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Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 1–5,
Washington, DC 20219
Docket No. OCC–2007–0019

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

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

[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)

[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