February 11, 2008

Department of the Treasury
Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop1-5
Washington, DC 20219

Transmission By Federal eRulemaking Portal and E mail

Re: Interagency Notice of Proposed Rulemaking: Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies under Section 312 of the Fair and Accurate Credit Transactions Act, Docket ID OCC-2007-0019

The Mortgage Bankers Association ("MBA")[1] appreciates the opportunity to comment on the subject Proposed Rule (the "Proposed Rule") issued by the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration and Federal Trade Commission (the "Agencies"). Pursuant to the proposal, MBA understands that by submitting the proposal to one agency it will be made available to all of the agencies.

The proposal would establish regulations and guidelines to implement the accuracy and integrity provisions, as well as the direct dispute provisions in section 312 of the Fair and Accurate Credit Transactions Act of 2003 (the "Act"). In particular, the Proposed Rule would establish rules and guidelines regarding the accuracy and integrity of information a furnisher of information (a "furnisher") provides to consumer reporting agencies ("CRAs") and the circumstances under which a furnisher must investigate disputes about the accuracy of information contained in a consumer report based on a direct request from the consumer. This issuance requires furnishers to develop policies and procedures in these areas.

MBA and its members are committed to ensuring that information regarding a consumer's creditworthiness is furnished with accuracy and integrity. The residential real estate finance industry relies on information from credit repositories to help price credit risk accurately and make lending decisions that have significant impacts on their customers, companies, and investors. In recent years, the advent of the credit score has given lenders a very powerful tool to help make such decisions. Its increased use in lenders' automated underwriting systems has led to more efficient, accurate and timely credit decisions. Credit scores have been shown to be extremely predictive of a borrower's likelihood to meet his or her debt obligations, but only if

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 400,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 3,000 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web Site: www.mortgagebankers.org.

sufficiently accurate information is provided so that the score truly reflects the borrower's credit profile.

As the Proposed Rule notes, the vast majority of furnishers submit credit information voluntarily. In the absence of such voluntary participation, credit repositories and ultimately users of consumer credit reports would be forced to make decisions regarding the extension of credit based on incomplete information. Borrowers would likely face higher costs for credit to offset perceived increased risks, and lenders, already in the midst of a significant tightening of underwriting standards due, in part, to current market conditions, would likely decide in some instances not to extend credit at all. Both consumers and furnishers benefit when credit information is developed with as much accuracy and integrity as possible under a set of reasonable and efficient regulations. For these reasons, MBA and its members seek to assure that any final rules facilitate maximum reporting of accurate information in an effective and efficient manner. If the regulations are too burdensome or invite undue liability, some furnishers will choose not to provide consumer credit information to CRAs. Again, such an outcome would negatively impact the financial services industry and consumers. It is with these critical principles in mind that MBA offers the following comments.

At the outset, MBA believes it is worth noting that mortgage lenders are already subject to a number of laws, regulations and policies that cover some of the subjects addressed in section 312. As MBA pointed out in its response to the Agencies' Advanced Notice of Proposed Rulemaking ("ANPR"), most mortgage companies are required by investors and government entities, such as Fannie Mae, Freddie Mac and the Department of Housing and Urban Development ("HUD"), to report "full file" credit information each month to the major CRAs. "Full file" reporting means that a mortgage company is obligated to describe the status of each mortgage it is servicing as of the last day of the month.[2] Statuses that must be reported for any given loan must include "new origination," "current," "delinquent" (30-, 60-, 90-days, etc.), "foreclosed" and "charged off." As such, "full file" reporting requires that mortgage servicers report both positive and negative credit information on each loan.[3] As a consequence of these existing reporting requirements, lenders already have a number of policies and procedures in place to ensure that information furnished to the CRAs are done so with accuracy and integrity.

Mortgage lenders in servicing their loans and independent mortgage servicers are required to address "Qualified Written Requests," pursuant to the Real Estate Settlement Procedures Act ("RESPA"), and its implementing regulations (Regulation X), that generally involve matters in dispute.[4] Under RESPA, a servicer has 60 days following the receipt of a Qualified Written Request to investigate any dispute or provide any information that the borrower requested. As part of this procedure, a servicer must provide a written acknowledgment of receipt of the Qualified Written Request within 20 days. The servicer is then obligated to investigate such a dispute and either provide an explanation as to why the account is correct, or correct the account (including any late charges and penalties) within the 60-day period. Many servicers also apply the same procedures when a request does not meet the technical definition of a Qualified Written Request, such as when the consumer makes a request of the lender via

[2] *E.g.*, Fannie Mae Single Family Servicing Guide, §I.304.09 (January 31, 2003).
[3] There are limited exceptions: for example, Fannie Mae and Freddie Mac require servicers to report forbearances as military indulgence if the borrower is a service member on active duty and eligible for benefits under the Servicemembers Civil Relief Act. See Fannie Mae Single Family Servicing Guide, §III.I ex. I (September 30, 2005). Additionally, lenders commonly suspend all reporting when a Qualified Written Request is pending. See below.
[4] See Real Estate Settlement Procedures Act, Regulation X, 24 C.F.R. § 3500.21(e).

telephone. MBA solicits the Agencies to consider these existing requirements as they construct the final regulations.

MBA believes that the Qualified Written Request system is particularly well-tailored to mortgage lenders as well as servicers for several reasons. The rules and regulations governing RESPA's Qualified Written Request provisions have now been operational for over a decade; industry, regulators and consumers have experienced an efficient application of these rules and are now proficient in their operation and procedure. Second, these rules were specifically designed to address issues pertaining to problem resolution and possible negative repercussions to consumer credit reports. Third—and as specifically addressing the Agencies' request for comment—the reuse of the RESPA rules to address the Fair and Accurate Credit Transactions Act ("FACTA") direct dispute provisions would go a very long way in minimizing the regulatory burdens of any final rule and their consequent costs. Use of the Qualified Written Request rules by mortgage lenders also would further the Agencies' efforts towards lessening the impact of this proposal on small institutions' current resources without creating any alternative approaches that differentiate between large and small actors. Vendors and legal professionals have already developed and implemented systems to effectively address disputes in the form of Qualified Written Requests and the introduction of a different set of requirements would increase costs.

Finally, MBA believes it is important to address the paramount role of the CRAs themselves in providing credit information with accuracy and integrity to both consumers and the users of credit reports. The regulations and guidelines contained in the Proposed Rule would apply only to furnishers of information, not CRAs. Despite recent improvements to the reporting process, members still encounter issues when furnishing data to the CRAs that compromise the accuracy and integrity of credit information as it is reflected on a credit report. MBA's response to the ANPR highlighted a number of these difficulties and the consequences they could have on ensuring the accuracy and integrity of credit information, such as:

- CRAs' rejection of records due to format or data errors;
- Lack of uniform methods employed by CRAs to match records with the appropriate individual; and
- Time delays between when information is furnished to a CRA and when it appears on a consumer's credit report.

We do not raise these issues to criticize the CRAs. Indeed, the CRAs have taken a number of important steps in cooperation with furnishers of credit information to bring greater standardization and efficiency to the reporting process. But this issuance does raise important concerns regarding the best means to avoid inaccuracies or inconsistencies that may appear on an individual's credit report. The proposed guidelines and regulations will have only limited success in achieving the ultimate goal of both the Act and the Proposed Rule--improving the accuracy and integrity of information used to make decisions regarding the extension of credit to consumers--if these issues are not addressed as well.

Accuracy and Integrity: Regulatory Approach versus Guidelines Approach

The Act instructs the Agencies to "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".[5] However, the legislation does not provide any definition

[5] 15 U.S.C. 1681s-2.

for either "accuracy" or "integrity." Indeed, the Proposed Rule notes that an examination of the legislative history presents conflicting opinions of the terms' definitions.[6] The Agencies propose and seek comments on two approaches to defining the terms "accuracy" and "integrity." One approach would specify the definitions in the regulations; the other would address these terms in the guidelines. Both approaches would require a specific set of accompanying guidelines to assist furnishers in developing policies and procedures to satisfy the requirements specific to one approach or the other.

Under the approach to define both of these terms in the regulations ("Regulatory Definition Approach"), the Agencies propose to define "accuracy" to mean:

> [T]hat any information that a furnisher provides to a CRA about an account or other relationship with the consumer reflects without error the terms of and liability for the account or other relationship and the consumer's performance or other conduct with respect to the account or relationship.[7]

"Integrity" under this approach, would be defined to mean that any information a furnisher provides 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 a consumer's creditworthiness".[8] Under this approach, information furnished to a CRA may be technically "accurate" yet lack "integrity" if critical information is omitted.

The second approach suggested in the Proposed Rule would define "accuracy" and "integrity" in the guidelines rather than the regulations (Guidelines Definition Approach). Under this approach, the term "accuracy" would have the same definition as under the regulatory definition approach, but would provide an alternative definition of "integrity":

> [A]ny information that a furnisher provides to a CRA about an account or other relationship with the consumer: (1) Is reported in a form and manner that is designed to minimize the likelihood that the information, although accurate, may be erroneously reflected in a credit report; and (2) should be substantiated by the furnisher's own records.[9]

MBA believes that there is great risk of negative and unintended consequences if inflexible definitions of "accurate" and "integrity" are implemented by regulation rather than through guidelines, especially if such an approach is not accompanied by any identifiable increase in protections for consumers. In short, the regulatory path would create a "strict liability" approach to reporting and safeguarding of consumer information; resulting in very considerable costs associated with investigations and litigation over meaningless and inconsequential errors. Most importantly, the legal expenses and reputational risks associated with such a standard would provide immense disincentives to any voluntary participation in reporting. Too much exposure to legal or regulatory action will lead some furnishers to decide that the risks outweigh the benefits, and cease to provide information. We strongly urge that the Agencies recognize this profound concern.

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[6] Interagency Notice of Proposed Rulemaking: Procedures To Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act, 72 Fed. Reg. 70944, 70949-70950 (proposed Dec. 13, 2007).
[7] 72 Fed. Reg. at 70950.
[8] *Ibid.*
[9] 72 Fed. Reg. at 70951.

To avoid such potential unintended consequences, a guidelines/principles based approach is superior for both definitions. Under this approach, a furnisher would be given latitude to develop methods to serve the rule's purposes without inviting regulatory action for minor inaccuracies or errors.

Direct Dispute

The Proposed Rule contains regulations implementing direct dispute procedures for furnishers. These proposals address: which types of information a furnisher is and is not required to investigate; the establishment of clear and conspicuous addresses to which consumers may direct disputes; what information a furnisher should reasonably expect from a consumer to conduct an adequate investigation; what constitutes a "frivolous" dispute; and how a furnisher is expected to communicate its determinations to the consumer.

As the Proposed Rule notes, many entities are already voluntarily investigating direct disputes. MBA believes that considering the other methods that consumers have to file disputes, direct disputes under these provisions should be limited only to areas where additional process is needed possibly to help resolve questions of identity theft. As noted, servicers are already required to comply with a set of direct dispute regulations as set forth in RESPA. As indicated, under RESPA, servicers are required to acknowledge their receipt of a dispute from a mortgage borrower within 20 days and to fully investigate the dispute within 60 days. Within that 60-day timeframe, a servicer must also either make the necessary corrections to a borrower's account, communicate such corrections in a written notice, or provide the borrower with a written explanation of why the servicer believes the account is, in fact, correct or why the information requested by the borrower is unavailable or cannot be obtained. Furthermore, servicers are prohibited from reporting further information to CRAs regarding the dispute during the 60-day period.

The Proposed Rule does not make clear how the proposed regulations interact with the existing regulations set forth under RESPA. For example, most credit disputes must be resolved within 30 days. However, RESPA recognizes the often complex nature of mortgage payments and how they are applied to accounts and provides 60 days for a thorough investigation. MBA believes RESPA was written to specifically address the unique nature of the lending industry and, as such, should be the default governing law for disputes between a borrower and his or her mortgage lender or servicer. Establishing an additional set of rules for direct disputes for mortgage lenders would only serve to unnecessarily increase compliance costs that would ultimately be paid by mortgage borrowers.

MBA also believes that other aspects of the Proposed Rule regarding direct disputes require greater clarification prior to finalization. For example, the Proposed Rule does not specify how a furnisher establishes the receipt of a dispute. Given the potential impact of not responding to a dispute in a timely fashion – information or, in some cases, an entire trade line can be deleted from a credit report – it is crucial that furnishers have sufficient time to investigate disputes. As a result, furnishers must be empowered to set the beginning of the investigative time period. Any delivery method used to communicate the dispute has inherent risks that may delay the actual receipt, and while the consumer is entitled to a timely response to a legitimate dispute, furnishers should be entitled to reasonably establish when that investigative period begins. Finally, the rules should allow the furnisher to specify the precise address (es) for incoming disputes. Such a step would emulate the procedures under RESPA and greatly contribute to

maintaining consistency. Furnishers should be able to include notice of the specified address in a monthly statement, or other periodic mailing, that pertains to the account in question, so long as the information is clear and conspicuous. In this regard, we again recommend that the Agencies consider the tested procedures set forth in RESPA's Qualified Written Request provisions.

Furthermore, it is unclear from the Proposed Rule how a furnisher should handle disputes received both directly from a consumer and indirectly through a CRA. While the Proposed Rule makes clear that furnishers can determine disputes that are substantially the same as previously resolved disputes to be "frivolous", even if submitted via a CRA, it does specify how furnishers are to respond to disputes that are substantially the same as other disputes that have not yet been resolved. MBA Members report that handling disputes received through a CRA are generally handled in an efficient and expeditious manner. This is achieved through the Online Solution for Complete and Accurate Reporting ("e-OSCAR"), an internet-based tool developed by the major CRAs and Consumer Data Industry Association that allows for the transmission of consumer disputes in a very timely manner; the expeditious receipt and processing of corrections by the CRA; and an electronic log of disputes and resolutions.

One of the most significant benefits of the system, both to furnishers and consumers, is the dramatically improved response time for processing corrections; what once took months can now be completed, on average, within three to seven days. The lending industry has embraced this methodology, and many entities have created an infrastructure to support responding to consumer disputes through it. For these reasons, MBA strongly encourages the Agencies to consider allowing furnishers who receive substantially similar disputes both directly from a consumer and indirectly through a CRA, to choose the method of response that most efficiently returns an answer to the consumer and to allow one response method to serve as the response for any other open dispute that is substantially similar to another. A requirement for a duplicate system would increase costs particularly for small businesses.

The Proposed Rule also seeks comment on whether there are situations in which oral communication can provide sufficient notification to consumers regarding the determination of a direct dispute. Mortgage lenders and servicers are already required, under RESPA, to provide borrowers with a written notice of determination and any necessary explanation for such a determination. Though the option of an oral notification may, in some instances, present a less burdensome approach, MBA believes that a written notification provides a more reliable methodology that benefits both consumers and furnishers. Consumers may misinterpret or mishear a notification delivered over the phone. Written notification provides both sides with a clear determination that is less susceptible to misinterpretation. Even if a consumer requires further explanation, both the consumer and furnisher will have a written decision to refer to for such discussions. Oral notification lacks such clarity.

Policies and Procedures

As part of any requirement to establish reasonable policies and procedures for furnishing information, the Proposed Rule acknowledges that many furnishers already have such policies and procedures in place, and that those should be included to the extent they are relevant and appropriate. MBA appreciates the regulators recognition of the fact that furnishers have already taken positive steps towards ensuring that information is provided to CRAs with accuracy and integrity. To the extent that existing policies and procedures can be used to satisfy regulatory

requirements, it lessens the burden on furnishers, decreases borrowers' costs and lessens the possibility that furnishers will be dissuaded from providing credit information.

MBA wishes to emphasize again that some of the objectives of these policies and procedures enumerated in the Guidelines rely on the cooperation of the CRA and are not entirely within the control of the furnisher. For example, one of the objectives contained in both the Regulatory Definitions Approach and Guidelines Definitions Approach is to ensure that information is reported "with a date specifying the time period to which the information pertains".[10] However, MBA members indicate that CRAs define a time period differently, even when the information is reported in a standardized method, such as the Metro 2 format. Given the diverse ways in which CRAs handle information submitted in standardized format, MBA encourages the Agencies to consider amending the proposed objectives to only cover those areas and processes over which a furnisher can be reasonably expected to maintain control.

Questions

The proposed rule includes several questions/information requests to which MBA offers the following responses.

Question 1 - The Agencies solicit comment on whether the definition of "accuracy" should specifically provide that accuracy includes updating information as necessary to ensure that information furnished is current.

> **Answer - MBA does not believe it necessary to embed an express requirement to update information into the definition of "accuracy." If the definition requires accuracy, then updating would be understood as required. An additional explicit instruction to "update" would add additional legal risks without achieving any further benefits for consumers.**

Question 2 - The Agencies solicit comment on whether the definition of ''accuracy'' should be made applicable to direct disputes, if the Guidelines Definition Approach is adopted. The Agencies also solicit comment on whether the proposed definition of ''accuracy'' is appropriate for the direct dispute provision.

> **Answer - MBA does not believe such application is necessary. MBA recommends that, for purposes of mortgage lenders and servicers, Agencies should adopt the procedures available under the "Qualified Written Request" guidelines of RESPA. This mechanism assures that direct disputes are properly investigated and protective of consumers. The procedure under RESPA requires that furnishers assess any complaint, correct the problem, or alternatively, provide proper explanation as to why the institution believes an account to be correct. MBA believes that these robust requirements offer proper interaction channels that allow consumers to adequately assert their interests without the need for additional regulatory provisions.**

Question 3 - The Agencies request comment on whether there are circumstances under which it would not be appropriate for a consumer to submit a dispute notice to the address of the furnisher set forth on the consumer report. The Agencies also invite comment on whether

[10] 72 Fed. Reg. at 70969.

§__.43(c)(3) should exclude certain types of business addresses, such as a business address that is used for reasons other than for receiving correspondence from consumers or business locations where business is not conducted with consumers.

Answer - The Qualified Written Request procedure under RESPA allows a servicer to specify the address(es) for incoming requests. If the procedure is accepted by the Agencies, for lenders and servicers the problem is resolved. This provision in these rules would help to maintain predictability. Furnishers should be able to include notice of the address in a monthly statement or other periodic mailing that pertains to the account in question, so long as it is clear and conspicuous. This would allow a mortgage division to include its address, a card division to include its address, etc.

Question 4 - In addition, the Agencies request comment on whether § __.43(c)(2) should be amended to permit furnishers to notify consumers orally of the address for direct disputes. The agencies also request comment on whether and, if so, how an oral notice can be provided clearly and conspicuously.

Answer - MBA believes that it is sensible to allow financial institutions to orally advise consumers of the address for direct disputes. Oral communications provide the quickest and most direct method to properly guide consumers on the appropriate address. While pre-scripted communications are one means to attempt clear and conspicuous oral communications, their effectiveness is not always clear.

Question 5 - Agencies solicit comment on what additional mechanisms should be required, if any, for informing consumers of their direct dispute rights.

Answer- MBA believes that agencies should utilize their websites and those of trade and consumer organizations to the greatest possible to inform consumers of their rights under the Fair Credit Reporting Act.

Question 6 - Agencies solicit comment on whether the guidelines should incorporate a specific time period for retaining records in order to provide for meaningful investigations of direct disputes, and, if so, what record retention time period would be appropriate.

Answer - Lenders are currently subject to a wide range of record retention requirements. In the interest of reducing regulatory burden and costs, MBA believe the guidelines should simply provide that records should be retained in accordance with existing records retention procedures.

Question 7 - Agencies specifically request comment on the impact of this proposal on small institutions' current resources, including personnel resources, and whether the goals of the proposal could be achieved for small institutions through an alternative approach.

Answer - MBA believes that to reduce impact on small institutions' resources, these institutions should be permitted to use current procedures and resources to the greatest extent feasible. In this vein, where there are direct disputes, as indicated, institutions should be permitted to utilize the Qualified Written Request

procedures and current records retention policies that facilitate the purposes of this rule.

Conclusion

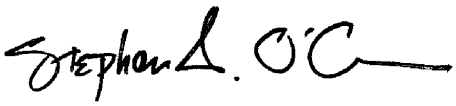
MBA greatly appreciates the opportunity to provide comments on these regulations. In short, MBA particularly urges the Agencies to:

(1) Adopt the "Guidelines Approach" to defining "accuracy" and "integrity"; and

(2) Accept RESPA's "Qualified Written Request" provisions in implementing the direct dispute provisions under Section 312 for mortgage lenders.

These are matters of importance to MBA and we look forward to working on these matters and the others issues raised with the regulators. For questions or further information, please do not hesitate to contact Ken Markison at kmarkison@mortgagebankers.org, at (202) 557-2930.

Sincerely,



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