February 15, 2008

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

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

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

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

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

Federal Trade Commission
Office of the Secretary
Room 135 (Annex C)
600 Pennsylvania Avenue, NW

Washington, DC 20580
Re: Project No. R611017

To whom it may concern:

This comment letter is submitted by the Consumer Bankers Association ("CBA") in response to the Interagency Notice of Proposed Rulemaking ("Proposal") published by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Trade Commission (collectively, "Agencies") in the *Federal Register* on December 13, 2007. CBA is the recognized voice on retail banking issues in the nation's capital. CBA's member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. CBA was founded in 1919 to provide a progressive voice in the retail banking industry. CBA represents over 750 federally insured financial institutions that collectively hold more than 70% of all consumer credit held by federally insured depository institutions in the United States. CBA appreciates the opportunity to share its views on the Proposal with the Agencies.

In General

CBA believes the Proposal includes many worthwhile provisions regarding a furnisher's obligations under the federal Fair Credit Reporting Act ("FCRA"). We especially commend the Agencies for intending to avoid significant compliance burdens on furnishers. As the Agencies are well aware, no furnisher is required by law to furnish information to a consumer reporting agency ("CRA"). Furnishing is a voluntary activity that provides clear and demonstrable benefits to consumers, creditors, and others. Like the Agencies, we believe that furnishers should furnish information as accurately as reasonably possible. We note, however, that there is a limit as to the burdens that can be imposed on furnishers before such burdens reduce the benefits of our consumer reporting system. Our members have told us that there are circumstances in which they have not furnished information to CRAs as a result of the *existing* burdens on furnishers under the FCRA. We believe that the Proposal could impose additional burdens that would have the unintended effect of further diminishing the amount of quality and reliable information furnished to CRAs. Such an effect would mean less accurate information in consumer files at CRAs, less reliable information in the hands of users of consumer reports, and increased costs of credit to compensate for the resulting additional risk.

We recognize that there are tradeoffs the Agencies must consider when issuing rules under Section 623(e) (accuracy and integrity) and Section 623(a)(8)(A) (direct disputes) of the FCRA. CBA offers its comments below on how the Agencies could reduce the additional compliance burdens associated with the Proposal without sacrificing consumer benefits or protections.

Definitions in Regulation or Guidelines

The Proposal provides two alternatives with respect to defining the terms "accuracy" and "integrity." One approach involves defining the terms as part of the regulation requiring furnishers to have written policies and procedures regarding the accuracy and integrity of the information they furnish. The other approach would define the terms in the guidelines accompanying the regulations. CBA believes it would be more appropriate for the Agencies to define "accuracy" and "integrity" in the guidelines accompanying the regulation. In so doing, the Agencies would avoid suggesting that policies and procedures that do not result in 100% accuracy or integrity (however such terms are defined) would be deficient. We understand this was not the Agencies' intent, but we are concerned that others may attempt to use a regulatory definition of a term such as "accuracy" in litigation or other proceedings outside the scope of the Agencies' enforcement. It would be unfortunate for furnishers if unnecessary legal risk attached to furnishers as a result of defining these terms in the regulation when the same policy objectives can be achieved by defining the terms in the guidelines. Moreover, it would be unfortunate for consumers to create such a disincentive to furnish information to CRAs.

Definition of "Accuracy"

The definition of "accuracy" in the Proposal is the same regardless of whether the Agencies propose to define it in the regulation or the guidelines. The Agencies propose the term to mean that the information furnished to a CRA "reflects without error the terms of and liability for the account or other relationship and the consumer's performance and other conduct with respect to the account or other relationship." The Supplementary Information states that the definition "is intended to require that furnishers have reasonable procedures in place to ensure that the information they provide to CRAs is factually correct."

CBA agrees with the Agencies that furnishers should have reasonable policies and procedures in place to provide information as accurately as reasonably possible. The Proposal, however, establishes a goal that simply cannot be met. Despite all best efforts, a furnisher will not be able to "ensure" that every piece of information provided is factually correct. For example, a furnisher may be the unknowing victim of an account fraud, and not know that the information does not relate to the consumer listed on the account. Or the furnisher may have a new product line, the features of which do not line up perfectly with the METRO 2 format, and the furnisher may be forced to fit a square peg in a round hole by matching its information to the METRO 2 fields. By suggesting that furnishers have policies and procedures designed to meet an objective they cannot meet, the Agencies have created ambiguity for bank examiners, bank compliance teams, and others who may attempt to enforce the Agencies' final rule. We believe it would be more appropriate to require furnishers to have reasonable policies and procedures designed to furnish information as accurately as reasonably possible.

The Agencies specifically ask whether the definition of "accuracy" should include updating information as necessary to ensure that information furnished is current. We do not believe this is necessary based on the existing requirements in the FCRA and those proposed by the Agencies. CBA is also concerned that such a definition could imply that a furnisher must furnish data to a CRA on a continuous basis as opposed to furnishing on a periodic basis.

Definition of "Integrity"

The Agencies propose two alternative definitions of "integrity"—one in the regulation and one in the guidelines. The regulatory definition states that the term means any information a furnisher furnishes to a CRA "does not omit any term, such as a credit limit or opening date, of that account or other relationship, the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user of a consumer report of the consumer's creditworthiness" or other specified characteristics. CBA strongly urges the Agencies to reject this definition and to adopt one similar to that provided in the guidelines.

The proposed regulatory definition of "integrity" does not have apparent bounds in terms of information that a furnisher should provide to a CRA. For example, a furnisher would be required to furnish the "terms" of the account. This would appear to include the interest rate, collateral, and perhaps even promotional issues (*e.g.*, the interest rate on the home equity line is 6.5% instead of 7% because the consumer has a checking account with the bank and has agreed to automatic debits to make payments on the equity line). However, because the Agencies provide an example of a "term" that is not commonly considered a "term" of an account—namely, the opening date of the account—it is unclear what types of information a furnisher is expected to furnish.

Given that the definition suggests that any and all information a furnisher has may be of the type the Agencies expect it to furnish, a furnisher would need to rely on the second half of the definition to attempt to understand the scope of its compliance requirements. However, it is not for the furnisher to know whether the absence of any given term may contribute to an incorrect evaluation by a user of a consumer report of the consumer's creditworthiness. The furnisher may suspect that a user could be interested in the interest rate on the account, the fact that a late payment a year ago was the result of a temporary medical problem and not an issue relating to future risk, or that the consumer does not revolve credit on a revolving account.[1] A furnisher would also need to survey commercial credit scoring firms and other creditors to see whether it is providing *all* of the variables that could *possibly* be used by more than a handful of creditors to avoid the compliance risk imposed by the definition.

CBA also notes that there may be legitimate competitive issues that could cause a furnisher to reconsider whether it will furnish any information if in doing so it might reveal its business model or strategy. For example, some furnishers may not want to furnish pricing information if such information would reveal too much about a furnisher's pricing strategy. It may be that ten, fifteen, or twenty years from now a popular scoring model is used that includes an entirely new input, one which many furnishers may consider proprietary. This Proposal should not force furnishers to choose between furnishing everything—and risking competitive disadvantages—and furnishing nothing.

Definition of "Furnisher"

[1] It is not clear how a furnisher would comply with the requirement in these circumstances since the CRA would likely not accept the information described, even if the furnisher attempted to provide it.

The Agencies' definition of "furnisher" appears to include *any* entity that furnishes information relating to a consumer to a CRA, except an entity providing such information to obtain a consumer report. This definition is unintentionally broad, and should be limited to an entity that furnishes personally identifiable information to a CRA if the furnisher intends for such information to be included in an individual consumer's file for purposes of generating consumer reports. As drafted, the definition is so broad that it could include the local telephone company (simply by virtue of providing a CRA with a local telephone directory of consumers' telephone numbers), a magazine publisher (if it sends a magazine to a CRA that includes information about individuals), or any other entity that may provide information about individuals to a CRA *for any reason*. We intend for these examples to be somewhat absurd to illustrate that the burden is on the Agencies to limit the scope of the definition while recognizing that precision is critical.

Requirement for Reasonable Policies and Procedures Regarding Accuracy and Integrity

The Proposal would require a furnisher to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of information it furnishes. The policies and procedures must be appropriate to the nature, size, complexity, and scope of each furnisher's activities. We believe this requirement is appropriate, and we urge the Agencies to retain it in the final rule. In particular, we applaud the Agencies for recognizing that not all furnishers will have programs of similar depth and complexity, depending on a variety of factors.[2]

CBA is also pleased that the Agencies indicate that a furnisher may be able to rely a great deal on its existing policies and procedures to comply with the proposed requirement. In fact, the Agencies have stated that it will take a furnisher approximately 21 hours to establish and maintain its written policies as envisioned by the Agencies.[3] This suggests that the Agencies recognize that most furnishers already furnish information with accuracy and integrity if they expect a furnisher to come into compliance based on a commitment that represents a single employee's work for less than three days. We strongly commend the Agencies for indicating that they do not intend the final rule to require significant changes for most furnishers who are reasonably diligent today.

Guidelines' Objectives

Generally speaking, CBA believes the Agencies have crafted objectives that are appropriate for furnishers to consider when developing a compliance program. In addition to our comments on "accuracy" and "integrity" above, we offer a few other suggestions. For example, with respect to the objective relating to the investigation of consumer disputes, we believe it should relate only to investigations of information the furnisher—and not some other party—furnished to a CRA. We also note that the objectives correctly note that a furnisher should "update" information in certain circumstances. However, as drafted, an examiner or other party could read the Proposal to suggest that instantaneous updating is necessary. We doubt the

[2] These expectations are also restated in the "Nature and Scope" portion of the guidelines, and they should be retained as well.

[3] The 21-hour estimate appears to exclude the Agencies' estimates for a furnisher to amend its procedures for handling direct disputes (four hours) and to implement the direct dispute requirement (four hours).

Agencies intended this, and we ask the Agencies to clarify that such updates may be included as part of a furnisher's normal furnishing practices and schedule.

FCRA Obligations

The guidelines include summaries of some furnisher obligations in the FCRA. These summaries do not add or subtract from the statutory obligations in the FCRA, and therefore are not necessary in the guidelines. We ask the Agencies to remove them from the guidelines because any time a statutory requirement is summarized or paraphrased, there is a risk that the summary will not mirror the exact nuances of the statute, thereby resulting in regulatory and legal confusion. For example, Section II.G. of the guidelines does not appear to be limited to notices of a dispute from a consumer reporting agency *pursuant to Section 611(a)(2) of the FCRA*, although the legal requirement summarized is limited to such disputes. The summaries in Sections II.A, B., and E. also have the potential to create ambiguities with respect to the Agencies' expectations under the FCRA.[4]

Establishing and Implementing Policies and Procedures

The Agencies list several actions a furnisher "should" take in establishing and implementing its compliance program. CBA agrees with the broad concepts outlined by the Agencies, such as that a furnisher should identify what it furnishes, evaluate its existing policies and procedures, and improve those policies and procedures as reasonably necessary. The Agencies include several suggestions in the guidelines as to how these concepts should be pursued. We ask the Agencies to reduce or eliminate these provisions, as they will likely become the blueprints for an examination handbook. It is not clear how each of these provisions could be considered and documented—much less how the actual program could be designed and implemented—in approximately 21 hours even for relatively small furnishers.

Even if the Agencies do not delete all of the suggestions, we believe some are particularly troubling. For example, the Agencies suggest that a furnisher *audit* its existing furnishing activities. It is not uncommon for examiners to treat such suggestions as requirements. It is not clear that any furnisher needs to audit its existing program to comply with the final rules. Furthermore, any suggestion of an audit of a furnisher's activities cannot be reconciled with the Agencies' clearly stated intention that compliance with the final rule should take approximately 21 hours. It would take more than 21 hours to conduct an audit of even a mid-sized furnisher, much less evaluate its results before beginning to draft a compliance program. Costs of an audit in the real world may also lead some institutions to not furnish information.

CBA also asks the Agencies to delete the suggestion that a furnisher obtain feedback from consumers, CRAs, or "other appropriate parties" when designing its compliance program. It is not clear how a furnisher would interact with consumers on such a matter, nor how consumers could possibly provide constructive feedback on a furnisher's regulatory compliance

[4] This is not to say that most of the Agencies could not issue rules implementing Section 623(a) of the FCRA. However, any such action should be done pursuant to such a rulemaking under the authority granted in Section 621(e) of the FCRA, not pursuant to one under the authority granted in Section 623(e) of the FCRA.

program.[5] We also doubt that CRAs would welcome the flood of calls from thousands of furnishers seeking feedback so the furnishers can "check a box" for the benefit of their examiners.

Components of Policies and Procedures

The Agencies list 13 components that a furnisher's compliance program "should" address. CBA concurs that furnishers should incorporate many of the items listed by the Agencies, and believes that most of the items are likely included in a furnisher's existing furnishing policies and procedures. The Agencies ask, however, whether they should require furnishers to retain records for a certain period of time for purposes of their furnishing obligations. CBA does not believe such a requirement is necessary or appropriate. First, had Congress intended Section 623(e) to morph into a recordkeeping requirement, we believe Congress would have addressed such an issue in Section 628 of the FCRA, which specifically relates to how certain entities dispose of records. Second, the Agencies have not articulated any consumer benefit associated with a record retention requirement. If a furnisher does not have the documentation to substantiate its position in a consumer dispute, the consumer's allegations are accepted. Although such recordkeeping requirements could produce marginally more accurate consumer files at CRAs, such marginal gains would likely not offset the enormous cost burdens that could be imposed on furnishers if they were required to store data they would not otherwise retain. Such burdens would also be a significant deterrent to becoming or remaining a furnisher.

CBA also encourages the Agencies to delete the suggestion that a furnisher must investigate a CRA's practices for purposes of evaluating the furnisher's own practices. The most a furnisher can be responsible for is the provision of data to a CRA. In most instances, such information will be transmitted in formats designated by the CRA as preferable (such as METRO 2) using technologies supported by the CRAs. A furnisher should not have the implied obligation to "investigate" further what each CRA does with such information, nor is it clear how a furnisher could conduct such investigation of each CRA. This implied obligation would also be difficult to implement given that each CRA does not necessarily have similar practices compared to every other CRA. Finally, the obligation also begs the question as to how any "dispute" regarding the CRA's practices should be resolved. The sole burden on the furnisher, in this regard, should be to provide information to the CRA in a manner acceptable to the CRA. Once this is done, the burden shifts to the CRA to incorporate the information appropriately.

Definition of Direct Dispute

The Proposal defines a "direct dispute" to be a "dispute submitted directly to a furnisher by a consumer concerning the accuracy of *any information contained in a consumer report* relating to a consumer." (Emphasis added.) CBA asks the Agencies to limit the scope of the definition to information the furnisher provided to a CRA, as a direct dispute should not include disputes of information the furnisher did not provide.

Direct Disputes and Credit Repair

[5] If the Agencies intend only that a furnisher would consider consumer complaints it has received regarding the accuracy of information furnished, such a requirement would be better placed in Section III.A.2.

The Agencies state that a furnisher does not have investigation obligations under the FCRA if the direct dispute "is submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to the consumer by, a credit repair organization" as defined in the Credit Repair Organizations Act ("CROA"). We believe this is an important exception, but ask the Agencies to revise it to give it effect. Specifically, a furnisher may not know that a dispute is submitted by a credit repair organization as defined in the CROA because the furnisher will not know whether the entity assisting the consumer was compensated. Yet, it should not matter if a consumer paid for use of a bogus dispute form, or whether the consumer simply found one on the Internet free of charge. In either case, the furnisher should be able to disregard the dispute. Therefore, CBA asks the Agencies to revise the exception to apply if the furnisher has reason to believe the dispute was submitted by, prepared by, etc. a credit repair organization.[6]

Direct Dispute Address

The statute states that a consumer who seeks to submit a dispute directly with a furnisher must submit the dispute "directly to such [furnisher] at the address specified by the [furnisher] for such notices."[7] The Proposal, however, would allow an individual to submit a direct dispute to *any business address* in many circumstances, even when the consumer has been provided the address of the furnisher as part of the individual's file disclosure from a CRA. We do not believe this is appropriate, nor is it consistent with the statutory requirements of the FCRA. CBA understands that a furnisher may not have an opportunity to provide a direct dispute address to individuals in all circumstances, such as those involving identity theft (as the furnisher would have been communicating with the criminal, not the victim). However, it does not seem as though a consumer should be disputing information contained in the consumer's credit report if the consumer has not actually observed that the information is incorrect through the consumer's review of his or her file disclosure from a CRA. Even if the consumer has had no contact with the furnisher, the consumer would still have an address at which to submit a dispute by virtue of the address provided in the file disclosure.

A furnisher's ability to rely on a central address is critical if it is to investigate a consumer's dispute efficiently and quickly. A central address ensures a stronger compliance program with more robust controls to serve the consumer quickly. On the other hand, if there are literally thousands of entry points (*e.g.*, any bank branch) into the direct dispute process, there is a much greater likelihood of a compliance breakdown. We also note that it becomes much more difficult to track dispute requests internally if such requests could have been handled by a variety of employees instead of those trained specifically in direct disputes. Further, if a consumer sends a dispute request to an address designed to receive bill payments, the furnisher may not have any practical way of handling the dispute. For example, it is not unusual for the mechanical

[6] This exception would also address an item the Agencies do not otherwise address despite a congressional mandate to do so. Specifically, this would mitigate the costs on furnishers if credit repair organizations attempt to circumvent the statutory protections against their abuse of the system.

[7] This provision is in Section 623(a)(8)(D) of the FCRA—a provision that does not appear to be subject to rulemaking under Section 623(a)(8)(A), and therefore it is not clear to CBA the authority on which the Agencies are relying for purposes of this portion of the Proposal. The same is true for those provisions in the Proposal relating to direct dispute notice contents and to frivolous or irrelevant disputes.

processing of that mail received at that address to process only two items, a remittance slip and a payment, with additional materials being discarded.

We also note at least two unintended consequences of allowing a consumer to submit a dispute to any business address of the furnisher. First, the consumer may send a dispute to an affiliate of the furnisher, and not to the furnisher itself. For example, the consumer could send the dispute to FictionalBank, N.A. when the dispute may actually be with an affiliate, such as FictionalBank, FSB or Fictional Finance Company. This could easily result in a significant delay of any investigation of the dispute, if the dispute is investigated at all. Second, this requirement would result in major furnishers having to implement a direct dispute compliance program at potentially thousands of addresses and branches, at least to direct employees at those addresses to forward a direct dispute to a specific address. It does not seem reasonable that every bank teller needs to be trained with respect to direct dispute compliance matters.[8] (As we discuss below, these compliance problems become even more significant if a direct dispute notice does not need to clearly state that it is a dispute under Section 623 of the FCRA.) We raise this because, if this were the result, the cost associated with this requirement would be a significant disincentive for furnishers to continue furnishing. We also note that such a result would create compliance burdens that far exceed the Agencies' prediction that it will take a furnisher only four hours to amend its procedures to handle direct disputes the same way it handles disputes from CRAs.

Direct Dispute Notice Contents

The Agencies state that a direct dispute notice must include certain information, all of which CBA agrees should be required. CBA also believes it is important that the dispute notice contain some indication that the consumer wants to exercise his or her rights under Section 623(a)(8)—or be submitted on a specific form—so that the furnisher understands what is expected, both by the consumer and by the Agencies for purposes of regulatory compliance. For example, if a consumer writes a letter to a bank and states that he or she disagrees with the bank's determination that the consumer is in default on a loan, it is not clear that the consumer is disputing any information that may be in a consumer report. Indeed, the bank may not usually furnish the type of information being disputed, but may feel as though it has to investigate to determine whether, for whatever reason, it may have furnished such information because the consumer was not clear as to whether the letter was intended to be a direct dispute.

This issue is mitigated somewhat if the furnisher may designate a single address to which consumers must send direct disputes, and such address is different from other addresses to which consumers send correspondence. However, a furnisher may not want to designate a specific address only for direct disputes, but rather designate its general correspondence address for such purposes. Furthermore, as discussed above, the Proposal envisions consumers being able to walk into any bank branch, for example, and delivering a direct dispute notice to a teller. We do not believe every bank teller and manager should be expected to guess whether or not the consumer's correspondence should be handled as a direct dispute or not.

[8] An unintended consequence of this may be that a bank teller or branch manager becomes unwilling to handle relatively routine customer service inquiries for fear that such an inquiry *may* be a direct dispute, and therefore requiring the consumer to put the request in writing and to include the required information.

We believe it is reasonable to expect a consumer to indicate that the correspondence is a direct dispute because the consumer would be told to do so, either in connection with the provision of the direct dispute address by the furnisher or as part of the FCRA disclosures a CRA provides to a consumer in connection with a file disclosure. If the consumer were to use a form, such form could be provided by the CRA with the file disclosure and the form could also be available via the Internet. We note that such a requirement to specify that the correspondence is a direct dispute or to use a specific form will also benefit consumers, as it will help furnishers route the dispute in the proper manner. Otherwise, consumer disputes that are not clearly labeled as direct disputes may not be resolved efficiently, if they are resolved at all.

Frivolous or Irrelevant Disputes

The Agencies state that a furnisher may treat a dispute as "frivolous or irrelevant" if the "furnisher is not required to investigate the dispute." It is not clear why the Proposal would attempt to govern how a furnisher treats correspondence from a consumer that does not trigger obligations under Section 623(a)(8) of the FCRA. Of course, a furnisher *may* decide to contact the consumer for additional information to see if the consumer is attempting to make a dispute under Section 623(a)(8). If the furnisher is not required to investigate anything based on the correspondence, however, it is not clear why the furnisher would be obligated to send the consumer a notice stating such fact as would be required if the dispute were "frivolous or irrelevant." In short, if the dispute does not trigger any requirements under Section 623(a)(8), it is not clear how any regulations promulgated thereunder could or should apply.

Conclusion

Again, CBA appreciates the opportunity to comment on the Proposal. It is our hope that the Agencies adopt a final rule that addresses our concerns and preserves the robust consumer reporting system we have today. Please do not hesitate to contact Marcia Sullivan (703) 276-3873 or msullivan@cbanet.org if we may provide additional assistance.

Sincerely,

Marcia Sullivan

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