision accident." *Id* . at 19 ¶¶ 2.6.2, 2.6.3. [FN14]

FN14. Under *ANSI D16.1-1996*, a noncollision accident includes an overturning, jackknife, accidental carbon monoxide poisoning, explosion, fire, breakage of part of the vehicle, and occupant hit by an object in or thrown against the vehicle or from a moving part of the vehicle, objects falling on or from a vehicle, a toxic spill or leakage, among others. *Id.* at 19 ¶ 2.6.3.

To date, DAC has not adopted the *ANSI D16.1-1996* definitions of accidents. The *ANSI D16.1-1996* definition nevertheless proves to be instructive: an "accident" generally involves at least one "harmful event," one "occurrence of injury or damage." At least one DAC witness defined "accident" in similar terms: "An unexpected event that involved damage to company equipment or someone else's property or person." (Aplee. App. vol. II, at 463 (Deposition of Alicia Jeffries at 9:10-11).)

In its brief, DAC seems to argue that the occurrence of damage or injury is not essential to an "accident," that an "unexpected occurrence" or "unanticipated event" would be sufficient. (*See* Aplee. Br. at 31. [FN15]) Yet there are many "unexpected occurrences" or "unanticipated events" encountered by commercial truck drivers and other motorists on a daily basis--occurrences and events that few would characterize as "accidents."

FN15. On the next page of its brief, DAC argues that "when a driver takes his heavy equipment over lawns, landscape and weaker hard surfaces, and causes damage, an accident has occurred," suggesting that the occurrence of damage defines the accident, even absent an unanticipated event. (*Id.* at 32.) This is not the only time that DAC's brief appears to argue seemingly contradictory propositions.

What criteria really define the category?

DAC's brief asserts that "DAC has defined each term in its report," and that "there was never a misunderstanding with the motor carriers regarding what was being reported." (*Id.* at 25.) This assertion may overstate things a bit.

From the materials in the record now before the court, it seems clear that DAC, responding to industry needs and concerns, intends "accident" to have a broad scope, and that DAC leaves it to the employers to define that scope according to their own needs. Those needs reach beyond concerns about highway safety to matters of economics and profitability. As DAC's President

explains:

> In my experience, drivers want to minimize the lesser accidents because they view these accidents differently than do the employers. Our members have made it very clear to DAC over the years that they want these minor accidents reported. A driver who has a record of breaking off mirrors, cracking fenders, wind guards, tearing off hinges, etc. can be *a non-profitable driver.*

(Aplee.App. vol. I, at 10 (Affidavit of Richard Wimbish, dated October 24, 1999, at 10 ¶ 20) (emphasis added).) Inclusion in DAC reports of "minor" accidents or "incidents" in which equipment was "damaged while assigned to the driver regardless of fault" thus speaks to economic concerns--driver profitability and company loss prevention--as well as public safety concerns. In explaining to Cassara's counsel why DAC's reporting of accidents is broader than the C.F.R. definition, counsel for DAC wrote:

> Let me give you a couple of examples of why the DAC definition is broader that the DOT's definition. Driver A may continually break off mirrors, hinges, doors, wind guards, etc. on the equipment ***1223** entrusted to him. *As a result, Driver A is not a profitable driver. His carelessness takes the profit out of the load.* None of these incidents would fall under the DOT definition of accident. *The DOT does not care how profitable a particular load is, but the employer does.* Driver B has accidents of backing into fixed objects, e.g., docks, buildings, light poles, cars, trucks, etc. No one was killed or injured, nor did serious property damage occur, but this is obviously a driver who does not pay sufficient attention and he would have killed someone except by the grace of God there was no one in the way. When selecting a driver, a company would prefer, if it has a choice, to pick a driver with the best driving record. The quality of drivers is not only measured by the results of their inattention....

(Aplee.App. vol. II, at 385-86 (emphasis added).) As discussed above, in responding to these concerns, DAC has attempted to integrate "incident" with "accident" in order to encompass even "minor" occurrences involving damage to equipment or property, regardless of driver fault. [FN16] In its optional reporting forms, employers may distinguish "DOT recordable accidents" from other accidents or incidents outside of the C.F.R. definition. But even these more recent efforts have stopped short of explicitly defining what DAC means by the term "accident."

> FN16. Having explained the employers' need for accurate information concerning all of a driver's "minor" accidents and incidents, (Aplee. Br. at 20-23), DAC's brief inexplicably asserts that "if the driver has six accidents within the DAC definition, an employer can opt to report none, one, or any number up to six. *Any report in each of these scenarios would be accurate.*" (*Id.* at 33 (emphasis added).) This proposition would seem to defeat DAC's stated purposes for reporting accident data involving drivers in the first place. (*See id.* at 21 ("Obviously, trucking companies want to have as much knowledge as possible about a driver's safety record.").) DAC's assertion only invites omissions and inconsistencies in the reporting process that guarantee *in* accuracy.

> When we don't know the meaning of a word, or when we suspect we may have connected the wrong meaning with the right word, or when for us a word is ambiguous or vague, we feel the need for a definition. We may ask, "What does this *word* mean?" Or we may ask, "What do *you* mean by this word?" In the former case, the supposition is that the word has some standard, regular, normal, correct meaning. In the latter case there seems to be implicit the recognition that a word's meaning may vary with its user.
>
> ROBERT T. HARRIS & JAMES L. JARRETT, LANGUAGE AND INFORMAL LOGIC 113 (1956) (emphasis in original).

Whatever the "common understanding" of the term "accident" among DAC's member employers may be, or whatever DAC chooses "accident" to mean, DAC remains somewhat at a loss to articulate it. The criteria defining the category of "accidents" reported on its forms remain largely implicit.

Were Cassara's Reported Events "Accidents"?

On their face, in 1997 and today, DAC's reports concerning Cassara indicate that as to the "accidents" reflected in each report, "*[t]he equipment was involved in an accident or damaged while assigned to the driver regardless of fault during the period of employment referenced above.*" (Aplee. App. vol. II, at 437-42.) The district court read this language to mean that "[a] DAC report includes accidents a driver may have regardless of the seriousness," and that the DAC report "contains the objective fact that damage occurred to the equipment while it was assigned to the driver." (Order, entered January 3, 2000, at 4 ¶ 10.)

***1224** In this instance, however, a close look at the DAC reports reveals that neither of these readings is entirely correct.

The evidence in the present record indicates that

DAC's reports on Cassara do *not* include all of Cassara's accidents while employed by WST, "regardless of the seriousness." When Cassara disputed the initial DAC reporting in 1997, WST removed one of two "accidents" it had reported three years earlier. Subsequently, a WST representative indicated that Cassara had as many as *four* "accidents" while driving for WST, only one of which is currently reflected in the DAC report. (Aplee. App. vol. I, at 28 (Affidavit of Tom Walter, dated September 9, 1999, at 2 ¶¶ 5-6).) Cassara disputes whether the events were "accidents" at all.

The verification that DAC obtained from Trism reflects events which Cassara argues were neither "accidents" nor "incidents" even as DAC uses those terms. According to Trism, on August 6, 1996, near Cleveland, Tennessee, Cassara turned around on a private parking lot, apparently damaging the surface of the parking lot. Cassara's truck and trailer were not damaged. [FN17] He did not collide with any other vehicle or object. Trism indicated to Cassara that no claim for damage has been paid.

FN17. When queried at deposition about whether such an event is an "accident," one DAC representative responded as follows:
Q. So if a driver were to drive over a parking lot and crack the parking lot, should that be listed under number of accidents?
A. If he did no damage to the truck or trailer, I would say no.
(Aplee.App. vol. II, at 402 (Deposition of Kent Ferguson at 45:12-16).) In subsequently submitted corrections, the witness changed his answer to "It would depend upon the facts," noting that his original answer "was incorrect." (Aplee. App. vol. II, at 430.)

Similarly, Trism verified that on November 21, 1996, at Pekin, Illinois, Cassara drove over a lawn to exit a parking lot and "bottomed out" his trailer, blocking the street. [FN18] It appears his equipment was not damaged; instead Trism noted damage to "landscaping," but advised Cassara that no claim for damage had been paid. [FN19]

FN18. In describing this event to the district court, DAC argued that this event was "reminiscent of the movie 'Smokey and the Bandit'. Plaintiff pulled his rig into a shopping center lot at night to go to sleep. When he awoke the next day, surprise, surprise, the parking lot was filled with customer's automobiles. Plaintiff was blocked in, but that did not deter the plaintiff. He took off over the shopping center's lawn and eventually got stuck and needed to be towed...." (Aplee. App. at 106 (citing Deposition of Joseph Cassara, dated May 24, 1999, at 103:4-104:16, Aplee. App. vol II, at 326-27).) According to Cassara, "the bottom of the trailer bottomed out on the crown of the road. So I had called a tow truck myself and paid for it myself, and it just needed a slight pull to get it going...." (Aplee. App. vol. II, at 326.)

FN19. This may indeed have been an "unexpected occurrence," but it seems doubtful that DAC's member employers would uniformly agree that a trailer becoming stuck on the crown of the road would constitute a reportable "accident." DAC argued to the district court that it "was an obvious accident, non-collision, but an accident nonetheless." (Aplee. App. vol. I, at 106.)

DAC's Senior Consumer Representative avers that each of these events, like the others reported by Trism, "was, in fact, an accident as that term is normally understood and as DAC defines it in its reports." (Aplee. App. vol. I, at 19 (Affidavit of Lynn Miller, dated September 9, 1999, at 3-4 ¶ 6).) Cassara disagrees. Without explicit criteria to apply in defining the category, resolution of the issue in this forum proves to be difficult.

The Question of Accuracy Raises a Genuine Issue

This court need not decide the question whether these events, or any others, ***1225** should be placed in the category of "accidents," or "accidents/incidents," or whether they are best listed as "other" events about which interested parties may inquire further. The question is whether, drawing all reasonable inferences in favor of Cassara, the district court was correct in concluding that DAC had shown that no genuine issues of material fact exist and that DAC is entitled to judgment as a matter of law concerning the accuracy of its reports.

[5] The district court soundly rejected Cassara's assertion that DAC should report only accidents within the meaning of 49 C.F.R. § 390.5. By the regulations' own terms, employers may investigate driver employment histories and driving records beyond the minimum standards established by the regulations themselves. As the present record amply demonstrates, the motor carrier industry's needs and concerns

involving drivers extend to a range of past accidents, incidents, mishaps, occurrences and events well beyond those encompassed by § 390.5. DAC's reporting system seeks to satisfy those needs and concerns as well as the federal regulatory requirements.

However, the district court's conclusion that Cassara's only basis for claiming that DAC's reporting was inaccurate "is his belief that terms should be defined in the best light toward him" does not resolve the question of whether the reporting was in fact accurate in light of whatever definitions or criteria *do* apply, or the more fundamental question whether absent an explicit definition of "accident," DAC has "followed reasonable procedures to insure maximum possible accuracy" as required by the FCRA. The district court's grant of summary judgment in this regard may well have been premature.

On the present record, it seems apparent that at least one of Cassara's former employers, WST, applies criteria in reporting drivers' accidents that materially differ from those urged by DAC as being commonly understood and applied by its reporting employers, and that DAC has been made aware of this. If, as DAC's President suggests, for "the DAC report to be effective, it is best to have uniform terms in order to compare apples to apples," then discrepancies among employers as to what it treated as a reportable accident become important. Cassara has pointed out such discrepancies, albeit at best a minimal showing on the present record.

We conclude that Cassara has raised a genuine issue of material fact as to (1) whether DAC's reports reflecting one accident while he was employed at WST and six accidents while he was employed at Trism are in fact "accurate" within the meaning of the Fair Credit Reporting Act, and (2) whether DAC failed to follow reasonable procedures to assure the accuracy of its reports--specifically, whether DAC is or should be reasonably aware of systematic problems involving the reporting of "accidents" by its member employers.

It certainly is not this court's role to define what an "accident" is for the use and benefit of the motor carrier industry. We affirm the district court's ruling declining to prescribe that DAC's reporting of accidents be limited to "accidents" within the meaning of 49 C.F.R. § 390.5 (2000). But if employers in that industry are to communicate meaningfully among themselves within the framework of the FCRA, it proves essential that they speak the same language, and that important data be reported in categories about which there is genuine common understanding and agreement. Likewise, if DAC is to "insure maximum possible accuracy" in the transmittal of that data through its reports, it may be required to make sure that the criteria defining categories are made explicit and are communicated to all who participate.

***1226** As the FTC Commentary suggests, if DAC "learns or should reasonably be aware of errors in its reports that may indicate systematic problems," then "it must review its procedures for assuring accuracy." 16 C.F.R. Part 600 App., at 508 (2000). "If the agency's review of its procedures reveals, or the agency should reasonably be aware of, steps it can take to improve the accuracy of its reports at a reasonable cost, it must take any such steps. It should correct inaccuracies that come to its attention." *Id.* Not only must DAC review its own procedures, it "must also adopt reasonable procedures to eliminate systematic errors that it knows about, or should reasonably be aware of, resulting from procedures followed by its sources of information," *id.*, in this case, its member employers. DAC may require a reporting employer who frequently furnishes erroneous information to revise its procedures "to correct whatever problems cause the errors." *Id.* DAC, then, is in a position to require its member employers to report accidents according to a uniform definition that DAC may articulate.

As DAC acknowledges, Cassara has not been alone among drivers in expressing concern about DAC's use of the term "accident" in reporting driving histories. DAC has already taken steps to address some of those concerns and to better communicate to both employers and drivers the meaning of the data it reports.

There may be more steps that need to be taken, or there may not.

We do not decide that today. We simply hold that Mr. Cassara has raised a triable issue as to whether DAC's reporting about his accident history is accurate, and whether DAC must review its procedures for assuring accuracy, and if warranted, take additional steps to assure maximum accuracy as required by the Fair Credit Reporting Act. [FN20]

FN20. If Cassara can prove that DAC failed to adopt reasonable procedures to eliminate systematic errors that it knew about, or should reasonably have been aware of, resulting from procedures followed by its member employers, that this failure resulted in distribution of an inaccurate report that caused him injury, then DAC may be liable to Cassara in damages.

We need not separately address Cassara's claim of defective investigation of his report by DAC because his allegation that DAC "failed to conduct any substantial factual

investigation" of the factual basis for its report, (Aplt. Br. at 46), finds no support in the present record, and because his allegations before the district court of internal inconsistencies in DAC's verification of accident data, (Aplee. App. at 42-45, 52-54), depend upon the same categorical consistency problem as his inaccurate reporting claim.

CONCLUSION

This court concludes that Joseph Cassara has raised a genuine issue of material fact concerning his claim of inaccurate reporting of his employment history accident data by DAC Services, Inc. under § 607(b) of the Fair Credit Reporting Act, 15 U.S.C. § 1681e(b) (2000), and specifically, his allegations that (1) DAC failed to follow reasonable procedures to assure the accuracy of its reports of numbers of accidents; and (2) the report in question here was, in fact, inaccurate. To that extent, the district court's judgment is VACATED AND REMANDED for further proceedings consistent with this opinion. In all other respects, the judgment of the district court is AFFIRMED.

276 F.3d 1210

END OF DOCUMENT

EXHIBIT 2

DAC services

TERMINATION RECORD FOR CDL DRIVERS

[1] MEMBER I.D.

[2] INDIVIDUAL'S LAST NAME — FIRST NAME INITIAL

[3] SOCIAL SECURITY # — [4] DATE OF BIRTH Mo. Day Yr

[5] PERIOD OF SERVICE ____ TO ____

	Yes	No	
[6] Was the driver involved in DOT or Non-DOT recordable accidents/incidents during this period of service?	☐	☐	*If yes, please complete accident and/or drug alcohol information on reverse.*
[7] Do you have record of the driver violating DOT drug/alcohol regulations in the past 2 years?	☐	☐	

[8] STATE — LICENSE #

STATE — LICENSE #

Important Notice: Refer to "Guide" for full explanation of codes below (Form SL0050g)

[9] **Eligible for Rehire** *(Circle only one)* 001 Yes 002 Yes, but against company policy 003 No 004 Review required before hiring

[10] REASON FOR LEAVING
(Circle Only One)
101 Discharged (or Company Terminated Lease)
104 Agency Lease Terminated
106 Laid Off (or Lease Suspended)
112 Leave of Absence
122 Repossession/Lease Default
127 Retired
133 Resigned/Quit (or Driver Terminated Lease
199 Other _____

[11] STATUS
(Circle All That Apply)
202 Company Driver
207 Lease Driver (Employee of Independent Contractor)
213 Owner/Operator
217 Lease Purchase Program
228 Trip Leaser
230 Student/Trainee
233 Student CDL Permit
234 Casual Driver
299 Other _____

[12] DRIVER'S EXPERIENCE
(Circle All That Apply)
303 Local
305 Regional
311 Mountain Driving
327 Over the Road
332 Single Driver
333 Driver Trainer/Instructor
351 1st Driver on Team
352 2nd Driver of a Team
355 Freight Handling
399 Other _____

[13] EQUIPMENT OPERATED
(Circle All That Apply)
505 Auto Transporter
511 Bus
516 Double Trailer
523 Driveaway/Towaway
527 Dry Box
529 Dump Truck
532 Flat Bed
533 Mobile Crane
534 Pick Up or Hot Shot
540 Refrigerated
542 Specialized Trailer
544 Specialized Truck/Toter
547 Straight Truck
549 Pneumatic Trailer
552 Tank Truck
562 Triple Trailer
573 Van
581 Winch
599 Other _____

[14] LOADS HAULED
(Circle All That Apply)
707 Bulk Commodity
712 Container
713 Empty Trailer
714 Gen. Commodity
716 Electronics
718 Hanging Meat
720 Hazardous Material
725 Household Goods
729 Livestock
730 Lumber
731 Machinery
733 Mobile Homes
735 Motor Vehicle
750 Passengers
762 Oversized Loads
763 Parcels
764 Pipe
769 Refrigerated
773 Steel
799 Other _____

[15] WORK RECORD
(Circle All That Apply)
901 Satisfactory
902 Superior
903 Outstanding
912 Excessive Complaints
913 Cargo Loss
915 Falsified Employ. Application
917 Equipment Loss
924 Late Pick Up/Delivery
926 Log Violation
928 No show
929 Failed To Report Accident
931 Quit Under Dispatch/Did Not Possess a Load
933 Quit/Dismissed During Training/ Orientation/Probation
935 Company Policy Violation
938 Unsatisfactory Safety Record
940 Disconnected Tracking Device
944 Personal Contact Requested
957 Unauthorized Equip. Use
959 Unauthorized Passenger
961 Unauthorized Use of Company Funds
999 Other _____

QUIT UNDER LOAD/ABANDONMENT
(If Applicable, Circle Only One)
950 Co. Terminal – With Notice
951 Auth. Location – With Notice
952 Co. Terminal – W/O Notice
953 Unauth. Location – W/O Notice
954 Left Vehicle With Team Driver
955 Unauth. Location – With Notice
956 Auth. Location – W/O Notice

[16] _____
List Disputed Employment Code(s) separated by a comma

[17] _____ _____
Contact Person (optional) Date

DAC Services 4500 S. 129th E. Ave, Ste 200 Tulsa, OK 74134-5885
800/331-9175 (Nationwide) DAC Customer Service 800/322-9651
FAX 800/327-3784

USIS00154 (00004)

Case No. 04-1384-Ex M3

TERMINATION RECORD DETAILS

[A] MEMBER I.D. # _____ [B] SOCIAL SECURITY # _____

Please detail all DOT recordable accidents (use additional paper if more than 8) and the most severe non-DOT recordable accidents

[C] _____ Total Number of DOT Recordable Accidents [D] _____ Total Number of Non-DOT Accidents/Incidents

[E] Accident/ Incident#	[F] DOT?	[G] Date	City	[H] State	[I] # of Injuries	[J] # of Fatalities	[K] HAZMAT	[L] Description Codes(s) (Use up to 4)
Sample	Y or N	3/3/1998	Tulsa	OK	0	0	Y or N	01, 02
1	Y or N						Y or N	
2	Y or N						Y or N	
3	Y or N						Y or N	
4	Y or N						Y or N	
5	Y or N						Y or N	
6	Y or N						Y or N	
7	Y or N						Y or N	
8	Y or N						Y or N	

ACCIDENT DESCRIPTION CODES

01 Backing	09 Overturn	17 Picked Up Damaged Trailer	24 Fuel Spill	40 Preventable Accident/ Incident
02 Right Turn	10 Struck Overhead Object	18 Mechanical Failure	25 Fire	50 Non-Preventable Accident/Incident
03 Left Turn	11 Jack Knife	19 Ran Traffic Control	26 Hit Animal	99 Misc.
04 Lane Change Side Swipe	12 Hit Pedestrian	20 Ran Off Roadway	27 Hit Parked Vehicle	
05 Rear End Collision	13 Passing	21 Downgrade Runaway	28 Load shift	
06 Intersection Collision	14 Dropped Trailer	22 Trailer Breakaway	29 Theft	
07 Head On Collision	15 Hit While Parked	23 Cargo Spill	30 Rollaway	
08 Struck Stationary Object	16 Hit While Moving		31 Non Contact	

[M] List disputed accident/incident number(s): (1,2,3 etc.) and/or items C and D _____

Indicate below any violations of 49 C.F.R. Part 40 that occurred during this period of service.

Violation		Date(s) of violation: Mo Day Yr	Mo Day Yr
1	☐ Driver had an alcohol test with a confirmed B.A.C. of 0.04 or greater.		
2	☐ Driver had a controlled substance test with a positive result.		
3	☐ Driver refused a controlled substance or alcohol test (includes verified adulterated or substituted results).		
4	☐ Driver violated other DOT drug/ alcohol regulations.		

Indicate below any violations of 49 C.F.R. Part 40 that occurred within the past 2 years which were reported to you by a previous employer.

Violation		Date(s) of violation: Mo Day Yr	Mo Day Yr
5	☐ Previous employer reported DOT drug/alcohol violation(s).		

CHECK HERE ☐ *if driver disputes Drug/Alcohol violation(s).*

EXHIBIT 3

DAC Services

GUIDE TO THE TERMINATION RECORD FORM

This guide includes the definitions of codes and terms used in the current version of DAC's Termination Record Form for CDL drivers.

While most of the descriptions on the termination form are self-evident, we recommend you consult this guide when contributing termination records if you are in doubt.

You may also receive employment histories contributed by other DAC members that contain terms not used in your operation. Use this guide to interpret any term in which you are unsure of the meaning.

USIS04141(OOIDA)

DAC SERVICES 4500 S. 129TH EAST AVE., Ste 200 TULSA, OK 74134
DAC 800 331-9175 (Nationwide) DAC Customer Service 800 322-9651
Fax: 800-327-3784

FormSL0050g

TERMINATION RECORD DETAILS

1 MEMBER ID #: Record the customer number assigned by DAC.

2 LAST NAME AND FIRST INITIAL OF FIRST NAME: Record driver's last name with no space and no punctuation. In the box at the end of this line, record the first initial of the driver's first name.

3 SOCIAL SECURITY NUMBER: Record the driver's social security number.

4 DATE OF BIRTH: Record the month, day and year (including century) of the driver's date of birth.

5 PERIOD OF SERVICE: Record period of service using starting month and year (including century) to terminating month and year (MMCCYY to MMCCYY).

6 WAS THE DRIVER INVOLVED IN DOT OR NON-DOT ACCIDENTS/INCIDENTS DURING THIS PERIOD OF SERVICE?: Answer by marking the yes or no box. If yes, give accident details on the back of the form.

7 DO YOU HAVE RECORD OF THE DRIVER VIOLATING DOT DRUG/ALCOHOL REGULATIONS IN THE PAST 2 YEARS?: Answer by marking either the yes or no box. If yes, indicate the violation on the back of the form.

8 STATES OF LICENSE: Record the post office abbreviation for the state or states in which the driver has held licenses while with your company. Record license number(s) omitting all spaces and dashes.

9 ELIGIBLE FOR REHIRE (circle only one code)
001 Yes: Driver is eligible for rehire.
002 Yes, but against company policy: Driver is qualified, but your company has a policy against rehiring drivers regardless of qualifications.
003 No: Driver is ineligible for rehire based on current company standards.
004 Review required before rehiring.

10 REASON FOR LEAVING (circle only one code)
101 Discharged: Employment or lease is involuntarily terminated.
104 Agency Lease Terminated: An agency affiliated with the company has terminated, closed, or is no longer under contract.
106 Laid Off: Driver is laid off or lease has been suspended due to business reasons unrelated to performance.
112 Leave of Absence: Company approved leave without pay.
122 Repossession/Lease Default: Owner Operator/Independent Contractor has defaulted on a lease contract or had their truck(s) and/or trailer(s) repossessed.
127 Retired: Driver retires.
133 Resigned/Quit: Employment or lease is voluntarily terminated.
199 Other: Anything other than items listed above. This space is provided for your documentation. DAC will record "other" only.

11 STATUS (You may circle more than one code)
202 Company Driver: An employee of the company.
207 Lease driver: Employee of an independent contractor.
213 Owner/operator: A person who owns and drives his own equipment for a company as its employee or as an independent contractor.
217 Lease Purchase Program: A driver that is currently participating or has participated in an equipment lease purchase program.
233 Student CDL Permit: A student qualified as a second seat driver while on a CDL learner permit.
228 Trip Leaser: Driver is acting as an independent operator or as an agent of a carrier contracting with your company for specific loads hauled on a trip by trip basis.
230 Student/Trainee: A student or trainee of the company.
234 Casual Driver: A driver hired to drive on an intermittent, casual, or occasional basis who may or may not be an employee of the company.
299 Other: Anything other than items listed above (see 199).

12 DRIVER'S EXPERIENCE (You may circle more than one)
303 Local: Driver had substantial city driving experience.
305 Regional: Driver had substantial regional driving experience.
311 Mountain driving: Driver had substantial mountain driving experience.
327 Over-the-Road: Driver had substantial long haul driving experience.
332 Single Driver: Driver had sole responsibility for equipment and substantial experience driving alone.
333 Driver Trainer/Instructor: Driver had substantial road experience training students and/or trainees. A company employee that has a substantial amount of experience with classroom and driving instruction.
351 1st driver of a Team: Driver had primary responsibility in a two-member team.
352 2nd driver of a Team: Driver had secondary responsibility in a two-member team.
355 Freight Handling: Driver had substantial experience loading and unloading freight.
399 Other: Anything other than items listed above (see 199).

13 EQUIPMENT OPERATED (You may circle more than one)
505 Auto Transporter: Truck, semi-trailer, or trailer with the body designed for the transportation of other vehicles.
511 Bus: A motor vehicle designed, constructed and used for the transportation of passengers.
516 Double trailer: (Also twin trailer-unit) consists of tractor, semi-trailer and full trailer.
523 Driveaway/Towaway: Motor vehicle(s) or trailer(s) constitute the commodity being transported. One or more sets of wheels of such vehicles are on the road during transportation.
527 Dry box: Enclosed semi-trailer.
529 Dump truck: Truck, semi-trailer or trailer which can be tilted to discharge load.
532 Flat bed: Truck or trailer without sides or top.
533 Mobile Crane: A truck designed for the specific purpose of transporting a crane.
534 Pick-Up or Hot Shot:: Up to one ton truck with or without a trailer.
540 Refrigerated: Refrigerated truck or trailer designed for hauling perishables.
542 Specialized trailer: A trailer designed for a specific purpose not included in the other categories listed (e.g. missile carrier).
544 Specialized truck/Toter: A straight truck/tractor with the body designed for a specific purpose other than those listed in other categories here (e.g. concrete, refuse, etc.).
547 Straight truck: A truck with the body and engine mounted on the same chassis and not listed elsewhere under equipment operated.
549 Pneumatic Trailer: Truck, semi-trailer or trailer loaded and/or unloaded using compressed air.
552 Tank truck: Truck, semi-trailer, or trailer with a tank body for hauling petroleum, chemicals, liquids, or dry commodities in bulk.

562 Triple trailer: Tractor, semi-trailer plus two trailers.
573 Van: Van, including step van.
581 Winch: Hoist used on straight truck or tractor (includes gin pole).
599 Other: Anything other than items listed above (see 199).

14 LOADS HAULED (You may circle more than one)
707 Bulk Commodity: Liquid or dry bulk.
712 Containers: Hauling of large cargo-carrying containers that can be easily interchanged between trucks, trains, and ships, without rehandling contents.
713 Empty trailer: Driver delivers empty trailers—does not apply to deadheading.
714 General Commodity: Varied types of freight.
716 Electronics: Transporting electronic commodities requiring special handling.
718 Hanging meat: Self explanatory.
720 Hazardous material: As designated by the Department of Transportation including but not limited to: explosives, radioactive materials, etiologic agents, flammable liquid or solids, combustible liquids or solids, poisons, oxidizing or corrosive materials, and compressed gases.
725 Household goods: Self explanatory.
729 Livestock: Transporting cattle, horses, etc.
730 Lumber: Self explanatory.
731 Machinery: Self explanatory.
733 Mobile homes: Self explanatory.
735 Motor vehicles: Transporting of motor vehicles by hauling them on special vehicles or through driveaway-towaway.
750 Passengers: People.
762 Oversized loads: Loads requiring special permits due to size or weight.
763 Parcels: Parcels and packages.
764 Pipe: Self explanatory.
769 Refrigerated: Self explanatory (not including hanging meat).
773 Steel: Other than pipe.
799 Other: Anything other than items listed above (see 199).

15 WORK RECORD (You may circle more than one)
It is strongly recommended that items denoting less than satisfactory performance be supported by documentation in the driver's file.
901 Satisfactory: Driver meets minimum company standards of performance in all categories.
902 Superior: Driver exceeds minimum company standards of performance in all categories.
903 Outstanding: Driver's performance is outstanding in all categories.
912 Excessive Complaints: An excessive number of complaints have been received regarding the driver's service and/or safety.
913 Cargo loss: Cargo was lost, stolen, damaged or destroyed while assigned or under direct responsibility of the driver.
917 Equipment loss: Equipment was lost, stolen, damaged or destroyed while assigned to or under direct responsibility of driver.
915 Falsified Employment Application: Falsified information on employment application or omitted information as required by company, state, or federal regulations.
924 Late pick up/Delivery: Failed to make pickup or delivery according to schedule.
926 Log Violation: Violation of Federal Motor Carrier Safety Regulations, "Hours of Service," part 395.
928 No show: Driver failed to appear on job site without notification or approval of supervisor. Driver has hauled previous loads for the company.
929 Failed To Report Accident: Driver violated accident reporting requirements while in the service of the company.
931 Quit Under Dispatch: Driver was available for work, assigned a load but quit before load was secured. Driver did not possess a load.
933 Quit/Dismissed During Training/Orientation/Probation: Driver did not complete company training, orientation and/or probabtion. If the driver quit or was dismissed during orientation, leave sections 12, 13 & 14 blank and do not provide further information to section 15.
935 Company policy violation: Driver violated company policies and/or procedures. Use this code only if the other selections in this section do not indicate the company policy violated.
938 Unsatisfactory Safety Records: Driver did not meet company safety standards.
940 Disconnected Tracking Device: The driver disconnected the truck and/or trailer-tracking device(s) without company authorization
944 Personal Contact Requested: Company issuing record has further information to provide regarding the driver or for the driver.
957 Unauthorized equipment use: Deviated from route or used equipment for purposes not specified by company. (Not intended to be used when the driver has resigned/quit or terminated lease and returned equipment to the nearest company terminal or a location authorized by the company.)
959 Unauthorized passenger: Passenger in company vehicle contrary to company policy or did not meet company policy requirements covering authorized passenger.
961 Unauthorized Use of Company Funds: Driver used company funds for purposes not authorized by company.
999 Other: Anything other than items listed above (see 199).

QUIT UNDER LOAD/ABANDONMENT: (Circle only one code, if applicable) Quit job before truck and/or cargo was delivered to final destination.
950 Co. Terminal - With Notice: Left truck and/or cargo at a company terminal. Driver did notify the company of termination. (Not intended to be used when the driver has resigned/quit or terminated lease and returned equipment to the nearest company terminal or a location authorized by the company.)
951 Auth. Location - With Notice: Left truck and/or cargo at a location authorized by the company. Driver did notify the company of termination.
952 Co. Terminal - W/O Notice: Left truck and/or cargo at a company terminal. Driver did not notify the company of termination. (Not intended to be used when the driver has resigned/quit or terminated lease and returned equipment to the nearest company terminal.)
953 Unauth. Location - W/O Notice: Left truck and/or cargo at a location unauthorized by the company. Driver did not notify the company of termination.
954 Left Vehicle With Team Driver: Left truck and/or cargo in the possession of a team driver.
955 Unauth. Location - With Notice: Left truck and/or cargo at a location unauthorized by the company. Driver did notify the company of termination.
956 Auth. Location - W/O Notice: Left truck and/or cargo at a location authorized by the company. Driver did not notify the company of termination.
**** The following codes are no longer used, but could appear on older termination records.
909 Abandonment: Abandoned truck and/or cargo without notification to the company.
937 Quit Under Load: Quit job before truck and/or cargo was delivered to final destination. Assumes that driver did notify company of termination.

16 LIST DISPUTED EMPLOYMENT CODES(S): List any employment codes that were disputed by the driver at the time of termination.

17 CONTACT PERSON: Signature of individual completing form and date.

A Member I.D.#: Record the customer number assigned by DAC.

B Social Security #: Record the driver's Social Security Number.

ACCIDENT/INCIDENT DETAILS

C Total Number of DOT Recordable Accidents: Record the total number of accidents that are classified as "recordable" under DOT guidelines. The number of accidents listed does not necessarily reflect fault on the part of the driver involved.

D Total Number of Non-DOT Accidents/Incidents: Record the total number of accidents/incidents that do not meet the DOT recordable classification. Accidents/incidents listed do not necessarily reflect fault on the part of the driver involved.

E DOT?: Circle Y or N to indicate whether the accident meets the DOT guidelines for a recordable accident or did not meet those guidelines.

F Date: Record the month, day and year (including century) the accident/incident occurred.

G City: Record the city or town (or nearest) in which the accident/incident occurred.

H State: Record the state in which the accident/incident occurred.

I Injuries: Record the total number of persons injured as a result of the accident/incident who immediately received medical treatment away from the scene.

J Fatalities: Record the total number persons that died as a result of the accident/incident.

K HAZMAT: Record whether hazardous materials, other than fuel from the tanks of motor vehicles involved in the accident/incident, were released.

L Description Code(s): You may use up to four (4) accident description codes to describe each accident.

01 Backing: Occurred while backing.
02 Right Turn: Occurred while making a right turn.
03 Left Turn: Occurred while making a left turn.
04 Lane Change Side Swipe: Involved a side swipe collision while changing lanes.
05 Rear End Collision: Involved striking another vehicle in the rear.
06 Intersection Collision: Involved a collision while in an intersection.
07 Head-On Collision: Involved a head-on collision with another vehicle.
08 Struck Stationary Object: Involved an impact with a stationary (fixed) object.
09 Overturn: Involved the truck and/or trailer overturning.
10 Struck Overhead Object: Involved an impact with an overhead object.
11 Jack-knife: Involved the truck and trailer jack-knifing.
12 Hit Pedestrian: Involved an impact with a pedestrian.
13 Passing: Occurred while passing another vehicle.
14 Dropped Trailer: Involved the trailer being dropped.
15 Hit While Parked: Involved the truck and/or trailer being hit while parked.
16 Hit While Moving: Involved the truck and/or trailer being hit by another vehicle or object while moving.
17 Picked Up Damaged Trailer: The driver picked up a trailer that had been previously damaged.
18 Mechanical Failure: Occurred due to mechanical failure of the truck and/or trailer.
19 Ran Traffic Control: Involved a failure to yield at traffic control.
20 Ran Off Roadway: Involved the truck and/or trailer running off the roadway.
21 Downgrade Runaway: Involved loss of control on a downgrade.
22 Trailer Breakaway: Involved the trailer breaking away from the tractor.
23 Cargo Spill: Involved a cargo spill.
24 Fuel Spill: Involved a fuel spill from the power unit.
25 Fire: Involved a fire.
26 Hit Animal: Involved an impact with an animal.
27 Hit Parked Vehicle: Involved an impact with a parked vehicle.
28 Load Shift: Involved a load shift.
29 Theft: Involved theft of the truck, trailer and/or cargo.
30 Rollaway: Involved a parked truck and/or trailer rollaway.
31 Non-Contact: Did not involve a collision.
40 Preventable Accident/Incident: Based on your company guidelines the accident/incident was preventable.
50 Non-Preventable Accident/Incident: Based on your company guidelines the accident/incident was non-preventable.
99 Misc.: Anything other than the items listed above.

M List Disputed Accident/Incident Number(s): List the accident/incident number(s) (1, 2, 3, etc. in the preceding chart) that the driver disputes. If the driver disagrees with the total number of DOT or non-DOT accidents/incidents, enter items C and/or D.

DRUG/ALCOHOL VIOLATION DETAILS

1 Driver had an alcohol test with a confirmed B.A.C. of 0.04 or greater: If the driver violated this section of 49 C.F.R. Part 40, Mark an "X" in the box and list the date(s) of violation.

2 Driver had a controlled substance test with a positive result: If the driver violated this section of 49 C.F.R. Part 40, mark an "X" in the box and list the date(s) of violation.

3 Driver refused a controlled substance or alcohol test (includes verified adulterated or substituted results): If the driver violated this section of 49 C.F.R. Part 40, mark an "X" in the box and list the date(s) of violation.

4 Driver violated other DOT drug/alcohol regulations. If the driver violated this section of 49 C.F.R. Part 40, mark an "X" in the box and list the date(s) of violation.

5 Previous employer reported DOT drug/alcohol violation(s). If the driver violated this section of 49 C.F.R. Part 40, mark an "X" in the box and list the date(s) of violation.

Check Here: Mark an "X" in the box if the driver disputes any of the drug/alcohol violations.

EXHIBIT 4

Report on Definitional Issues in *OOIDA v. USIS*

Edward Schiappa, University of Minnesota

June 2, 2005

Executive Summary

- The purpose of definitions is to provide precise, accurate meanings to a word or phrase. Good definitional practices facilitate *denotative conformity* (agreement about what a word or phrase refers to) and *connotative predictability* (a reliable sense of the reactions a word or phrase elicits).

- Good definitions or category descriptions provide clear exemplars of the phenomenon being defined such that members of a particular language community understand that "X counts as Y in context C." Members of a language community, such as the trucking industry, must have shared understanding of how information is *encoded* into data and how data should be *decoded* accurately.

- Good definitional practices meet four criteria: Clarity, Shared Purpose, Appropriate Authority, and Feedback. Collectively, these practices facilitate a language community's shared understanding of what "attributes" are central and important to the catetgories used by that community.

- The following phrases and definitions used in DAC's Termination Record Form and DAC's *Guide to the Termination Record Form* were analyzed: "company policy violation," "unsatisfactory safety record," "excessive complaints," "cargo loss," "equipment loss," "quit/dismissed during training/orientation/probation," "eligible for rehire: no," "other," "personal contact requested," "late pick up/delivery," "log violation," "no show," "failed to report accident," "quit under dispatch," "unauthorized equipment use," "unauthorized passenger," and "unauthorized use of company funds."

  In all cases, the "definitions" provided were seriously flawed: They were circular, vague, ambiguous, or open to abuse. They fail to facilitate denotative conformity or connotative predictability.

- The definitional practices of USIS's DAC Services fail to meet the four criteria of good definitional practices. The flawed design of the code categories can be understood clearly by considering how the codes *could* have been defined more clearly.

- Accurate interpretation of data generated by TRF reports is impossible. The problems are systemic to the design of the form and its definitional glossary. The Work Record section of the TRF does not meet the goal of "maximum possible accuracy of the information concerning the individual about whom the report relates."

Report on Definitional Issues in *OOIDA v. USIS*

Edward Schiappa, University of Minnesota

June 2, 2005

This report is divided into three sections. Section I describes a set of standards for understanding and evaluating definitions and categories. Section II provides an analysis of the definitions provided in the *Guide to Termination Record Forms* distributed by USIS's DAC Services. Section III provides an overall assessment of the definitional issues.

I. Standards for Definitions & Categories

In this section I provide a set of criteria for evaluating definitions and categories. I frame my remarks as answers to a series of questions: What is a definition? What is the difference between a definition and a category (or "classification")? What is the purpose of definition? And, lastly, What are the criteria for good definitional practices?

What is a definition?

Since definition is a topic that has been of interest for well over 2,000 years, it is not surprising that there are actually a number of definitions of "definition" (Robinson, 1950; Rey, 2000). Aristotle is credited for the standard definitional form involving genus and difference: An *X* is (a kind of) *class name* that has such-and-such *attributes*. I will discuss categories and attributes in the following subsection. Before that discussion, we need to recognize that distinctions are drawn among lexical, ostensive, operational, theoretical, stipulative, circular, and other types of definition. It is not necessary to discuss all of these types of definition, but four are particularly relevant. First, a *lexical* definition is simply the sort of definition found in a

dictionary. It is an empirical guide to usage; that is, a dictionary tells us what the most common use of words has been, and thus functions as a prescriptive guide for how language users should use the word now.

For ordinary, day-to-day use, a standard dictionary is adequate. Groups of language users often have specific needs and interests that require them to use words in a more precise way than is common in ordinary language use. Obvious examples of this would be legal, medical, and scientific terms. In such specialized language communities, a good deal of effort is expended defining words in a precise manner. Ordinary words take on a far more specific meaning within a specialized language community (such as "force" in physics or the law). It should be noted, however, that it is not only the highly specialized fields of law, medicine, and science that develop their own special uses for words. Indeed, any time an identifiable group of people share a common set of experiences, they can be described as a language community that develops a particular set of language practices that mark them as distinct. If a person becomes a musician, an auto mechanic, a professional poker player, a salesperson, or a truck driver, part of learning how to be part of that community involves learning to "talk the talk." Joining a community, such as "the trucking industry," is joining a *language* community that uses words in a particular fashion. Some of those words may be unique to that community, and other words may be taken from ordinary usage but given more specific meaning within that community.

For specialized language communities, reliance on lexical definitions is not enough. There is a need for what are called "stipulative" and "operational" definitions. A *stipulative* definition is simply a declaration and agreement by a language community that a word "Y" will be used in a particular fashion. Whomever first called the manual graphical user interface part of a computer a "mouse" simply declared it to be so, and now everyone knows what we are talking

about when we refer to a computer's "mouse"—even though that use is obviously quite different than the traditional lexical definition of a mouse. Furthermore, when it is important to have common agreement about when something should be called "Y," we often develop an *operational* definition. An operational definition often specifies some *measurable* dimension. In education, "gifted" and "challenged" are often defined by reference to a specific score on a standardized intelligence test. Many psychological diagnoses are dependent on specific scores measured by detailed questionnaires. Vehicles are often categorized by such measurable dimensions as weight, size, and number of tires. "Speeding" is operationalized by travel at a speed in measurable excess of posted limits.

Lastly, it is important to note that what is called a "circular definition" is *not* an acceptable form of definition. A circular definition is one that simply repeats the word or phrase being defined in the definition itself without providing additional information about the word or phrase's denotative or connotative meaning. Since circular definitions assume a prior understanding of the word or phrase being defined, it does not provide members of a language community any insight into how the word or phrase should be used.

To summarize: Specific language communities develop, through practice over time or through concrete acts of stipulation, general and operational definitions that guide the linguistic behavior of the community's members. What these definitions have in common is a desire for clear and consistent use of specific words. Formally, they create a linguistic "rule" of the form "X counts as Y in context C." Thus, a "flush" in poker *counts* as a flush only if one has a sufficient number of cards of the same suit. That use of the word "flush" is obviously quite different than how the term might be used by a plumber or doctor. Accordingly, the same word

might be defined quite differently by different language communities, depending on their respective needs and interests.

For the purposes of this report, “definition” refers to a specific effort by a language community to identify the denotative and connotative meanings of a word. What I wish to stress at this point is that a definition functions within a language community as a kind of linguistic rule, “X counts as Y in context C.”

What is the difference between a definition and a category?

Much of what I have said so far about definitions could also be said about “categories” and systems of “classification.” As communication scholars Bowker and Star note, “to classify is human” (1999). Stressing the importance of categorization, Senft (2000) argues, "classification abilities are necessary to the survival of every organism" (p. 11). Similarly, Bowerman notes "the grouping of discriminably different stimuli into categories on the basis of shared features is an adaptive way of dealing with what would be an overwhelming array of unique experiences" (1976, pp. 105-6). In short, the way we make sense of the world is through the aquisition of categories. This is also a useful way to think about how language works—primarily as a complex system of categories used to make sense of an infinitely complex world.

Categories are formed based on learning the relevant functional, perceptual, or other sorts of attributes that members of a category share. This is precisely why Aristotle’s formulation of definitions is so influential: An _X_ is (a kind of) *class name* that has such-and-such *attributes*. “Attributes” are simply features or qualities of a phenomenon: a chair is something we sit on (a functional attribute), a ball is round (a perceptual attribute, something we see). One's earliest exposure to a category is sometimes called an original or prototypical exemplar (Bowerman,

1976). It is through exposure to a series of examples (or "exemplars") that we learn what counts as a member of a category. One typically does not learn what a "ball" is from one example, since balls have attributes that other categories have as well (not all round objects are balls). For a category to be meaningful and useful, it must both include items and exclude others, thus humans acquire a social category by learning a set of "similarity/difference relationships" that distinguish one category from another (Schiappa, 2003). We have to learn when something "counts" as a member of *this* category but not *that* one, and we do that by learning what attributes one category has in common that are *different* from the attributes of another category. Some linguists and philosophers refer to this process as "semantic mapping." That is, we must learn how our words map out the world around us, and we must learn to "read" that map in a manner consistent with other members of our language community: "A network of definitions maps experience by categorizing" (Matthews, 1998, p. 55).

The production of definitions is a social practice designed to *formalize* our understanding of specific categories. Definitions identify the "definitive" or "essential" attributes that characterize a category. Definitions are ultimately intended to serve a social purpose of *stabilizing* meaning so that when a person refers to a category, we know what that person is talking about.

What is the purpose of definitions?

Though I have already said that definitions serve an important stabilizing function so that we can understand each other, especially in specialized language communities, a few additional remarks may be useful to understand the purpose that definitions have. The key idea is that definitions are intended to have more *precise* and *predictable meaning* than mere "description":

Descriptions "do not constrain experience as a network of definitions do. Descriptions are open-ended" (Matthews, 1998, p. 56). To explain how definitions function more precisely and predictably than descriptions, I next describe the concepts of "denotative conformity" and "connotative predictability."

Denotative conformity refers to the degree of intersubjective agreement about what a specific word *refers* to. To "denote" means to "refer," to point out something, as in "there's a tornado!" Denotative conformity can be measured. For example, among experienced poker players, one would find 100% agreement about what the terms "flush" and "straight" refer to. The degree of denotative conformity varies among different language communities. A term like "solenoid" might have relatively low denotative conformity among a general population (I would *not* know one if I saw it, for example), but it would undoubtedly have a near perfect degree of agreement among experienced mechanics.

Connotative predictability is similar, but refers to the subjective "sense" of a word rather than its objective referent. All words conjure up thoughts, including images, feelings, and attitudes. Sometimes those thoughts are mundane (such as the word "pencil"), and other times the feelings and attitudes elicited by a word can be quite powerful (such as the word "murder"). Part of what definitions help to do is to stabilize the connotative predictability of a word so that when person A uses a word, that person can predict the sorts of images, feelings, and attitudes person B will have in response. This is why politicians use highly charged words like "terrorist" or "freedom," of course, but the same principle would apply to almost any word used in a specific language community. If a veteran professional baseball player refers to another player as a "rookie," the term has both a denotative meaning (referring to a player in his first year of

major league play) and a set of predictable connotative meanings (inexperienced and eager, for example).

Definitions play a crucial role in the encoding/decoding process of communication. The concepts of encoding and decoding have been crucial parts of models of communication for over 50 years, most notably in the Osgood and Schramm model (Schramm, 1954) that stressed all communicators are "interpreters" who must encode and decode information. *Encoding* is the process of converting a complex set of information into more manageable "bits" of data. This is what language does: Words reduce an infinitely complex set of experiences into manageable and shareable chunks of information. However, such data or information are *meaningful* only if they are *decoded* accurately. *Decoding* is the reverse process of converting data that has been sent by a source into meaning (denotative and connotative) understandable by a receiver. Much of what we mean by learning to "talk the talk" of a particular language community involves learning to encode and decode in a manner consistent with veteran members of that language community, and here definitions can play an important role.

The bottom line purpose of definitions is *shared meaning*. Put simply, we want to know what a person *means* when he or she uses a word. Though "meaning" is a vexed term itself, all linguists and communication scholars certainly recognize the fundamental attributes of meaning include what Gottlob Frege described in 1892 as "sense" (connotative meaning) and "reference" (denotative meaning); that is, the subjective thoughts a word elicits in the mind of a hearer, and the objective referent to which a word refers.

Put more formally: The social goal of definition is to foster a coordinated and common understanding of words so that members of a language community have a high degree of denotative conformity when they use words to refer to the people, objects, and events most

relevant to that community, as well as connotative predictability so that they can anticipate the likely response to their use of such words. Similarly, "accuracy" in communication can be operationalized in the same fashion: To understand the meaning of a word "accurately" means that one understands its denotative reference and connotative sense with precision.

What makes for a good definition?

The proof of a good definition is in its performance. That is, if a particular language community defines a word such that its members recognize that X counts as Y in context C, then one should find a high degree of denotative conformity and connotative predictability. If a language community achieves high levels of denotative conformity and connotative predictability, it has a successful practice of definition. If not, then it does not have a successful practice of definition.

I would suggest four criteria that can assist in identifying successful definitional practices: Clarity, Shared Purpose, Appropriate Authority, and Feedback.

Clarity: As mentioned previously, we learn a category by being taught clear exemplars. By "clear exemplars" I mean examples that highlight the similarity/difference relations that distinguish one category from another. So, while not all birds can fly, one can learn the meaning of the category "bird" best through examples of birds that fly. There is clear evidence, for example, that a small child will learn to categorize "birds" better by initially being shown robins rather than penguins (Roberts & Horowitz, 1986). By contrast, one would not be advised to try to teach someone the meaning of the category of "chair" by first showing them a beanbag chair.

Learning a category involves learning what attributes are "essential" or "definitive" of a class of objects, events, or people. Thus, it would be preferable to learn who counts as an

"attorney" by reference to the attribute of "passing the bar exam" rather than, say, "someone who likes to argue." The first attribute is more essential or definitive than the second, and it helps differentiate between attorneys and non-attorneys more clearly.

Accordingly, the first criterion of a good definitional practice is that it strives for clarity through clear examples that allow members of a language community to recognize what the key attributes of a category are.

Shared Purpose: What counts as "essential" or "key" attributes of a category depends on members of a language community having a shared purpose in defining a given word. When I use the word "essential" I am not referring to some sort of metaphysical essence. Rather, I am referring to those attributes that the history and values of a given community deem as crucially important, given the community's shared purposes. Definitions are driven by needs, interests, and values. That is, we do not define words just for fun, but rather because of specific needs and interests that are reached when we have agreement on how to use certain words. For example, there are many ways to define "wetlands" and sometimes those definitions compete as government agencies and legislators have to decide what "counts" as a wetland within the meaning of specific laws and regulations. Ultimately, what is at stake is deciding what attributes (such as the presence of hydrophytes—plants that only grow in anaerobic conditions—versus how many days of the year there is standing water) are most important given the purposes of environmental protection laws.

It is unlikely that a language community will achieve *clarity* in its definitional practices unless it also has a common and *shared purpose* in defining important words. One cannot establish a clear category, with a clear set of definitive attributes, unless there is shared purpose. Without shared purposes for defining a word, it will be difficult if not impossible to agree on

what similarity/difference relations should be learned to know the rules for when X counts as Y in context C. In other words, a member of a language community cannot know if an X should count as a Y or not-Y without some understanding of the purpose of defining the category in the first place.

Appropriate Authority: An important criterion to consider when evaluating a set of definitional practices is who should have the *power* to define. When children are learning a language, it clearly advances the social interests of denotative conformity and connotative predictability to stipulate that parents and teachers have that power. When people are newcomers to a language community, such as medical students, law students, or apprentice laborers, it also makes sense that veterans have the authority and power to teach such newcomers what is what. In short, becoming a member of a language community involves initially "surrendering" definitional authority to those with more experience. As I said before, to be socialized into a particular community, one must learn to talk the talk.

Once one is socialized into a community, however, the question of how words should be defined is more a matter of negotiation and persuasion. For example, the faculty members of a new department might need to define what counts as a "scholarly publication" for the purposes of annually reviewing the achievements of each faculty member. Obviously, the department would want to achieve clarity in such a definition so that all faculty members would know what counts (denotative conformity) since scholarly publication is highly valued (connotative predictability). Through persuasion and negotiation, the department would identify what faculty members agreed were the most important attributes that should define the category, such as peer review and respected academic publishers. In such a case, the democratic norms of faculty

governance would be invoked since all faculty members would be recognized as authorized members of the language community.

Deciding who the appropriate authority should be in the practice of definition would vary from language community to language community. In the legal arena, the Supreme Court is the ultimate authority for defining what the words of the U.S. Constitution mean. In terms of deciding the definitions that appear in standard dictionaries, in a sense *everyone* is an appropriate authority because dictionaries are supposed to reflect what the most common uses of a word are.

I would suggest two ways to think about who the appropriate authority for defining should be. Ideally, *all* members of a specific language community share a stake in definitions. The best way to achieve denotative conformity and connotative predictability is to try to define terms as they are understood by all, or as many as possible, members of that community. Thus, just as in the case of dictionary definitions, the best way to foster the social goals of definition is through a "democratic" process that reflects the shared purposes of all members of that language community.

In cases where a "democratic" approach is not practical, such as a highly contested area of the law, definitional authority may have to be highly centralized. However, when such a circumstance obtains, the *other* criteria I have identified become all the more important. For example, if a group of faculty in a new department could not come to an agreement about how to define "scholarly publication," it could become necessary for a college dean to stipulate how scholarly publication will be defined for the purposes of reviewing faculty achievement. If that were to happen, it would be crucially important that the Dean meet the other criteria I have identified, including *clarity* and *shared purpose*. If the faculty members did not understand how the Dean defined scholarly publication, the group would risk not achieving their collective goals.

An individual faculty member might publish in an online, non-peer-reviewed journal, for example, then be outraged to learn after the fact that such an action does not "count" as scholarly publication.

In other words, regardless of who has the power to define, *all* members of a language community must be "empowered" with a clear understanding of the salient definitions of their community. Otherwise, the whole point of defining (denotative conformity and connotative predictability) is lost.

Feedback: An important part of how any word is learned is through the process of feedback. For example, small children will make mistakes of *overextension* (using a word too broadly, as in calling all round objects "balls") and *underextension* (not recognizing a green apple as an "apple"). It is only through a process of feedback that language-learners have their use of categories "corrected" by more experienced language-users. The process of correction may be one-way, as in a teacher-student relationship, or it may be a process of mutual feedback among members of a language community, such as when they work together to refine a coding system to improve their level of inter-rater reliability. Regardless of the language community, the desired end is a high degree of denotative conformity and connotative predictability, and a primary means of reaching that end is feedback aimed at improving a community's understanding of rules of the form "X counts as a Y in context C." Without such shared understanding, the coordinated management of meaning is impossible.

II. Analysis of the Definitions provided in the *Guide to Termination Record Forms.*

USIS or DAC Services collects information about drivers' employment histories in part by soliciting Termination Record Forms. The question I address is whether the definitions used

to explain the codes in the "Work Record" section of the Termination Record Form meet the goal of providing "maximum possible accuracy of the information concerning the individual about whom the report relates," as required by the Fair Credit Reporting Act (15 U.S.C. § 1681e[b]).

My assessment of the relevant definitional practices is informed by reviewing the following materials: The initial and amended complaint, copies of depositions (and supporting materials) involving Kent Ferguson, David Kuehl, Lynn Miller, and Richard A. Wimbish, a copy of DAC Services "Master User Guide," a document titled DAC Services "Guide to the Termination Record Form," affidavits of Lynn Miller from the cases of *Fomusa v. DAC Services* and *Cassara v. DAC Services*, affidavits of Richard Wimbish from the cases of *Fomusa v. DAC Services, Cassara v. DAC Services* and *Brabazon & Kaelin v. DAC Services,* sample Termination Record Forms, the text of *Cassara v. DAC Services*, various compilations of statistics regarding work history forms, and a copy of the FCRA and relevant regulations.

The focus of this section is DAC Services' *Guide to the Termination Record Form* (hereafter GTRF) because this guide "includes the definitions of codes and terms used in the current version of DAC's Termination Record Form for CDL drivers" (p. 1). This is the only document I found that explicitly attempts to define the key terms used in the Termination Record Form; indeed, the Guide encourages readers to "Use this guide to interpret any term in which [*sic*] you are unsure of the meaning" (p. 1). Plaintiff identifies seventeen phrases or categories that are problematic; I examine each in turn.

"Company Policy Violation." This phrase is defined as code 935 in the GTRF in the following manner: "Driver violated company policies and/or procedures. Use this code only if the other selections in this section do not indicate the company policy violated." It is worth

noting that this "explanation" of code 935 is not a definition in the traditional sense of the word. It is a classic example of a *circular definition*--one that assumes a prior understanding of the term or phrase being defined. It simply repeats the phrase and then provides instruction on when *not* to use the code. It is not an Aristotelian definition, which would require an explanation in the form "A company policy violation is [a kind of] *class name* that has such-and-such *attributes*." There are insufficient criteria provided to infer a clear definitional rule: X counts as Y (a company policy violation) in context C. There is no way to operationalize the phrase except in the crudest fashion, since to qualify for code 935 requires merely one violation of one company policy *or* "procedure."

Apart from lack of definition, understanding the meaning of the phrase "company policy violation" is problematic on several levels. First, no clear exemplar is provided, leaving it up to the person hearing the phrase to provide its "sense." That is, the only connotative predictability one can assume is that the phrase is meant to be pejorative. Second, the phrase is *prima facie* vague, and that vagueness is amplified by the definition when it describes a policy violation as when a driver violated company policies *and/or procedures*. By "vague" I mean that one cannot tell from the phrase what sort of policy and/or procedure was violated, and one certainly cannot ascertain the importance or magnitude of the policy and/or procedural violation. In short, one cannot tell what the words are, in fact, *referring to*. This lack of denotative clarity is made worse by the fact it is defined only by what it is not; that is, the GTRF says to "Use this code only if the other selections in this section do not indicate the company policy violated," which means that one can know only what is *not* being referred to, not what *is* denoted.

An analogy may be helpful in understanding just how meaningless the phrase "company policy violation" is. If I were to say that person A "violated one of the Ten Commandments,"

you would not know what person A did—only that A's action violated one or another commandment. You would not know if person A did something as serious as killing someone, or took the Lord's name in vain, or worked on a Sunday, or coveted a neighbor's car. Because companies have different policies and/or procedures, and religions have different beliefs and norms, a better analogy would be a statement of the form "religious policy and/or procedure violated," which covers everything from mass murder to eating oysters to failing to cross oneself properly. The analogy is useful because *within* various religions, not all sins are treated as equal. Judaism distinguishes among three levels of sin: intentional sin, sins of uncontrollable feelings, and unintentional sins. To state that "someone sinned" does not identify the important attributes of the category—severity and magnitude. Similarly, to state that a company policy and/or procedure was violated does not tell us anything about the severity, magnitude, or type of policy and/or procedural violation that took place. It is, in a practical sense, meaningless. A more useful category system would provide a means to identify the type of company policy and/or procedure violated, as well as the number and magnitude of the violation(s).

"Unsatisfactory Safety Record." This phrase is defined as code 938 in the GTRF in the following manner: "Driver did not meet company safety standards." This is not a circular definition; in fact, it is a sort of operational definition that can be formulated as "A driver has an 'unsatisfactory safety record' when the driver did not meet company safety standards." Unfortunately, the only defining attribute identified ("did not meet company safety standards") is as vague as the previous phrase analyzed, "company policy violation."

Once again, there are insufficient criteria provided to infer a clear definitional rule: X counts as Y (a company safety standard) in context C. Once again, no clear exemplar is provided, leaving it up to the person hearing the phrase to provide its "sense." That is, the only

connotative predictability one can assume is that the phrase is meant to be pejorative. The code and definition in combination are denotatively meaningless because one cannot tell what the words are, in fact, *referring to*. To state that a driver did not meet company safety standards does not tell us anything about the number, importance, or type(s) of standards, nor does it tell us by how *much* a driver did not meet one or more standard. In short, the "definition" provided of "unsatisfactory safety record" renders the code without meaning.

"Excessive Complaints." This phrase is defined as code 912 in the GTRF in the following manner: "An excessive number of complaints have been received regarding the driver's service and/or safety." This is another circular definition, since the "definition" basically restates the phrase being defined and assumes a prior understanding of the phrase.

The definition provided is not an Aristotelian definition, which would require one to identify a set of definitive attributes. Indeed, it is not clear *who* made the complaints, *how many*, *what* the complaints were about, or whether the complaints were *justified*. There are no criteria provided to infer a clear definitional rule: X counts as Y (excessive complaints) in context C. There is no way to operationalize the phrase except in the crudest fashion, since to qualify for code 912 requires merely more than one complaint.

Apart from lack of definition, understanding the meaning of the phrase "excessive complaints" is problematic on two levels. First, no clear exemplar is provided, leaving it up to the person hearing the phrase to provide its "sense." The only connotative predictability one can assume is that the phrase is meant to be pejorative. Second, the phrase is denotatively vague--one cannot tell what the words are, in fact, *referring to*.

"Cargo Loss" and **"Equipment Loss."** These phrases are defined in the GTRF as codes 913 and 917, respectively, in the following manner: "Cargo" or "equipment" "was lost, stolen,

damaged or destroyed while assigned to or under direct responsibility of driver." The problem with these definitions is somewhat different than the previous phrases and definitions. In these cases, enough of a definition is provided that one can formulate a linguistic rule of the form "*cargo/equipment loss* occurs when cargo/equipment is lost, stolen, damaged, or destroyed in a particular context; namely, when assigned to or under direct responsibility of the driver."

The problem is not so much one of denotative vagueness as it is an ambiguous overabundance of possible specific referents. The phrase "cargo loss" could refer to events as disparate as having one's cargo stolen, swept away in a flood, damaged by lightning, or destroyed by vandals. The problem is that a reader of such a report must guess which sort of loss occurred, how serious it was, and who (or what) was the cause.

Given that the *purpose* of the employment history records provided by USIS is to aid employers in making hiring decisions, one must evaluate the suitability of the definitions in light of that purpose. That is, do the definitions of the categories identify the attributes important for potential employers? In these cases, they do not, for the simple reason that the definitions do not make clear whether the cargo or equipment loss was *significant* or whether the loss was the driver's *fault*. A more useful category system would provide a means to: A) indicate whether the cargo or equipment was lost, stolen, or damaged, B) estimate the value of the loss, and C) attribute responsibility for the loss. Or, if there is only space for one category, it would be operationalized in such a way to make the information more useful, such as "cargo loss valued in excess of $500 due to driver malfeasance."

"Quit/Dismissed During Training/Orientation/Probation." This phrase is explained as code 933 in the GTRF in the following manner: "Driver did not complete company training, orientation and/or probation. If the driver quit or was dismissed during orientation, leave

sections 12, 13 & 14 blank and do not provide further information to section 15." The second sentence is not a definition, since it is only an instruction as to how to complete other portions of the Termination Record Form. The first sentence is again a classic example of a circular definition that does nothing more than repeat the category label.

Again the problem is that the label has an ambiguous overabundance of potential referents that makes the code unrevealing (meaningless) with respect to identifying driver attributes. It is not clear *when* in the employment process the event occurred, *who* initiated it, or *why*. A reader of such a report must guess, and the range of possibilities is so broad that one cannot make any confident inferences about a driver. Despite this lack of denotative clarity, it is obvious that whatever connotative meaning the label has is negative. "Quit" attributes the cause of the termination event to the driver in pejorative manner. "Dismissed" attributes the cause of the termination event to the employer, again in a manner that is derogatory to the driver.

It would not be difficult to restructure this category to make it more denotatively meaningful and less connotatively negative by indicating *when* the termination event occurred (including whether it was pre-contractual), *who* terminated the relationship (driver or employer), and providing a check-off list of the most common *reasons* for such termination.

"Eligible for Rehire: No." This phrase is explained as code 003 in the GTRF in the following manner: "Driver is ineligible for rehire based on current company standards." This explanation is another example of a circular definition that does nothing more than repeat the category label. The only attribute clearly denoted is that the driver is not eligible to be rehired (which clearly carries a negative connotation); however, the *rationale* for such ineligibility collapses back into one of the vaguest expressions found in the Termination Record Form—"based on current company standards." Again, a reader has no idea what company standards

have informed a decision that the driver is not eligible for rehire, and thus the reader learns nothing about the particular attributes of the driver. Though checking this code makes it clear what the driver's status is with respect to the company completing the form, it conveys no useful information about the driver's abilities. Beyond that company-specific rehiring status, the category is denotatively meaningless.

"Other." This phrase is defined as code 999 in the GTRF in the following manner: "Other: Anything other than items listed above (see 199)." Code 199 says "Other: Anything other than items listed above. This space is provided for your documentation. DAC will record 'other' only." Obviously, this category is denotatively meaningless and the category is not defined in any positive sense. There is no way to know what the category is referring *to*, only what it is *not*.

Categories identified as "other" are generally unhelpful in coding schemes. Consider the following example: Let us say that a department store wants to track the reasons that customers return articles of clothing that were purchased at that store. A set of categories might include "wrong size," "garment flawed," or "gift return" and such information could assist both the customers and the store to improve its future service. An unexplained "other" category would be useless because it does not *refer* to anything denotatively. It would be completely useless in helping the store understand why merchandise is being returned, since all anyone could infer is that "something" was wrong.

This case is similar. Since the work record is not described as "satisfactory," there is a vague connotative meaning that is negative—"something" was wrong. But no one receiving such information—either the driver or possible employers—would know *what* was wrong, which makes the information functionally useless.

"Personal contact requested." This phrase is defined as code 944 in the GTRF in the following manner: "Company issuing record has further information to provide regarding the driver or for the driver." This is not a typical category code because it does not even attempt to convey explicit information about a driver's performance. Rather, it is a request for action: For unstated reasons, the company issuing the TRF wishes contact with a potential employer *or* with the driver. Because this category conveys no explicit denotative meaning about the driver's performance, it is not clear to me why it belongs in a section labeled "Work Record."

Since it is a category different from reporting a "satisfactory" (code 901), "superior" (903) or "outstanding" (903) work record, there is a vague negative connotation here that there were problems of some sort warranting a personal contact for explanation. Such meaning is vague and indeterminate, however, since the code explanation includes the possibility that the issuing company wishes to contact the *driver* rather than a potential employer.

Other Descriptive Categories. There are eight additional categories that warrant a different sort of evaluation than the phrases and definitions analyzed so far. These categories are provided with a definition in the GTRF, so they are, in a sense, more meaningful than the circular and vague definitions identified previously. However, these categories are still seriously flawed.

Code 924 "**Late Pick Up/Delivery**" is defined as "Failed to make pickup or delivery according to schedule."

Code 926 "**Log Violation**" is defined as "Violation of Federal Motor Carrier Safety Regulations, 'Hours of Service,' part 395."

Code 928 "**No Show**" is defined as "Driver failed to appear on job site without notification or approval of supervisor. Driver has hauled previous loads for the company."

Code 929 "**Failed to Report Accident**" is defined as "Driver violated accident reporting requirements while in the service of the company."

Code 931 "**Quit Under Dispatch**" is defined as "Driver was available for work, assigned a load but quit before load was secured. Driver did not possess a load."

Code 957 "**Unauthorized Equipment Use**" is defined as "Deviated from route or used equipment for purposes not specified by company. (Not intended to be used when the driver has resigned/quit or terminated lease and returned equipment to the nearest company terminal or a location authorized by the company.)"

Code 959 "**Unauthorized Passenger**" is defined as "Passenger in company vehicle contrary to company policy or did not meet company policy requirements covering authorized passenger."

Code 961 "**Unauthorized Use of Company Funds**" is defined as "Driver used company funds for purposes not authorized by company."

There are three major problems with this set of categories. First, though each code denotes some sort of behavior or event, the category name or phrase is sufficiently broad that it is impossible to determine accurately the significance or importance of the violation. The categories do not allow the person completing the form to indicate the magnitude of the offense, its frequency, duration, or severity. For example, code 924 ("late pick up") could be checked whether the driver was 5 minutes behind schedule or 5 days. With respect to all eight categories, there is simply no way to distinguish between events that may be trivial, accidental, or due to factors beyond the driver's control, versus events that might be quite significant, intentional, and due to driver malfeasance.

Second, it is important to note how the categories are open to abuse due to the fact that all eight categories have distinctly negative connotations. The problem is that there could be two cases that are dramatically different (say, for example one driver is 5 minutes late versus another driver who is 5 days late). The negative connotations and harm to the driver's reputation would be identical since, in both cases, the only message communicated is a checkmark in a particular code box. Thus, even for cases that are denotatively quite different, the categories carry equally weighted negative connotations.

Third, drivers are not provided with these definitions, thus for them these categories are practically meaningless. Note that in some cases the definition is subjective and relies on ordinary language use (such as "late pick up" or "no show"), while others have fairly specific definitions (such as "log violation") that refer to specific policies or regulations. In one case a Federal regulation is referenced, while in several others, "company policy" is referenced. Cumulatively, the eight definitions put drivers between a rock and a hard place. On one side are highly technical definitions that drivers are not provided. On the other are vague or circular definitions that are open to anyone's interpretation. In both types of cases, drivers are disempowered from the relevant language community. Neither drivers nor potential employers are put in a situation to determine the accuracy of the report.

The "bottom line" problem with these categories is that there is no opportunity to provide the sort of details or narrative that would allow someone reading the report to produce an accurate interpretation of the events. We use categories to simplify our understanding of a complex world. However, there is a tradeoff between the *scope* and *precision* of categories: The broader and more abstract a category, the greater the range of events that can be described by it. However, what we gain in scope we lose in precision and accuracy, since a broad category will

lump events together that may be quite different. For example, if we only categorized movies into "comedy" and "serious drama," we would have two categories that have a powerful scope, but at a cost of lumping together films that are quite different. *To maximize accuracy*, one would need to subdivide categories more precisely, so we can distinguish (say) between *To Kill a Mockingbird* and *Star Wars* instead of lumping them together.

One of the best ways to understand the deficiencies of the current category definitions is to imagine how they could be improved. In every case, one can easily imagine how additional descriptors and an opportunity to provide a narrative would increase the meaningfulness of the work record. An example of such an improvement is how the category "Quit Under Load/Abandonment" has been elaborated. At one point, code 909 was "Abandonment" and code 937 was "Quit Under Load." I suspect for the very sorts of reasons discussed throughout this report, these categories were reformulated such that there are now *seven* categories covering a range of events instead of only two. This change nicely illustrates my point about the tradeoff between scope and precision. By elaborating the category, one must give up the simplicity of having only one or two categories, but with seven categories one gains precision and accuracy. I have no doubt that all of the TRF categories could be improved in a similar manner.

III. Overall Assessment and Conclusion

The question I address is whether the definitional practices employed by USIS in the "work record" portion of the TRF accomplish their stated ends or not. The USIS website description of their Employment History File product claims:

- Members receive more complete information in an efficient manner. Reports include information such as reason for leaving, equipment operated, eligibility for re-hire, status, driver's experience, and number of accidents.

- Employers release and obtain objective, factual information without risk. USIS's Employment History File protects employers from liability because termination records are submitted using a standard, multiple-choice termination form. Non-subjective, industry standard terminology is used to eliminate the possibility of information being misconstrued. (http://www.usis.com/commercialservices/transportation/employmenthistory.htm accessed 3/13/05).

In contrast, Plaintiff contends that the Termination Record Form that USIS pays carriers to fill out and return relies on terms that are "vague, ambiguous, incomplete, uncommonly defined, and inaccurate."

My overall assessment is that the Termination Record Forms fall far short of providing "complete information" about a driver's performance. The multiple-choice format does not produce "non-subjective" terminology that eliminates "the possibility of information being misconstrued," as USIS claims. Most of the definitional language is so vague or ambiguous that it virtually guarantees that report writers and readers will systematically misconstrue the denotative meanings of the codes. The system of categories as defined in the TRFs does not meet the requirement to "assure maximum possible accuracy of the information." Indeed, in most cases it is difficult if not impossible to ascertain the specific actions, behaviors, and events that the categories are supposed to refer to. The TRF as currently designed is a source of systemic *inaccuracy* in terms of denotative conformity and connotative predictability.

The problem can be diagnosed by returning to a distinction made in section I between *encoding* and *decoding*. The contested categories of the TRF have been designed in an excessively open-ended fashion from the standpoint of encoding. For example, an incredibly broad array of events can be encoded as "cargo loss." From the standpoint of a former employer completing a TRF, it does not matter if a tornado blew away the cargo or if the truck was robbed. No matter what happened or who was responsible or how much cargo was lost, it would all be

encoded by checking box 913. Those who write the reports are given almost no guidance as to how to "encode" specific events or attributes. Without such guidance, errors of overextension (applying a code too broadly or "false positives") and underextension (not applying a code when one should, or "false negatives") are inevitable.

No coding scheme or system of classification is neutral: All guide our attention in particular ways by providing semantic maps for making sense of our experiences, Such maps tell us what is important to notice and what can be neglected, and what is valuable and what is not worth our attention. By keeping the TRF codes to a minimum, the categories are "defined" so flexibly as to make them largely meaningless. **Furthermore, the "flexibility" of the encoding process is what makes accurate *decoding* impossible.** The data have become meaningless because it is impossible for a writers and readers to know what the codes are referring to (denotative meaning) and only vaguely how the codes are evaluating the driver (connotative meaning). The varying frequency of usage of the various codes by different carriers underscores this point—the TRF does not constrain coders, it gives them excessive latitude such that decoders have no clear idea what is or is not being reported.

The data gathered through such a coding scheme does not serve its purpose in assisting employers make informed hiring decisions based on accurate and precise information, and it obviously does not serve the interests of drivers either. Indeed, insufficient information is provided to allow drivers to know what behavior resulted in what sort of evaluation, which makes it extremely difficult to check or dispute the accuracy of such records.

Just how far short of the requirement to "assure maximum possible accuracy of the information" the TRFs are can be seen most clearly by considering how the categories *could have been* constructed and defined in such a way to avoid the problems identified in section II.

In each and every case, the problems identified above could be solved by providing additional codes to distinguish more precise subcategories or by defining the current codes with greater denotative precision.

Since the publication of Claude E. Shannon's "A Mathematical Theory of Communication" in 1948 it has been understood that "The fundamental problem of communication is that of reproducing at one point either exactly or approximately a message selected at another point" (p. 379). **The question is not only do the people completing a TRF know which box to check, the question is also whether those who subsequently *read* the output can accurately decode the meaning of such checked boxes.** If the message "received" or "interpreted" by the reader of a TRF is significantly different than the message "sent" by the original source, then we have, as it is put in *Cool Hand Luke*, "failure to communicate." That failure can be summarized as a profound lack of clarity and specificity in the "definitions" of the codes, which results in a lack of denotative conformity and connotative predictability.

To press the "diagnosis" a step further, I would suggest that the problems identified stem, in part, to a lack of shared purpose among drivers and carriers in creating the definitions and codes. The TRF is apparently designed wholly to serve the interests of carriers, who are consistently referred to as the "customers" in the depositions of Lynn Miller and David Kuehl. The code categories appear to have been defined to minimize the difficulty of filling out the form, while maximizing the power of the carriers over drivers.

If the categories are defined entirely from the carriers' perspective, then drivers are excluded from being what were described in section I as "appropriate authorities." In Miller's second affidavit in *Fomusa v. DAC*, she states that "Drivers are not users of our employment history reports" (§24). Despite the claim that "DAC uses definitions that follow industry

practice," she acknowledges that "I routinely encounter drivers who dispute their employment history reports because they do not understand the meaning of the terms in the report" (§24). The power to define is entirely in the hands of DAC Services, which apparently does not include any driver representatives on the DAC Advisory Board.

Furthermore, there does not seem to be any formal or institutionalized process of providing *feedback* that assures drivers a role in refining the code definitions. Drivers are not provided a copy of the "Guide to Termination Record Form," which includes the list of "definitions" I analyzed above. This lack of information obviously hampers drivers' ability to understand how or why their work record has been evaluated in a particular manner, and it makes the task of disputing a particular evaluation extremely difficult. Any informal or formal means of dispute resolution is hampered. Furthermore, the vagueness and ambiguity of the language function strategically to deflect responsibility by maintaining a kind of "plausible deniability" (Walton, 1996) about the "meaning" of TRF codes. That is, the vaguely negative connotations of the categories discussed above create a negative "presumption" about a driver, but because the form stops short of providing clear denotative meanings, DAC can deny specific inferences made from ambiguous codes. The TRF thus functions as a form of systematic "innuendo" about drivers and DAC avoids assuming a reasonable "burden of proof" for what is inferred from the vague categories (cf. Walton, 1996).

Giving carriers "definitional hegemony," or near-total authority over how a driver's history is encoded, functions to infantilize drivers in the language community that makes up the trucking industry. By denying appropriate authority or adequate opportunity for feedback for drivers, the category codes are potentially open to a good deal of abuse. The definitions of the codes are so vague, ambiguous, and/or circular that they can be stretched to describe just about

anything. Whether they have been abused is a question I am not in a position to answer, but I can say with confidence that the codes are very poorly designed and open to abuse.

To conclude: The definitional practices as found in the *GTRF* and in the various documents I studied associated with this case fail to provide "maximum possible accuracy of the information concerning the individual about whom the report relates." The TRF is not designed to provide accurate denotative or connotative meaning in terms of driver attributes. The category codes are vague or ambiguous—they do not provide sufficient guidance to promote either denotative conformity or connotative predictability. Because there is a lack of explicit and shared definitional purposes, and because drivers are not treated as appropriate authorities or provided an institutionalized opportunity for feedback, the definitional practices are seriously flawed.

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