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COMMENTS OF ACA INTERNATIONAL ON INTERAGENCY ADVANCE 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

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I. Introduction.

The following comments are submitted on behalf of ACA International ("ACA") in response to the Interagency Advance 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 ("ANPR").[1] ACA's comments respond to requests from the six administrative agencies jointly issuing the ANPR, including the Federal Trade Commission (collectively, "Agencies").

The Fair Credit Reporting Act[2] was extensively amended in 2003 by the Fair and Accurate Credit Transactions Act ("FACT Act").[3] Prior to the amendments, furnishers of consumer data were prohibited from providing to consumer reporting agencies information that knew, or consciously avoided knowing, was inaccurate.[4] The FACT Act elevated the

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1 71 Fed. Reg. 14419 *et seq.* (March 22, 2006).

2 15 U.S.C. § 1681-1681x.

3 Fair and Accurate Credit Transactions Act, Pub. L. 108-159, 117 Stat. 1952.

4 Section 623(a)(1)(A); 15 U.S.C. § 1681s-2(a)(1)(A). The FCRA, prior to its amendment in 2003, provided consumers a broad array of other protections by imposing obligations on furnishers to correct and update accounts, accurately record notices of disputes, and report delinquency dates to consumer reporting agencies. *See* Section 623(a); 15 U.S.C. § 1681s-2(a).

standards applicable to furnishers for identifying inaccurate data,[5] and prescribed the development of regulations establishing guidelines for furnishers to follow when reporting consumer data.[6] As a precursor to promulgating the guidelines in the form of a proposed rulemaking, the Agencies have requested comments on three specific areas: (1) the four-part criteria to be followed to develop the accuracy and integrity guidelines, (2) the articulation of reasonable policies and procedures for implementing the guidelines, and (3) the four-part criteria to be weighed to determine when a furnisher is required to reinvestigate disputes concerning the accuracy of information in a consumer report.[7]

ACA members welcome the much anticipated availability of the accuracy guidelines that will be developed as an outgrowth of the ANPR.[8] The guidelines will define the future ability of data furnishers, many of whom are members of ACA, to report consumer data to consumer reporting agencies. Guidelines that are too restrictive may deter reporting, either due to the difficulties of implementing the requirements or as a way for data furnishers to minimize business risk. At the same time, guidelines that are too ill-defined create a risk of reporting

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5 Section 623(a)(1)(A); 15 U.S.C. § 1681s-2(a)(1)(A) (deleting conscious avoidance standard and adopting "reasonable cause to believe" standard).

6 Section 623(e); 15 U.S.C. § 1681s-2(e).

7 71 Fed. Reg. at 14422 col. 3.

8 Guidance to data furnishers on compliance with the new FCRA requirements particularly is needed in light of the fact that the FTC, as the primary Federal regulatory of many ACA members, has discontinued its long history of issuing informal guidance in the form of staff opinion letters interpreting the FCRA.

inaccuracies. A brief illustration demonstrates this point. A consumer now can record a *written* dispute of the accuracy of information on his or her report by directly contacting a data furnisher. Previously such disputes were routed to consumer reporting agencies. Experience demonstrates that, more often than not, it is unclear whether the disputing consumer is registering a dispute about the accuracy of data in a tradeline placed by the data furnisher, and if so, the specific information in question. Typically, it also is not clear whether the consumer is disputing the debt itself, as he or she is entitled to do pursuant to a separate federal statute applicable to many data furnishers, the Fair Debt Collection Practices Act ("FDCPA"). The FDCPA, as construed by the courts, requires data furnishers to accept consumer disputes whether communicated in writing or *orally*.[9] When played out across literally billions of tradeline transactions, the intersection of the FDCPA's preference for oral and written disputes, and the FACT Act's requirement for written accuracy disputes, results in many data furnishers reporting *all consumer communications as disputes*. This can be counterproductive to the intent of Congress to increase the accuracy of information on consumer reports, with far-reaching implications on credit scoring, evaluation of credit risk, and the general accuracy of consumer information.

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9 *Brady v. Credit Recovery Co.*, 160 F.3d 64 (1st Cir. 1998) (violation of the FDCPA by failing to include a consumer's oral dispute of the debt in the consumer's report furnished to consumer reporting agencies); *Young v. Credit Bureau Inc.*, 729 F. Supp. 1421 (W.D.N.Y. 1989) (FDCPA does not require that a consumer, in order to dispute the validity of a debt, convey that information in writing).

Perhaps the single most important issue for the Agencies charged with the promulgation of the new accuracy guidelines is how the diversity of data furnishers can be accommodated without deterring reporting or unintentionally degrading accuracy. Data furnishers are not defined by statute, and they defy easy classification.[10] They are heterogeneous. They include, for example, credit grantors reporting their own transactions and experiences with their customers, third-party debt collectors acting as agents of credit grantors, attorneys, and companies that acquire accounts either from credit grantors or collectors. Private and public companies furnish data, as do Federal and State administrative agencies. Indeed, the Federal government may be one of the largest data furnishers to consumer reporting agencies based on the statutory requirement that all Federal delinquent debts be reported.[11]

Data furnishers are not defined by company size or the tradelines reported. Furnishers include the largest of companies with thousands of employees to the smallest of companies

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10 *See generally Carney v. Experian Info. Solutions, Inc.*, 57 F. Supp. 2d 496, 501 (W.D. Tenn. 1999) (defining data furnishers as entities reporting a specific debt owed by a specific consumer).

11 The Debt Collection Improvements Act of 1996 requires all Federal delinquent consumer debts to be reported to consumer reporting agencies. As such, the Federal government regularly furnishes massive amounts of information to consumer reporting agencies concerning debts owed to the government, including the six administrative agencies issuing the ANPR. *See* Guide to the Federal Credit Bureau Program, *available at* http://www.fms.treas.gov/fedreg guidance/fedcreditbureauguide.pdf, at preface ("The use of nationally recognized credit reporting agencies . . . is an inexpensive tool that can assist Federal agencies to improve their credit management and debt collection programs. While only one of several tools available, increased credit bureau reporting and increased Federal agency use of credit reporting agencies is designated as a 'high priority' by the Office of Management and Budget (OMB), the Treasury Department's Financial Management Service (FMS), and the Federal Credit Policy Working Group").

with only one or two. Nor is there uniformity in the types of accounts reported: secured and unsecured loans, mortgages, federal and state tax assessments, utilities, medical bills, public and private educational debts, and administrative fines and penalties are but a few examples. Individual consumer accounts, as well as business accounts, are reported. Each account hosts a unique transactional history. No two accurate tradelines are the same.

Suffice it to say, there is less than more uniformity to data furnishers. Amid this diversity, the Agencies have a formidable task of developing policies and procedures of general applicability. As discussed below, ACA believes that there is but one option: minimum standards are required, and those standards must account for the realistic compliance capabilities of small businesses.

II. Background On ACA International

ACA International is an international trade organization of credit and collection companies that provide a wide variety of accounts receivable management services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 6,500 company members ranging from credit grantors, third-party collection agencies, attorneys, and vendor affiliates. ACA has numerous divisions or sections accommodating the specific compliance and regulatory issues of its members' business practices.[12]

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12 *See* www.acainternational.org. These divisions or sections of ACA include Creditors International, Asset Buyers Division, Members Attorney Program, Government Services Program, Healthcare Services Program, and Internet and Check Services Program.

ACA INTERNATIONAL COMMENT

The company-members of ACA are subject to applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. Specifically, the collection activity of ACA members is regulated primarily by the Federal Trade Commission under the Federal Trade Commission Act,[13] the Fair Debt Collection Practices Act ("FDCPA");[14] the FCRA, and the Gramm-Leach-Bliley Act;[15] in addition to numerous other federal and state laws. Indeed, the accounts receivable management industry is unique if only because it is one of the few industries in which Congress enacted a specific statute governing all manner of communications with consumers when recovering payments. In so doing, Congress committed the Federal regulation of the recovery of debts to the jurisdiction of the FTC.

ACA members range in size from small businesses with a few employees to large, publicly held corporations. Together, ACA members employ in excess of 100,000 workers. These members include the very smallest of businesses that operate within a limited geographic range of a single town, city or state, and the very largest of national corporations doing business in every state. The majority of ACA members, however, are small businesses. Approximately 2,000 of the company members maintain fewer than 10 employees, and more

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13 15 U.S.C. § 45 *et seq.*

14 15 U.S.C. § 1692 *et seq.*

15 15 U.S.C. § 6801 *et seq.*

than 2,500 of the members employ fewer than 20 persons. Many of the companies are wholly or partially owned or operated by minorities or women.

Whether creditors, asset buyers or sellers, or third-party debt collectors, ACA members regularly furnish an incalculable amount of consumer information to consumer reporting agencies under the FCRA. In most instances, this information is furnished to consumer reporting agencies electronically using the automated Metro 2 Format developed and accepted by the nationwide consumer reporting agencies.[16] The reporting by data furnishers is based on contracts with the nationwide consumer reporting agencies. The Metro 2 Format instructs data furnishers as to the mechanics of organizing and transmitting data to the consumer reporting agencies. Record layouts, file formats, and status codes of the consumer data, for example, are defined by the nationwide consumer reporting agencies. As discussed *infra*, data furnishers sometimes report that the procedures imposed by consumer reporting agencies to furnish and update tradelines are inconsistent, which can affect the transmission of data and the accuracy of the tradelines.

Data furnishers commonly report consumer tradelines in an aggregated or "batch" format. The files are sent to the consumer reporting agencies electronically, and the agencies review and upload the data. Data furnishers thereafter will submit monthly updates to the

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16 The reporting procedures followed by data furnishers when providing data to smaller or specialty consumer reporting agencies are less standardized. Further, some data furnishers still use the Metro 1 Format.

consumer reporting agencies to reflect the transactional experiences occurring during the month, for example, payments received or consumer disputes.

As the leading trade association representing the accounts receivable management industry, ACA has extensive experience with the development of industry standards designed to improve the consumer's experience based on best business practices. ACA developed The Professional Practices Management System™ ("PPMS") several years ago as a management system to implement, document, and adhere to a set of industry specific professional practices and policies.[17] The proprietary program is based on 17 core elements:

1. *Management Responsibility*: Reviewing vision, mission, goals and expectations.

2. *Management System*: Writing company policies, procedures and work instructions.

3. *Review of Client Issues*: Determining company's ability to meet client's needs and expectations.

4. *Document & Data Control*: Maintaining both electronic and paper documents – policies, procedures, work instructions – and removing obsolete information.

5. *Purchasing*: Managing the purchasing process – major products and services.

6. *Control of Client & Customer Supplied Data*: Securing and controlling all data flowing into the office.

7. *Data Identification & Traceability*: Understanding company information and where it belongs.

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17 *See* http://www.acainternational.org/media.aspx?cid=65.

8. *Process Control*: Maintaining procedures or instructions for consistent performance.

9. *Inspection & Testing*: Testing, reviewing and verifying planned work processes.

10. *Inspection & Test Status*: Verifying that company processes occur in sequence.

11. *Identification of Nonconformity*: Identifying and recording mistakes or problems.

12. *Corrective Action, Preventive Action & Continuous Improvement*: Correcting and preventing problems by finding a better, faster or more reliable way to accomplish work.

13. *Handling, Storage, Preservation & Delivery*: Disaster planning and delivery of information.

14. *Management of Records/Data*: Handling, storing, retrieving and depositing of information.

15. *Internal Management Audits*: Ensuring procedures and policies are followed and the management system is working by having all departments inspected on a regular basis.

16. *Training*: Continuous training of all staff.

17. *Process & Client Satisfaction Measurements*: Measuring results internally and externally.

ACA's experience in the standardization of policies and procedures applicable to data furnishers adhering to PPMS makes it well-positioned to be of assistance to the Agencies seeking to explore reasonable policies and procedures to be followed by data furnishers.

III. ACA Members Are A Critical Part Of The Economy.

ACA members play a crucial role in safeguarding the health of the economy. Uncollected consumer debt threatens the economy. According to the Federal Reserve Board and United States Census Bureau, total consumer bad debt costs every adult in the United States $683 every year. This translates into a cost for the average non-supervisory worker of nearly 54 hours (before taxes) in annual salary that pays for the bad debt of other consumers. By itself, outstanding credit card debt has doubled in the past decade and now approaches three quarters of one trillion dollars.[18] Total consumer debt, including home mortgages, exceeds $9 trillion.[19] Moreover, the greatest increases in consumer debt are traced to consumers with the least amount of disposable income to repay their obligations.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of practically every community's businesses. For example, we represent the local hardware store, the retailer down the street, and the local physician. The collection industry works with these businesses, large and small, to obtain payment for the goods and services received by consumers. In years past, the combined effort of ACA members has resulted in the recovery of billions of dollars annually returned to businesses and reinvested. For example, ACA members recovered and returned over $30 billion in 1999 alone, a massive

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18 Eileen Alt Powell, *Consumer Debt More Than Doubles in a Decade*, Associated Press, Jan. 6, 2004.

19 William Branigan, *U.S. Consumer Debt Grows at an Alarming Rate*, Wash. Post, Jan. 12, 2004.

infusion of money into the national economy. Without an effective collection process, the economic viability of these businesses, and by extension, the American economy in general, is threatened. At the very least, Americans are forced to pay higher prices to compensate for uncollected debt.

IV. Statutory Overview.

As it relates to data furnishers and the ANPR, the FACT Act amended section 623 of the FCRA in two ways. First, it added a new subsection (e) to section 623 requiring the Agencies to create accuracy guidelines for data furnishers. The Agencies are required to:

> (A) establish and maintain guidelines for use by each person that furnishes information to a consumer reporting agency regarding the accuracy and integrity of the information relating to consumers that such entities furnish to consumer reporting agencies, and update such guidelines as often as necessary; and
>
> (B) prescribe regulations requiring each person that furnishes information to a consumer reporting agency to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A).[20]

To develop the accuracy guidelines prescribed in section 623(e)(1)(A), the Agencies are to evaluate four subjects:

> (1) identify patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to consumer reporting agencies;

20 Section 623(e)(1); 15 U.S.C. § 1681s-2(e)(1).

(2) review the methods (including technological means) used to furnish information relating to consumers to consumer reporting agencies;

(3) determine whether persons that furnish information to consumer reporting agencies maintain and enforce policies to assure the accuracy and integrity of information furnished to consumer reporting agencies; and

(4) examine the policies and procedures that persons that furnish information to consumer reporting agencies employ to conduct reinvestigations and correct inaccurate information relating to consumers that has been furnished to consumer reporting agencies.[21]

Second, the FACT Act added a new subsection (8) to section 623(a) which allows consumers to dispute the accuracy of information on a consumer report in writing directly to the data furnisher that reported the information.[22] A written dispute notice must be submitted by the consumer.[23] The written dispute notice must identify the specific information disputed, explain the basis for the dispute, and include all supporting documentation required by the data furnisher to substantiate the basis of the dispute.[24] The furnisher must conduct a reasonable investigation of the disputed information, review the substantiation provided by the consumer,

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21 Section 623(e)(3); 15 U.S.C. § 1681s-2(e)(3). As discussed, *infra*, the FACT Act limits liability for possible violations of the requirements of section 623(e) to government enforcement, similar to the enforcement of section 623(a). *See* Section 623(c)(2); 15 U.S.C. § 1681s-2(c)(2).

22 Section 623(a)(8); 15 U.S.C. § 1681s-2(a)(8). Previously consumers contacted consumer reporting agencies about the accuracy of information contained in a tradeline placed by a data furnisher. The agencies then notified data furnishers of the consumers' disputes, investigated, and reported back to the agencies.

23 Section 623(a)(8)(D); 15 U.S.C. § 1681s-2(a)(8)(D).

24 *Id.*

timely report the results to the consumer reporting agencies, and correct the information if inaccurate.[25] Frivolous or irrelevant disputes do not require a data furnisher to investigate, including disputes that fail to provide sufficient information to investigate and disputes that are substantially the same as matters previously disputed by the consumer either with the furnisher or through consumer reporting agencies.[26]

To evaluate the reinvestigation obligations of furnishers, the Agencies are required to weigh the following four factors when prescribing regulations:

(1) the benefits to consumers with the costs on furnishers and the credit reporting system;

(2) the impact on the overall accuracy and integrity of consumer reports of any such requirements;

(3) whether direct contact by the consumer with the furnisher would likely result in the most expeditious resolution of any such dispute; and

(4) the potential impact on the credit reporting process if credit repair organizations . . . are able to circumvent the prohibition in subparagraph (G).[27]

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25 Section 623(a)(8)(E); 15 U.S.C. § 1681s-2(a)(8)(E).

26 Section 623(a)(8)(F); 15 U.S.C. § 1681s-2(a)(8)(F). A notice of determination must be sent to the consumer within five days of making the determination that the dispute is frivolous or irrelevant. *See* Section 623(a)(8)(F)(ii); 15 U.S.C. § 1681s-2(a)(8)(F)(ii).

27 Section 623(a)(8)(B); 15 U.S.C. § 1681s-2(a)(8)(B).

V. General Comments Regarding The ANPR And The Accuracy Guidelines.

A. Data Furnishers Are Entitled To Flexibility When Establishing Reasonable Policies And Procedures Implementing The Guidelines.

ACA respectfully submits that data furnishers must be given flexibility and latitude to establish reasonable procedures to implement the accuracy guidelines adopted by the Agencies. This is supported by the statute, as well as more practical considerations.

The four-part criteria in section 623(e)(3), by statutory limitation, applies only to the development of the accuracy guidelines in section 623(e)(1)(A). Section 623(e) does not require the Agencies to apply the four-part criteria to establish reasonable policies and procedures to be followed by furnishers when implementing the guidelines under section 623(e)(1)(B). This is significant because it reflects a congressional understanding that the specific policies and procedures adopted by data furnishers should not be a Federal administrative determination. It should be up to furnishers to define what is reasonable in terms of policies and procedures that implement the accuracy guidelines. Indeed, the promulgation of regulations under section 623(e)(1)(B) probably is satisfied simply by requiring furnishers to adopt reasonable policies and procedures to implement the accuracy guidelines.

The flexibility urged by ACA is consistent with the approach used by the FTC in formulating the Safeguards Rule component of the Gramm-Leach-Bliley Act.[28] The GLB Act required the FTC to establish standards that "safeguard" the security and confidentiality of customer records and information, to protect against any anticipated threats or hazards to the security or integrity of such records, and to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.[29] The standards adopted by the FTC are flexible to the company's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information it handles. The FTC emphasized that the "Final Rule strikes an appropriate balance between allowing flexibility to financial institutions and establishing standards for safeguarding customer information that are consistent with the Act's goals."[30]

B. The Agencies Should Clarify The Limitation On Liability For Alleged Violations Of The Accuracy Guidelines.

The FACT Act limits data furnishers' liability for violations of the requirements of section 623(e) to government enforcement.[31] There is no civil liability for the alleged violation of data furnishers regarding the accuracy and integrity of the information furnished to

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28 Standards for Safeguarding Consumer Information, Final Rule, 67 Fed. Reg. 36484 (May 23, 2002).

29 15 U.S.C. § 6801(b).

30 67 Fed. Reg. at 36484 col. 3.

31 Section 623(c)(2); 15 U.S.C. § 1681s-2(c)(2).

consumer reporting agencies, including the alleged failure of a furnisher to follow reasonable policies and procedures to implement the accuracy guidelines.[32] The rule implemented by the Agencies should reflect this statutory reservation of enforcement authority in the final rule.

C. The Accuracy Guidelines Should Provide Data Furnishers A Reasonable Procedures Defense.

The Agencies are required to establish guidelines for use by data furnishers regarding the accuracy of consumer information, and to create regulations requiring data furnishers to implement the accuracy guidelines through reasonable policies and procedures. A data furnisher that complies with the accuracy guidelines and implements reasonable policies and procedures should be entitled to a presumption of statutory compliance and a defense to enforcement.

An example of this presumption can be found in the FDCPA's bona fide error or "reasonable procedures" defense. The FDCPA is a strict liability statute. However, data furnishers that are debt collectors are entitled to a reasonable procedures defense. A debt collector cannot be held liable in any action in which it demonstrates by a preponderance of evidence that an alleged violation was not intentional and "resulted from a bona fide error

32 *See* Sections 623(c)-(d); 15 U.S.C. § 1681s-2(c)-(d). Section 623(c) states that section 616 (civil liability for willful noncompliance) and section 617 (civil liability for negligent non-compliance) do not apply to any violation of the section 623(e) accuracy guidelines promulgated by the Agencies, with the limited exception of the potential liability of furnishers processing disputes in section 623(b). Further, section 623(d) provides that the enforcement of the accuracy guidelines is exclusively committed to the Federal and State entities in section 621.

notwithstanding the maintenance of procedures reasonably adapted to avoid such error."[33] Courts have applied the FDCPA's reasonable procedure's defense to alleged violations by data furnishers subject to the statute.[34]

ACA requests that the Agencies address this issue in the proposed rule. Comments should be requested from interested parties in the notice of proposed rulemaking as to the presumption afforded to data furnishers based on their implementation of reasonable policies and procedures in conformity with the Agencies' rulemaking.

D. The Agencies Should Define Minimum Guidelines.

The accuracy guidelines should reflect the minimum guidelines necessary to satisfy the accuracy and integrity standards. Minimum guidelines are required because of the heterogeneous characteristics of data furnishers and the need for flexibility, as discussed above. They also are required due to the complexities of furnishing data to a multitude of different nationwide and specialty consumer reporting agencies often with inconsistent or differing reporting procedures.

The accuracy guidelines should be scalable to the data furnisher. Guidelines for credit grantors who possess complete account and transactional history necessarily should be

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33 Section 813(c); 15 U.S.C. §1692k(c).

34 *See, e.g., Heintz v. Jenkins*, 514 U.S. 291 (1995); *Hyman v. Tate*, 362 F.3d 965 (7th Cir. 2004); *Juras v. Aman Collection Serv. Inc.*, 829 F.2d 739 (9th Cir. 1987); *Jenkins v. Union Corp.*, 999 F. Supp. 1120 (N.D. Ill. 1998); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383 (D.Del. 1991).

different than the guidelines applicable to third-party debt collectors that are provided selective information from their clients. The guidelines also are likely to be variable to the type of debts. For example, the guidelines for accuracy in reporting medical accounts are qualitatively and quantitatively different than other types of debts, such as purchased debts, where some information about the debtors may not be available.

To accommodate this diversity, ACA encourages the Agencies to again consider the model developed by the FTC in the context of the GLB Act. The GLB Act required the FTC to develop the Safeguard Rule requiring the implementation of standards to protect against the disclosure of sensitive consumer information. Pursuant to the FTC's rule, affected entities must develop a written plan covering five broad areas and scalable to the size of the company:

- designate one or more employees to coordinate its information security program;[35]
- identify and assess the risks to customer information in each relevant area of the company's operation, and evaluate the effectiveness of the current safeguards for controlling these risks;
- design and implement a safeguards program, and regularly monitor and test it;
- select service providers that can maintain appropriate safeguards, make sure your contract requires them to maintain safeguards, and oversee their handling of customer information; and

35 The centralized oversight of the Safeguard Rule standards is consistent with the practice of some collection agencies that specialize in healthcare debts. These agencies utilize "patient quality coordinators" to interface with patient debtors, accept and process their disputes, and generally function as a advocate to respond to their concerns.

- evaluate and adjust the program in light of relevant circumstances, including changes in the firm's business or operations, or the results of security testing and monitoring.

Further, it is essential that the accuracy guidelines do not impair the use of personal identifiers, such as social security numbers, as a vital data element when recovering a debt and reporting to consumer reporting agencies. As FTC Commissioner Jon Leibowitz testified to Congress this month, "With 300 million American consumers, many of whom share the same name, the unique nine-digit SSN is a key identification tool for businesses, government, and others."[36] Commissioner Leibowitz correctly noted that, "Without the ability to use SSNs as a personal identifier and fraud prevention tool, the granting of credit and the provision of other financial services would become riskier and more expensive and inconvenient for consumers."[37] Social security identifiers permit debt collectors and creditors alike to identify debtors with similar information, for example, two debtors with the name of "John Smith."[38] At all costs, the use of this key identification tool must be preserved.

E. The Accuracy Guidelines Must Accommodate Small Businesses.

The Agencies request comment on the potential impact on small institutions as a

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36 Prepared Statement of the Federal Trade Commission Before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce, *Social Security Numbers in Commerce: Reconciling Beneficial Uses with Threats to Privacy*, at 2 (May 11, 2006).

37 *Id.* at 3.

38 *See generally id.* at 2 n.5 (highlighting industry data that 14 million Americans have one of ten last names, and 58 million men have one of ten first names).

consequence of the accuracy guidelines. Data furnishers that are small businesses do not have extensive administrative, technical, and financial resources at their disposal to implement complex policies and procedures. If the Agencies adopt complex, costly, and/or resource-intensive policies and procedures which define "reasonable" behavior, the impact on small businesses that must comply will be substantial. It may force small data furnishers to cease or substantially curtail their reporting of consumer information. Such an outcome, in aggregate, would have far-reaching implications on the credit system. Small data furnishers individually may not supply vast amounts of consumer information to consumer reporting agencies, even though today small businesses collectively furnish much of the information reported.

As it stands, the ANPR does not propose specific policies and procedures, so it is not possible for ACA to project the impact for future rules on the small-business members in the Association. The Agencies have not included a proposed Regulatory Flexibility Analysis, thereby making it difficult to project compliance requirements. At this stage, ACA simply notes that the Agencies must factor into their rulemaking the substantial impact on small businesses. Most ACA members are small businesses and most are data furnishers. Approximately 2,000 of the company members of ACA maintain fewer than 10 employees, and more than 2,500 of the members employ fewer than 20 persons. The ability of these members to comply with the accuracy guidelines should be foremost in the minds of the Agencies. Compliance can be fostered and encouraged not solely by adopting scalable

procedures, but also by post-rule guidance from the Agencies. For example, the FTC has a practice of issuing guidance to small businesses when a compliance obligation is implicated by a rule the Agency promulgates.[39]

F. The Accuracy Guidelines Should Address When A Data Furnisher Has Reasonable Cause To Believe Information Is Inaccurate.

The Agencies should address in the rulemaking the circumstances in which a data furnisher may have "reasonable cause to believe" consumer data is inaccurate. Section 623(a), as amended, prohibits data furnishers from reporting information with actual knowledge of errors.[40] The statute construes "actual knowledge" to include a person who "knows or has reasonable cause to believe that the information is inaccurate."[41] The data furnisher accuracy standard articulated in section 623(a) is linked with the obligation of the Agencies to develop the accuracy guidelines.

The "reasonable cause" component of the "actual knowledge" standard replaced the pre-existing "conscious avoidance" language in section 623(a). Data furnishers today are without any Congressional or administrative guidance as to what constitutes a "reasonable cause to believe" that information reported by the furnisher is not accurate. For example, is

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39 *See* Federal Trade Commission, How To Comply With The Privacy Of Consumer Financial Information Rule Of The Gramm-Leach-Bliley Act: A Guide For Small Business From The Federal Trade Commission (July 2002), *available at* http://www.ftc.gov/bcp/conline/pubs/buspubs/glblong.pdf.

40 Section 623(a)(1)(A); 15 U.S.C. § 1681s-2(a)(1)(A).

41 *Id.*

there "reasonable cause to believe" the data furnisher's information is inaccurate when a consumer makes an undocumented allegation of an inaccuracy? Is there "reasonable cause to believe" that information reported by the data furnisher is inaccurate when the furnisher batch reports data received from a creditor client in reliance on the information provided by the client? Obviously data furnishers do not have the resources and access to all of the underlying account documentation to verify each piece of consumer data supplied by their clients prior to reporting.

As noted above, the Agencies are charged with enforcement of data furnishers' compliance with the accuracy guidelines and section 623(a) generally. As such, the Agencies should address this issue by articulating in the rule, or in the statement of basis and purpose, how they intend to construe the new accuracy standard in section 623(a) and, specifically, the "reasonable cause" component of the standard. This guidance is needed to remove the existing ambiguities as to what will be construed as a "reasonable cause."

VI. Specific Comments Regarding The Proposed Accuracy Guidelines.

ACA has the following comments in response to the Agencies request for comments on the accuracy and integrity guidelines:

Paragraph ***A1.*** requests a description of the types of errors, omissions, or other problems that may impair the accuracy and integrity of information furnished to a consumer reporting agency. Although imperfect, the credit reporting system is capable of successfully

recording and updating massive amounts of consumer data. The system is dependent on the interaction of numerous entities that contribute to building tradeline information, including consumers, creditors, data furnishers, and consumer reporting agencies. Accuracy problems occur when any part of this system fails. Although the unheralded successful recordation of consumer information is far more common, failures in the system are inevitable in light of the millions of consumers and billions of tradelines contemplated.

The causes of the problems impairing accuracy are varied. Data furnishers collecting debts on behalf of credit grantors can and must rely on the accuracy of the information provided to them for collecting and reporting purposes. Numerous courts have concluded that "a debt collector has the right to rely on information provided by the client-creditor, and has no obligation to undertake an independent debt validity investigation."[42] In some instances, the information provided to the data furnisher is incomplete or inaccurate, although unknown to the furnisher. When the furnisher reports the information to consumer reporting agencies, inaccuracies are transmitted. In theory, the consumer dispute process (either directly with data furnishers or to consumer reporting agencies) is positioned to identify the incomplete or inaccurate information and report corrected information. Here too, however, the

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42 *Jenkins v. Union Corp.*, 999 F. Supp. 1120, 1140-41 (N.D. Ill. 1998). *See also Ducrest v. Alco Collections, Inc.*, 931 F. Supp. 459, 462 (M.D. La. 1996) ("debt collector should be able to rely on the representation and implied warranty from its client that the amount was due under either the lease or the law"); *Schmitt v. FMA Alliance*, 398 F.3d 995, 997 (8th Cir. 2005) (debt collector is not liable for actions taken in reliance on the creditor's provided information).

reinvestigation process of the FCRA may require the data furnisher to rely on the original credit grantor to provide documentation verifying the accuracy of the information reported.

Some data furnishers have observed that credit grantors have a reduced incentive to assure the accuracy of the information they provide to data furnishers because it is the data furnisher that bears the risk of liability for reporting the information. For this reason, the Agencies should consider whether accuracy guidelines should impose any accuracy obligations on entities that provide consumer information to data furnishers for reporting purposes.

Another problem contributing to the impairment of the accuracy of consumer tradelines is the lack of standardized procedures to furnish data to consumer reporting agencies. The nationwide consumer reporting agencies utilization of the Metro 2 Format assures some uniformity, but there can be interoperability challenges between the agencies which contribute to errors. Data furnishers have reported that, apart from Metro 2, the specific procedures required by consumer reporting agencies to transfer and upload data are not uniform. The variations are even greater when you factor specialty consumer reporting.[43]

Certainly the consumer reporting agencies have a formidable job of accepting data from tens of thousands of different furnishers. At the same time, an individual data furnisher may

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43 The process of furnishing data often requires regular interactions between the data furnishers and consumer reporting agencies. It has been reported by data furnishers that their primary or exclusive contacts at consumer reporting agencies are sales persons, as opposed to employees with technical expertise or training in compliance issues. The instruction to data furnishers in this setting may not fully appreciate the legal and compliance consequences of reporting data in the manner directed.

submit batch data to multiple consumer reporting agencies, and unless the reporting process is similar if not identical, there are opportunities for mistakes. This is an acute issue for small data furnishers that might not have the sophisticated technological capabilities of larger furnishers, as well as for data furnishers that submit only to specialty consumer reporting agencies.

Another potential problem area is updating account information. Data furnishers provide monthly updates to consumer reporting agencies. This ensures the continued accuracy of the information reported on the account by reflecting current transactions. Some data furnishers have experienced delays (60 days or longer) at the consumer reporting agencies in the process of updating consumer information. The causes are varied, but the effects are apparent to consumers who obtain their consumer reports in the intervening period of time expecting to see their accounts with a different status than reflected in the reports. The consumers naturally contact the data furnisher wanting an explanation as to why their accounts do not reflect a particular status, e.g., disputed.

Finally, ACA notes that accuracy can be impaired when reporting medical debts. The FACT Act placed greater restrictions on the use and disclosure of medical information by redefining the term "medical information," tightening affiliate sharing provisions, and creating

new duties for "medical information furnishers."[44] Healthcare providers and their agents still are permitted to furnish data and use consumer reports, however, they must restrict or encrypt all of the information other than account status.[45] To protect consumer medical privacy, the name, address and telephone number of medical information furnishers must be encoded if they are to appear in a consumer report. The coding may not allow one to identify or infer the specific provider or the nature of the services, products, or devices underlying the transaction. In the Metro 2 context, the medical information provider notifies the consumer reporting agency of its status by reporting creditor classification "02" in the K1 Segment for each medical account reported.

Medical information furnishers report that they have implemented policies to comply with the FACT Act medical reporting requirements and, when reporting, they have the encoded tradeline information (including the creditor name). The tradelines appearing on consumers' reports in some instances, however, include a pseudonym ("All State Collections") identified as furnisher or the creditor. Users of the consumer report are able to infer from the pseudonym that the account is a collection account, and it may additionally reveal that it is medical account.

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44 Section 623(a)(9); 15 U.S.C. § 1681s-2(a)(9). A medical information furnisher is defined as "a person whose primary business is providing medical services, products, or devices, or the person's agent or assignee, who furnishes information to a consumer reporting agency on a consumer."

45 Section 605(a)(6)(A); 15 U.S.C. § 1681c(a)(6)(A).

Paragraph ***A2.*** inquires into patterns, practices and activities that can compromise the integrity of the information furnished to the consumer reporting agencies. ACA refers the Agencies to its comments in response to paragraph A1. In addition, ACA notes that there are three broad areas of activities that raise specific issues for the accuracy of consumer information.

First, information or data brokers pose unique problems for the accuracy of information, particularly in instances where the brokers are not the original furnisher of the information but, instead, aggregate and resell information reported by data furnishers. The FTC is acutely aware of the security and data accuracy concerns associated with data brokers.[46] Data brokers mine consumer information from a variety of private and public reporting sources. Because the data brokers typically are not the original furnisher of the information, they frequently have no way of verifying the accuracy of the mined information which then is reported.

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46 *See, e.g., United States v. Choicepoint*, FTC File No. 052-3069 (N.D. Ga.) (stipulated final judgment), *available at* http://www.ftc.gov/os/caselist/choicepoint/0523069stip.pdf. *See also* Federal Trade Commission, *Protecting Consumers' Data: Policy Issues Raised By Choicepoint*, Prepared State of the Federal Trade Commission Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, U.S. House of Representatives (Mar. 15, 2005); Federal Trade Commission, *Securing Electronic Personal Data: Striking a Balance Between Privacy and Commercial and Governmental Use*, Prepared Statement of the Federal Trade Commission Before the Committee on the Judiciary of the United States Senate (April 13, 2005); Federal Trade Commission, *Enhancing Data Security: The Regulators' Perspective*, Prepared Statement of the Federal Trade Commission Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, U.S. House of Rep. (May 18, 2005).

ACA INTERNATIONAL COMMENT

Data furnishers report that some brokers repopulate consumer reports with inaccurate tradelines that pre-dates or otherwise fails to include the changes to the tradeline made by the data furnisher. For example, a data furnisher may report an account in month 1, and update the account as disputed in month 3. If a data broker captures information from month 1 alone, that the consumer's dispute will not be reflected in the information resold by the broker or later placed on the report. Consequently, consumers or other entities who purchase reports from these data brokers may not receive the most accurate and current information, which can lead to unnecessary complaints with data furnishers for failing to maintain the accuracy of the account when, in fact, the furnisher has done so.

As a second broad area of activities, a special concern for asset buyers and collection agencies is the treatment of collection accounts returned to the creditor after reported by the debt collector data furnisher. When this occurs, the creditor may place the account with another debt collector. If the tradeline placed on the consumer's report by the former data furnisher is not promptly deleted, a duplicate tradeline can appear on the report for the same account when the new data furnisher reports the account. This can occur in a number of ways. One way is when the previous data furnisher's request to cancel and delete the tradeline is not processed promptly or is overtaken by the subsequent data furnisher's tradeline. Another way it occurs is when a data furnisher does not update the status codes for the account with a deletion request, or if the updated status codes are not loaded promptly by the consumer

reporting agencies.

ACA has worked with the consumer reporting agencies, including the Consumer Data Industry Association, to verify the method under the Credit Reporting Resource Guide to process these transactions. The data furnisher that returns the account to the creditor must promptly notify the consumer reporting agencies with an updated account status code (Base Segment, Field 17A in Metro 2) with a "DA" code, thereby instructing the agencies to delete the entire account for reasons other than fraud.[47]

The Agencies mention a third area of potential accuracy issues -- asset sales and acquisitions to and among collection agencies. The sale of assets by creditors to collection agencies and/or among debt collectors poses special challenges to maintain the accuracy of the consumer information. Some asset sellers do not provide all account information, including payment histories and transactional data, as a part of the sale transactions. The reasons for this are not clear. It may be because of the expense associated with collecting the information. It may be a form of risk management in the event that the transactional data developed by the seller is not accurate but nonetheless is provided to the asset buyer. In some instances, the data may not be available either in part or whole, or it only may be available at an additional cost.

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47 Similarly, the "DA" status code in the Metro 2 Format is used by debt sellers that either resell the debt portfolio to another entity or it forward to a third-party collection agency.

ACA INTERNATIONAL COMMENT

ACA's Asset Buyers Division has studied these issues in depth. Many participants in asset buying transactions report that the accuracy of consumer information is no more impaired than in non-sale transactions. At the same time, the accuracy and integrity of consumer data is more prone to impairment as debt portfolios are bought and sold several times.

ACA's Asset Buyers Division has developed Due Diligence Guidelines ("DDGs") which are provided to all ACA Asset Buyers Division members. The DDGs are designed to implement a process for the sale and transfer of accounts receivables built on the highest standards of integrity and understanding of the complex asset sale and acquisition market. The DDGs include questions in the following categories:

- general account due diligence,
- general account information,
- interests and charges previously assessed to the accounts,
- communications with debtors,
- previous legal activity and account status,
- credit bureau reporting histories and scoring,
- media and documentation availability,
- internal and external historical collection activity, and
- industry specific documentation (for example, credit cards, medical, telecommunications, and utilities).

ACA members are encouraged to adhere to the DDGs when engaging in sale or acquisition of accounts. The DDGs have been instrumental in assuring greater accuracy.

In response to the Agencies' request in ***A3.***, ACA refers the Agencies to its comments in response to ***A1.*** and ***A2.***

A4. inquires into the policies and procedures that data furnishers should implement and maintain to identify, prevent, and maintain conduct that can compromise the accuracy and integrity of consumer information. ACA refers the Agencies to its discussion of the DDGs issued by ACA's Asset Buyers Division. In addition, the Agencies should evaluate whether the accuracy of consumer information would be enhanced if asset sellers are required to provide, as a condition of the sale, minimum information necessary to accurately report the accounts and respond to consumer disputes. Defining the minimum necessary data is not an easy proposition. For example, the data presumably would include the consumer's name, address, and obsolescence information for purposes of identifying the delinquency date. Alternatively, it may include more detailed information such as transactional history. The Agencies should consider requesting comments from interested parties in order to evaluate whether certain minimum data should be required as part of the sale of debt portfolios.

A5. asks for a description of the methods used to furnish consumer information. As discussed previously, most data furnishers electronically transmit the data using the automated Metro 2 Format. The Metro 2 Format, and specifically the Credit Reporting Resource Guide

issued by the Consumer Data Industry Association, instructs data furnishers as to the mechanics of transmitting the data to the consumer reporting agencies. Record layouts, file formats, and status codes of the consumer data, for example, are pre-defined. Data furnishers report all tradelines for consumers in an aggregated or "batch" format. The files are sent to the consumer reporting agencies electronically, and the agencies review and upload the data.

Data furnishers thereafter submit monthly updates to the consumer reporting agencies to reflect the transactional experiences occurring during the month, for example, payments received or consumer disputes. In addition, the e-OSCAR system transmits consumer disputes from consumer reporting agencies to data furnishers and accepts data furnishers' reinvestigation results for tradelines and identification disputes.[48]

ACA refers the Agencies to its responses to ***A1.-A5.*** in response to ***A6.-A7.*** In addition, ACA comments that data furnishers commonly have policies and procedures in place to ensure the accuracy and integrity of the information reported to consumer reporting agencies. The policies and procedures frequently are written and specify the requirements for identifying accounts to be reported and the procedures to be followed. The procedures, in one form or another, follow the requirements of the FCRA and the provisions of the Credit

48 The e-OSCAR (Online Solution For Complete and Accurate Reporting) system was developed and implemented by the consumer reporting agencies in response to the new FCRA requirements. It is a browser-based system that transmits consumer disputes from consumer reporting agencies to data furnishers and accepts data furnishers' reinvestigation results for tradelines and identification disputes.

Reporting Resource Guide.

The Agencies seek comment in ***A8.*** concerning the policies and procedures used by data furnishers to conduct reinvestigations and correct inaccurate information. ACA limits its response to reinvestigations based on a consumer dispute received by the data furnisher from a consumer reporting agency.[49]

The FCRA requires that, if the completeness or accuracy of any item of information contained in a consumer's file is disputed by the consumer, and the consumer notifies the consumer reporting agency of such dispute, the consumer reporting agency must conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate. Within five business days of receiving a notice of dispute from a consumer, the consumer reporting agency must notify the data furnisher that the information it provided has been disputed. The notice to the data furnisher must include all relevant information regarding the dispute that the consumer reporting agency received from the consumer.

The process followed by data furnishers upon receipt of the notice from the consumer reporting agency varies. If the data furnisher is a third-party debt collector, it will conduct a reasonable investigation of the consumer's dispute and review the data provided by the consumer reporting agency. In some instances, the data furnisher in this context is able to use

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49 These disputes are received through the e-OSCAR system. Policies and procedures for investigating disputes directly from consumers to data furnishers are discussed *infra*.

the information in its possession to determine whether the information reported, in fact, is inaccurate. Data furnishers also may seek information or verification from the owner of the account. Indeed, in the case of debt collectors functioning as data furnishers on behalf of creditors, collectors are well acquainted with the requirements of Federal and State law as to validating debt information.[50]

Upon completion of a reinvestigation, a data furnisher takes certain steps. If an item of information is found to be inaccurate or incomplete, a data furnisher must notify each consumer reporting agency previously provided with the inaccurate or incomplete information. In the case of inaccurate, incomplete, or unverifiable information, a data furnisher either (1) modifies the item of information in the consumer report to correct the inaccuracy; (2) deletes the item of information in the consumer report; or (3) permanently blocks the reporting of that item of information.

ACA refers the Agencies to its comments to ***A8.*** in response to the request for comments in ***A9.***

VII. Comments On Direct Disputes Regulations.

The FCRA and the FDCPA impose liability on data furnishers and debt collectors in connection with the receipt of a dispute directly from a consumer. Under the FDCPA and the FCRA, when a consumer disputes information that is part of a consumer report, a debt

50 *See* Fair Debt Collection Practices Act, 15 U.S.C. § 1692g.

collector/data furnisher must notify the consumer reporting agency of the dispute.

Previously, a direct dispute from a consumer to a data furnisher did not trigger the duty to conduct a reinvestigation. Section 623(a)(8) of FCRA, as amended by the FACT Act, now permits consumers to dispute the accuracy of their reports in written communications directly with data furnishers. A direct dispute with a data furnisher triggers, among other things, a duty to reinvestigate under certain circumstances. This is a significant change from pre-FACTA law. The new dispute, reinvestigation, and other requirements of section 623(a)(8) have a significant impact on ACA members.

Before addressing the Agencies' requests for comments on direct disputes, ACA notes that the new investigation requirements of section 623(a)(8)(E)(iii) present serious compliance problems that should be addressed. For example, there is a conflict between the FACT Act and the FDCPA/State collection law requirements that arises when a data furnisher that is collection agency licensed to collect debts in a specific state receives a dispute from a consumer in another state. The conflict arises because the FACT Act requires the data furnisher to complete an investigation and report the results to the consumer, but a collection agency that complies with the FACT Act and reports the results may be accused of violating state licensing laws by attempting to collect a debt in the state when it does so.

Virtually all States have specific laws regulating the out-of-state collection of debts. Most States have laws which make it a violation for an out-of-state collection agency to

communicate with in-state debtors without a state license, state registration, and/or a posted bond if "doing business" in the state.

The conflict for debt collectors as a consequence of the intersection of the FACT Act direct dispute requirements and interstate collection laws is real and poses serious liability. It is common for a consumer to reside in State A when he or she incurred a debt, and for the creditor to refer the debt to a licensed, registered, and bonded collection in State A. When the consumer moves to State B and registers a dispute with the collector in State A, the collector is required by the FACT Act to timely investigate and respond to the dispute. Because it is a collection account, the collector's responding letter to the consumer now residing in State B will include Federal and State mandated disclosures that the communication is from a debt collector attempting to collect a debt.[51]

A furnisher that complies with section 623(a)(8) by investigating a dispute and reporting the results to the consumer might be alleged to have engaged in a "communication"

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51 Section 807(11), 15 U.S.C. § 1692e(11), requires collectors to provide a "Mini-Miranda" to debtors in an initial written communication that "This is an attempt to collect a debt and any information obtained will be used for that purpose." State laws frequently modify the Mini-Miranda requirements by requiring the disclosure in all communications and/or adding State-specific language. *See, e.g.,* Colo. Rev. Stat. §12-14-107(1)(1); Conn. Agencies Regs. § 36a-809-3(f); Ga. Comp. R. & Regs. r 120-1-14.23(b); Haw. Rev. Stat. § 443B-18(2); Iowa Code § 537.7103(4)(b); Me. Rev. Stat. Ann. tit. 32, § 11013(2)(K-1); N.C. Gen. Stat. § 58-70-110(2); Tex. Fin. Code Ann. § 392.304(a)(5); Vt. Code R. 104.04(b), (d); W. Va. Code § 46B-4-7(2); Wyo. R. & Regs. Ch. 4 §10(k).

or attempt to collect a debt.[52] ACA believes that the Agencies must address this conflict in the proposed direct dispute regulations by clarifying that compliance with section 623(a)(8) by communicating with an out-of-state debtor is not a "communication" or attempt to collect a debt in violation of State and/or Federal collection laws.

In paragraph ***B1.***, the Agencies ask for the circumstances under which a data furnisher should or should not be required to investigate a direct dispute. The FCRA defines the circumstances when a data furnisher is required to investigate. Under the amended FCRA, a consumer who wishes to dispute an item of information directly with a data furnisher must adhere to the following four steps:

- The consumer must provide a written notice of a dispute directly to a data furnisher at the mailing address provided to receive such disputes. The dispute must be based on the accuracy of information reported by the specific data furnisher to one or more consumer reporting agencies.

- The consumer must identify the specific item of information that is in dispute for reasons of alleged inaccuracy.

- The consumer must explain the basis for the dispute. ACA believes that it is reasonable for the Agencies to require the consumer to clearly and conspicuously inform the data furnisher that they dispute the accuracy of the information, including the information deemed inaccurate, and the reason or reasons upon which the consumer bases his or her contention for the disputed accuracy of that information.

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52 The FDCPA defines "communications" broadly to include "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. §1692a(2).

- The consumer has an affirmative obligation under the statute to include all supporting documentation required to substantiate the disputed accuracy of the information. ACA believes that it is reasonable to require the consumer to clearly and conspicuously inform the data furnisher that the consumer has provided all documentation in his or her possession to substantiate his or her contentions, or, if the consumer does not possess any substantiation for the dispute, the consumer should be required to specify in writing to this effect.

The amended FCRA makes an exception in those cases where a consumer dispute is frivolous or irrelevant. Under the statue, it is a reasonable determination that a dispute is frivolous or irrelevant if (1) the consumer fails to provide sufficient information to investigate the disputed information; or (2) the consumer has previously submitted substantially the same dispute either directly to the data furnisher or indirectly through a CRA, and the data furnisher has already fulfilled their duties with respect to the dispute, i.e. conducted a reasonable investigation within the time frame permitted.[53]

Once a data furnisher has made a reasonable determination that a dispute is frivolous or irrelevant, it must promptly notify the consumer. The data furnisher must provide notice of the determination within five business days of making such determination, by mail, or (if authorized by the consumer) any other means available. Within the notice, a data furnisher is required to identify the reason(s) for the determination that a particular dispute is frivolous or

53 The Agencies should reconcile the redundant obligations on data furnishers in situations where a consumer that submits a written dispute with a data furnisher at the same time he or she disputes with a consumer reporting agency. It is common for consumers to do this, and the result is that data furnishers have to respond to two separate information streams which unnecessarily increases the furnishers' time and costs.

irrelevant.

ACA believes that it is essential for the Agencies to require clear and conspicuous written communications of disputes from consumers to data furnishers in order to maximize accuracy of consumer reporting.[54] Unfortunately, more often than not, consumers who send written notices to data furnishers do not specify what they are disputing. For example, they may simply disclaim the account generally, or they may assert that they previously paid off the account, without specifying the allegedly inaccurate tradeline information that is disputed. For that matter, consumers generally do not specify whether they are "disputing" a debt under the FACT Act, the FDCPA, and/or both, which can have significant consequences as noted below.

For these reasons, the Agencies' regulations should require consumers to clearly and conspicuously inform the data furnisher in writing that they are disputing the accuracy of the information under the FCRA, including the information deemed inaccurate, and the basis for the alleged inaccuracy.

The Agencies also should address certain inconsistencies between the FACT Act and the FDCPA (for debt collector data furnishers) in order to improve the accuracy of credit reporting, effectively record consumers' disputes, and avoid unnecessary litigation. As noted, *supra*, the FDCPA, as construed by the courts, requires data furnishers to accept consumer

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54 ACA is studying options available to data furnishers and consumers to facilitate the efficient communication of written disputes by consumers and timely reporting of reinvestigation results by data furnishers.

disputes whether communicated in writing or *orally* and report them to consumer reporting agencies.[55] In contrast, the FACT Act permits consumers to file only relevant, non-frivolous disputes directly with data furnishers in *writing* and only about alleged inaccurate information. The result of the broader applicability of the FDPCA dispute provisions is that data furnishers must accept all communications (oral and written) from consumers as "disputed" accounts when reporting to consumer reporting agencies, even though the consumers have not followed the proper dispute procedures under the FACT Act by providing a written communication with the collector.

Even more vexing problem for the accuracy of the tradelines is that, even where a dispute is irrelevant or frivolous for statutorily-prescribed reasons, the data furnisher will continue to report the account to the consumer reporting agencies as disputed so as not to violate section 807(8) of the FDPCA. Section 807(8) prohibits a debt collector from "communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed."[56] It does not require the consumer to identify a reason for a dispute. The statute only requires the consumer to notify the collector of the dispute. There is no

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55 *Brady v. Credit Recovery Co.*, 160 F3d 64 (1st Cir. 1998) (violation of the FDCPA by failing to include a consumer's oral dispute of the debt in the consumer's report furnished to consumer reporting agencies); *Young v. Credit Bureau Inc.*, 729 F. Supp. 1421 (W.D.N.Y. 1989) (FDCPA does not require that a consumer, in order to dispute the validity of a debt, convey that information in writing).

56 Fair Debt Collection Practices Act, 15 U.S.C. § 1692e(8).

requirement that the dispute be "valid" for the statute to apply, contrary to the FACT Act which rules out frivolous and irrelevant disputes. In effect, if a consumer believes an account to be in dispute, it is in dispute under the FDCPA no matter what the debt collector does to verify it, even though it may not be a "dispute" under the FACT Act. Upon notice of the dispute from the consumer (again, either orally or in writing under the FDCPA), debt collectors are required to report the consumer's dispute to all consumer reporting agencies to which they previously reported the information.[57]

The result is that a frivolous, irrelevant, or unsubstantiated claim of inaccurate information on a tradeline will continue to be reported as disputed by the data furnisher in order to avoid litigation under the FDPCA. Obviously this outcome does not foster a process of increasing the accuracy of the information, and it also can affect the credit scoring and the availability of credit.

ACA strongly encourages the Agencies, when promulgating regulations implementing the direct dispute requirements, to evaluate ways to make the dispute process, procedures, and outcomes consistent under the FACT Act and the FDCPA. Failing to do so will only reinforce outcomes where consumers' tradelines will be reported as disputed regardless of the merits of the disputes, the result of the investigations into the disputes, or whether consumers intend to dispute under the FDCPA, FACT Act, and/or both statutes.

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57 *See Cass*, FTC Informal Staff Letter (Dec. 23, 1997).

Finally, in ***B5***., the Agencies inquire as to whether it is the current practice of data furnishers to investigate direct disputes. A data furnisher that receives a valid notice of a dispute from a consumer should have policies already in place to investigate the dispute. ACA has advised its members that, at a minimum, the data furnisher must perform the following:

- conduct a reasonable investigation with respect to the disputed information;
- review all the information provided by the consumer with the notice of dispute;
- complete the investigation and respond to the consumer within the time frame permitted for such investigations when initiated by a consumer through a consumer-reporting agency under section 611 of the FCRA [generally 30 days, unless a consumer provides additional relevant information after the start of an investigation (45 days in the latter instance).]; and
- if the investigation determines that the disputed item of information is inaccurate, the data furnisher must correct the inaccuracy with each CRA to which the data furnisher has provided the inaccurate information.

VIII. Conclusion.

ACA appreciates the opportunity to comment on the issues raised in the ANPR. If you have any questions, please contact Andrew M. Beato at (202) 737-7777 or abeato@steinmitchell.com.

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Respectfully submitted,

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