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May 22, 2006

Via Electronic Delivery

Office of the Comptroller of the Currency
250 E Street, SW, Mail Stop 1-5
Washington, DC 20219
Attention: Docket Number 06-04

regs.comments@occ.treas.gov

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1250

regs.comments@federalreserve.gov

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

comments@fdic.gov

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: No. 2006-06

regs.comments@ots.treas.gov

Ms. Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

regcomments@ncua.gov

Federal Trade Commission
Office of the Secretary
Room 159-H (Annex C)
600 Pennsylvania Avenue, NW
Washington, DC 20580
Project No. R611017

https://secure.commentworks.com/ftc-FACTAfurnishers

Re: MasterCard Comments on 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

To Whom It May Concern:

This letter is submitted on behalf of MasterCard International Incorporated ("MasterCard")[1] in response to the Advance Notice of Proposed Rulemaking ("ANPR") issued by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Trade Commission ("Agencies") in the *Federal Register* on March 22, 2006. MasterCard thanks the Agencies for the opportunity to provide comments on the ANPR prior to the issuance of a proposed rule.

Introduction

The Fair and Accurate Credit Transactions Act ("FACT Act") charges the Agencies with exploring two specific issues relating to entities that provide information to consumer reporting agencies ("Data Furnishers" and "CRAs", respectively). The Agencies must consider guidelines "regarding the accuracy and integrity" of information provided to CRAs by Data Furnishers, and require Data Furnishers to establish reasonable policies and procedures for implementing those guidelines. The Agencies must also identify the circumstances under which a Data Furnisher is required under the Fair Credit Reporting Act ("FCRA") to reinvestigate a dispute regarding the accuracy of information provided to a CRA based on the direct request of a consumer.

[1] MasterCard is an SEC-registered private share corporation that licenses financial institutions to use the MasterCard service marks in connection with a variety of payments systems.

MasterCard applauds the Agencies for issuing an ANPR to gather information prior to developing a proposed rule on these two items. Issues relating to CRAs and Data Furnishers are complex, and the ANPR will assist the Agencies in gathering information prior to issuing a proposed rule. Furthermore, because the decision to furnish information to CRAs is entirely voluntary, any regulatory decisions that may affect Data Furnishers should be carefully considered so as not to create disincentives to providing robust information to CRAs.

As was noted throughout the legislative process leading up to the enactment of the FACT Act, the United States has the most robust consumer credit markets in the world. This is due in no small part to the phenomenal consumer reporting system that has developed in this country. While participants in the system are guided and governed by the FCRA, the consumer reporting system is largely the product of private sector innovation and cooperation. We fully expect the system to continue to evolve and improve as a result of continued private sector innovation. It is our hope that any additional regulatory or compliance obligations arising from this rulemaking process do not inadvertently result in fewer participants in the consumer reporting system, or in a less robust system. We are confident that the Agencies share this desire.

Accuracy and Integrity

Data Furnishers strive to provide accurate information to CRAs for many reasons. Most fundamentally, Data Furnishers are also the end users of the finished product built using the information they provide. This is especially true for MasterCard's member banks because consumer reports are used extensively in connection with reviewing credit card applications and accounts. Data Furnishers also recognize that accurate information results in fewer disputes from consumers, either received from CRAs pursuant to section 611 of the FCRA or received directly from consumers. In other words, accurate information on the front end results in fewer resources expended on the back end as part of an investigation.

Although the mechanics of furnishing information to CRAs will obviously vary from bank to bank, it appears that the rule of thumb is that information is provided to CRAs approximately every thirty days using the Metro 2 format preferred by the major CRAs. Some banks may report on a rolling basis based on the account cycle, instead of providing all of the account information at the same time. The information may be provided electronically or via a hard medium, such as a disk or a "tape".

We also note that Data Furnishers generally provide information to CRAs that is taken directly from their own credit files. The operation of credit card portfolios has become automated for the most part, even for smaller credit card issuers. MasterCard members take advantage of the efficiencies provided by automation in many respects, including in connection with their furnishing of information to CRAs. In this regard, the information furnished to CRAs is generally an exact replica of the information in the cardholders' files at the bank. The automation eliminates opportunities for errors in transcription from the cardholders' files to the file that is ultimately provided to CRAs. It should go without saying that banks make commercially reasonable efforts to maintain

accurate files with respect to the loans they provide. Therefore, the accuracy of the information provided to CRAs from these banks is the product the same commercially reasonable efforts.

Despite the sound process used to provide information to CRAs, Data Furnishers may provide information to CRAs that may not be accurate from time to time, such as if the underlying information in the consumer's file at the bank is incorrect. We believe these circumstances are the small exception to the rule, but no system can guarantee 100% accuracy. In the rare instances in which this occurs, the FCRA provides powerful tools to consumers to dispute the accuracy of information in their file at a CRA. If a consumer disputes information in his or her file, and the CRA determines that the alleged error is not the CRA's error, the CRA will forward the dispute to the appropriate Data Furnisher. Each of our member banks obviously has its own mechanism for investigating the disputes received from CRAs. However, it appears that Data Furnishers generally review the information provided by the CRA and compare it to the information in the consumer's file at the Data Furnisher. Many times a correction can be made based on this type of investigation. Other times a Data Furnisher may feel the need to investigate the facts of matter further, and take the appropriate steps to do so.

The most common system used for receiving disputes from CRAs is the E-OSCAR system established by the major CRAs. The dispute can be received efficiently through E-OSCAR, and the results of the Data Furnisher's investigation are also transmitted back to the CRA through E-OSCAR. MasterCard understands from the users of E-OSCAR that it provides a relatively simple and efficient mechanism through which basic information can be communicated between Data Furnishers and CRAs.

Based on the method by which our member banks generally furnish information to CRAs, and reinvestigate alleged errors, we do not believe that significant regulatory modifications to these processes are required. The information furnished is extremely accurate because it is the information on which the bank itself also relies. Furthermore, investigation requests prompt appropriate reviews of the necessary information. Although regulatory intervention does not appear to be warranted, MasterCard would support efforts by the Agencies to develop guidelines pertaining to accuracy and integrity of information provided to CRAs. Such guidelines should recognize that there are Data Furnishers of varying sizes and technological capabilities. The guidelines should also recognize that absolute accuracy is an unreasonable and unattainable goal. Rather, Data Furnishers should have reasonable policies and procedures, commensurate with the size and scope of their activities, to control for the accuracy and integrity of the information they furnish. We believe that reliance on the accuracy of existing account files should be demonstrative of such polices and procedures.

MasterCard also notes that the Agencies suggest that furnisher practices can affect the "accuracy and integrity" of credit file information by "omit[ting] potentially significant information about the consumer account or transaction, such as credit limits for...the account." The Agencies' assertion begs the question as to what may constitute "accuracy and integrity." We suspect "accuracy" means that the information provided is factually correct. It is not apparent from the legislative history of the FACT Act, nor is it so from

the ANPR, what it means for information in the file to have "integrity"—other than it must be something other than "completeness" since that term was altered in the FACT Act after significant negotiations and compromises.

We caution the Agencies against implying that an amorphous concept of "completeness" must be included as part of this rulemaking. To require that information furnished must be "complete" suggests that there is an objective standard to measure the completeness of information. In fact, there is no such standard, nor could there be given the myriad of potential users of consumer reports and the purposes for which consumer reports are used. Just because someone has developed a scorecard that uses a variable—no matter how minor an input in the model—should not mean that furnishers must update their furnishing practices. Not only would this make the furnishing system more complicated, creating a disincentive for furnishers to provide information voluntarily, but it is also arbitrary.[2]

Direct Dispute Regulations

Benefits of Initiating Disputes with CRAs

If we could design a dispute mechanism from scratch, based on the existing consumer reporting system, such a mechanism would probably be the same as envisioned under section 611 of the FCRA. The existing dispute process gives consumers control of the dispute without requiring them to expend more energy or resources than is necessary. If the consumer finds one or more errors in his or her file at a CRA, the consumer must write only a single letter to initiate the entire dispute, and the results will be provided to the consumer at the conclusion.

To illustrate our point, it may be useful to contrast the existing dispute process with one based on disputes initiated through Data Furnishers. If a consumer believes there is an error with respect to information in his or her file at a CRA, and initiates a dispute with the Data Furnisher, the consumer will still need to initiate at least one more communication with respect to the dispute. For example, if the Data Furnisher does not believe the error stems from the information it provided to the CRA, the consumer would then need to contact the CRA, as the Data Furnisher does not have the same statutory obligation as CRAs do under section 611 to manage the dispute process from start to finish. Even if the Data Furnisher provides a correction to the CRA as a result of the consumer's dispute, a prudent consumer would still need to contact the CRA to ensure that the correction was actually made in the consumer's file at the CRA. Regardless of the outcome, the consumer needs to initiate at least two communications if he or she starts the process with the Data Furnisher. The number of communications a consumer must make obviously increases if the consumer believes that there are errors with respect to more than one tradeline.

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[2] The Agencies should seriously consider how such a requirement would be implemented. Would the development of any scorecard necessitate a change in the "completeness" requirement? Only scorecards used by some users? Most users? Certain types of users? Only if the variable has more than a minor impact? Would the information be provided to all CRAs? Only some CRAs? The list of questions requiring arbitrary answers is virtually endless.

Aside from the status quo requiring a minimal amount of effort from the consumer, it is also relatively efficient for CRAs and for Data Furnishers. By starting with the CRA, communications between the CRA and Data Furnishers will be avoided if the error is the CRA's. But if the error is the CRA's, and the investigation begins with the Data Furnisher, the Data Furnisher will probably resubmit the correct information a second time with the hope that the consumer's file is updated. (Of course, the consumer would have to contact the CRA to see if the correction was made.)

There is also the reality that the consumer is disputing a product collected and assembled by the CRA. *It is the CRA's product*, not the Data Furnisher's. Although the Data Furnisher may have provided some information to be used by the CRA, the CRA is the one who sorted and interpreted the information to create the consumer's file. The situation is somewhat analogous to the billing error provisions in section 161 of the Truth in Lending Act ("TILA"). Under TILA, although the billing error may be the fault of the merchant, the process is premised on the fact that the card issuer is in the best position to determine the source of the error and manage its resolution.

Existing Practices

The Agencies invite comment on the existing practices of Data Furnishers with respect to receiving disputes directly from consumers. Generally, MasterCard's member banks have mechanisms in place to receive customer service inquiries from consumers, including those pertaining to information furnished to a CRA. For example, virtually any bank has a mechanism by which the consumer can contact the bank to ask questions or express concerns. We believe our member banks also make an effort to investigate consumers' allegations with respect to the accuracy of information furnished to CRAs. This is not necessarily due to any specific legal requirement, but due to the desire to provide superior customer service.

According to a sample of our member banks, however, the vast majority of disputes relating to information they provided to a CRA originate through the CRA pursuant to section 611 of the FCRA. A very small percentage of the dispute volume is attributable to consumers contacting the banks directly. Obviously, a certain number of those disputes are duplicates—that is, the bank received them both from the CRA and from the consumer. Members report varying degrees of success in consolidating those investigations. Member banks also report varying levels of activity with respect to letters that are obviously influenced (if not prepared by) credit repair clinics. Many of these are clearly form letters whereby the individual makes unusual allegations with respect to the legal enforceability of debts or similar claims. The general rule among our members appears to be to perform an investigation of the consumer's allegations when contacted directly by the consumer, but not to investigate them repeatedly absent a material change in facts or allegations.

Costs Associated with Increased Obligations on Data Furnishers

Having said this, we strongly caution the Agencies not to conclude that a rulemaking providing for FCRA obligations in response to a dispute initiated by a

consumer with a Data Furnisher will simply be a formalization of what Data Furnishers "are doing anyway." MasterCard firmly believes that this would not be the case.

As we mention above, only a small percentage of disputes originate from the consumer. However, if the regulatory requirements were amended to require Data Furnishers to engage in certain activities in response to a direct consumer dispute, the number of disputes received by consumers would almost certainly increase significantly. For example, the disclosures provided by a CRA to a consumer pursuant to section 609 of the FCRA would most likely list the Data Furnisher as a point of contact for disputing the accuracy of information in the consumer's file at the CRA.[3] We also believe that credit repair clinics would target Data Furnishers more than they do today, increasing the number of bogus disputes received and processed by Data Furnishers. It is likely that credit repair clinics today focus their attention on CRAs—not Data Furnishers—because the FCRA forces CRAs to pay at least some attention to disputes from credit repair clinics. Data Furnishers, on the other hand, can simply ignore obviously bogus and repetitive disputes without fear of legal or compliance repercussions.[4] If Data Furnishers have legal obligations with respect to disputes received from consumers, however, they will become an inviting target for credit repair scams, increasing dispute volume from these nefarious operators.

It is worth discussing at this point the provision inserted by Congress which was designed to protect Data Furnishers from credit repair scams. In particular, section 623(a)(8)(G) permits Data Furnishers to ignore a dispute if it "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 section 403(3), or an entity that would be a credit repair organization, but for section 403(3)(B)(i)" of the Credit Repair Organizations Act ("CROA"). Based on the statutory language alone, Data Furnishers may not be able to rely on this provision for any purpose. Even if the Data Furnisher is confident that the consumer received some assistance in preparing a dispute letter the Data Furnisher will have a difficult time ascertaining whether that entity truly is a "credit repair organization" as defined in CROA. In particular, the Data Furnisher will not know whether the consumer paid the entity, or whether the entity meets the other portions of the definition of a "credit repair organization". For example, the consumer could have gotten the form language from an Internet web site free of charge, such as from a "chat room" or similar web site, meaning that section 623(a)(8)(G) would not apply. Basically, section 623(a)(8)(G) was an expedient political response to a real and significant issue—the impact of credit repair on Data Furnishers if they must accept disputes directly from the consumer. Although the provision provides little or no mitigation to the stated problem, it stands as an obvious indication that Congress was concerned about the problem. We urge the Agencies to consider the obvious congressional concern with this issue as they proceed.

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[3] The disclosure today instructs the consumer to contact the CRA, perhaps explaining why most disputes are directed to CRAs.

[4] A common strategy among credit repair scam artists is to repeatedly dispute the same information with the hope that the reinvestigation process breaks down in connection with one of the several disputes, *i.e.*, the dispute "slips through the cracks."

Without doubt, the compliance burden on Data Furnishers will increase if the regulatory requirements associated with the FCRA include obligations arising from disputes initiated directly by consumers. For some, the net effect may only be an increase in the costs of complying with government mandates. Consumers will obviously absorb some of this in the form of higher costs of credit. For others, though, the net effect may be a more material change in behavior, hurting consumers and industry alike. Some Data Furnishers may simply stop providing information to CRAs due to the increased costs and legal liabilities. Others may provide less information, or perhaps not perform meaningful investigations of consumers' disputes. Regardless, the net result would be a decrease in the accuracy and robust nature of information in consumers' files at CRAs. This could affect some consumers directly, as their files will not have as much information as they should, meaning lenders have less of a record with which to work. All consumers could be affected indirectly, however, if lenders determine that the value of consumer report information as a whole is diminished. Any degradation in the quality of information obtained in consumer reports will result in a general increase in the cost of credit due to lenders being forced to hedge against increased potential credit risks.

The Agencies must weigh the potential effects of increasing obligations on Data Furnishers against any potential benefits to consumers. We are unaware of any widespread problems regarding the accuracy of information provided to CRAs, or of any inability by consumers to correct that information. In the limited circumstances in which consumers are unable to correct inaccurate information, it *may* be that contacting Data Furnishers directly may have some benefit. In this regard, the consumer can explain a complicated or nuanced dispute without fear of key facts being lost in the translation. In fact, it is reasonable to assume that this occurs today when the consumer is frustrated with the results generated by an initial dispute through the CRA.[5] MasterCard also notes that the most difficult reinvestigations, and therefore those that are the most compelling cases for direct disputes, almost always involve claims of identity theft or similar fraud. As a result of the FACT Act, however, a reinvestigation is not the most appropriate tool for consumers to use. Rather, the FCRA now permits victims of identity theft to simply prohibit the furnishing of information relating to the victim's identity theft to the CRA in the first place. Similarly, the victim can prevent the CRA from reporting the information to others. Reinvestigating the information relating to identity theft is a moot point given the new powerful tools made available to victims of identity theft.

[5] If so, it would mitigate any need to increase regulatory burdens pursuant to this rulemaking.

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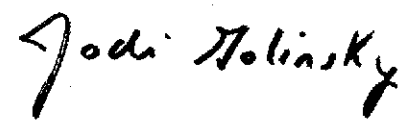
Once again, we appreciate the opportunity to comment on the ANPR. If you have any questions concerning our comments, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to call me, at the number indicated above, or Michael F. McEneney at Sidley Austin LLP, at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

Sincerely,



Jodi Golinsky
Vice President &
U.S. Regulatory Counsel

cc: Michael F. McEneney, Esq.