National **Retail** Federation

The Voice of Retail Worldwide

COMMENTS OF THE
NATIONAL RETAIL FEDERATION

Concerning Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies

DEPARTMENT OF THE TREASURY
Office of the Comptroller of the Currency
12 CFR Part 41
[Docket ID OCC–2007–0019]
RIN 1557–AC89

FEDERAL RESERVE SYSTEM
12 CFR Part 222
[Docket No. R–1300]

FEDERAL DEPOSIT INSURANCE CORPORATION
12 CFR Part 334
RIN 3064–AC99

DEPARTMENT OF THE TREASURY
Office of Thrift Supervision
12 CFR Part 571
[Docket No. OTS–2007–0022]
RIN 1550–AC01

NATIONAL CREDIT UNION ADMINISTRATION
12 CFR Part 717

FEDERAL TRADE COMMISSION
16 CFR Part 660
RIN 3084–AA94

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The National Retail Federation ("NRF") is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail establishments, more than 24 million employees - about one in five American workers - and 2006 sales of $4.7 trillion. Many of NRF's members make credit available to their customers directly, through financial services affiliates, and through third party credit providers. Typically, these are open-end (revolving) credit lines. Some NRF members furnish information concerning their experiences with customers to consumer reporting agencies, versions of which may be incorporated into consumer reports.

In response to Congressional directives contained the in the Fair and Accurate Credit Transactions Act ("FACT Act"), in a March 2006 Advance Notice of Proposed Rulemaking ("ANPR") the denominated agencies ("Agencies") sought preliminary answers to questions regarding planned accuracy and integrity guidelines. They also sought guidance on weighing various factors in assessing the potential for empowering individuals to lodge objections to the contents of consumer reports with furnishers ("direct disputes"), as an alternative to filing disputes under the existing Fair Credit Reporting Act ("FCRA") procedures.

The facial simplicity of the FCRA belies the complexity of the activities it governs. Consequently, the issues assigned to the Agencies by Congress are not easily amenable to simple emendation and response. They entail the operations of a virtually organic system: the method by which consumer credit and other benefits are allocated in an extraordinarily heterogeneous business and social environment. It involves a wide array of actors and intermediaries on both the consumer and business sides. That the consumer reporting system has grown over time to incorporate and accommodate differing sized furnishers and users, with greatly varying incentives and degrees of commitment to participating in, and maintaining, the system's scope and integrity, are quite consequential considerations.

Attempting to modify significant components of the credit process, while ignoring systemic effects, invites serious repercussions. Accordingly, Congress provided the Agencies with very specific guidance, in terms of words and standards to be followed in amending this important law. While the agencies appear to have generally followed this guidance, with sensitivity to the underlying activity regulated, in some instances the analysis appears to have gone a bit astray.

Direct Disputes

After much member discussion and deliberation, NRF filed ANPR comments intended to provide an overview of the very serious matters Congress asked the Agencies to consider. Especially with respect to the issue of direct disputes, NRF highlighted important distinctions among the types of information involved, the consequences of allowing direct disputes in certain instances, and the interplay with the statutory factors the Agencies must weigh before they could determine under which circumstances (if any) direct disputes were warranted.

We recognize the many demands on Agency resources this process entails. Nevertheless, after reviewing filed responses, NRF is disappointed that several carefully nuanced comments, by it and others, delineating the historic operation of the consumer credit reporting system, and the many adverse consequences of imposing new mandates on here-to-fore *voluntary* behavior, are not addressed in the Notice of Proposed Rulemaking ("NPR").[1]

As you know, Congress set forth very specific instructions by which regulators are to engage in statutory analysis in this area. As explained in the NPR, section 623(a)(8) of the FACT Act requires that the Agencies weigh *four factors* in determining under which circumstances direct disputes are warranted:

1. The benefits to consumers and the costs to furnishers and the credit reporting system;
2. The impact on the overall accuracy and integrity of consumer reports of any direct dispute requirement;
3. Whether direct contact by the consumer with the furnisher would likely result in the most expeditious resolution of disputes; ***and***
4. The potential impact on the credit reporting process ***if*** credit repair organizations are able to circumvent the provisions in subparagraph G of section 623(a)(8). (*emphasis supplied*).

However, in their assessment, at section .43(a), while the Agencies purport to address the first three points, the analysis is conspicuously silent as to the statutorily required weighing of the fourth[2]. Instead of weighing the very important consequences of the fourth and final factor, the Agencies seem to skip over the analysis and simply fill the void with section .43(b), stating that the proposed rule "excepts from the investigation requirement any direct dispute if the notice of dispute

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[1] The NPR's only vaguely relevant substantive responses, that "The [regulator] **encourages** voluntary furnishing of information to consumer reporting agencies" and "The Agencies ***encourage*** furnishers to continue voluntary investigations…" (emphasis supplied), completely ignores the question of whether entities will in fact continue to furnish in the first instance. Nor does the NPR provide any basis to demonstrate why a regional retailer or utility company should choose to subject itself to a potential barrage of legally enforceable Agency sanctioned disputes. It is almost oxymoronic to tout the Agencies' espousal of encouragement to undertake voluntary action while simultaneously imposing voluminous new requirements on those who do. Unfortunately, wishing does not make it so.

It is disappointing that the Agencies propose these new rules without attempting to address the issues raised so pointedly in the responses to the ANPR. Regardless, in answer to the newly propounded questions, we raise those points again in this filing. A copy of the relevant text of NRF's response to the ANPR is attached and is explicitly incorporated herein by reference as Additional Comments to this rulemaking.

[2] "The Agencies are proposing this approach in light of the considerations set forth in the statute to be weighed by the Agencies, including the benefits to consumers, the impact on the overall accuracy and integrity of consumer reports, and whether direct disputes would lead to the most expeditious resolutions of consumer disputes."

Rather than complete the analysis by weighing the fourth factor along with the other three, as the statute specifically requires, or even acknowledge the horrendous burdens credit repair organizations already place on the current system, the Agencies instead proceed to an unrelated discussion of targeted approaches. (Also rejected based on further truncated readings of the factors.)

is submitted by...a [defined] credit repair organization." In the view of many NRF members, such an "exception" neither completes the analysis nor offers much protection from spurious or abusive disputes.

As the Agencies are aware, credit repair is one of the most difficult problems facing consumer reporting agencies. Their inability to effectively identify and block the hundreds of thousands of credit repair organization attacks on their highly sophisticated systems speaks volumes to the fact that furnishers will have the exact same (if not greater) difficulties. Further, the Agencies' proposed rules subject furnishers to *legal sanctions* should they assess erroneously. The fact that the Agencies have seemingly side-stepped their Congressional mandate to weigh the potential impact on the credit reporting process if credit repair organizations are able to circumvent the provisions in subparagraph G of section 623(a)(8) is very troubling. Therefore, before proceeding to final rulemaking, and imposing new mandates on voluntary, yet vital participants in the credit reporting system, we ask that the Agencies further articulate their analysis and weighing of *all* of the required factors, including the impact of credit repair.

It may well be that, after having weighed all of the criteria; the Agencies will discern a limited number of situations under which the fourth factor reasonably can be avoided. For example, the Agencies may determine that in true identity thefts, the presence of law enforcement as an adjunct to the complainant, makes it highly unlikely that spurious credit repair organizations would either be needed or choose to expose themselves to law enforcement's presence. In such cases a weighing of the factors might support direct disputes. NRF is not unalterably opposed to the direct dispute concept. Rather, we believe they should be reserved for those situations that clearly meet the tests Congress enacted[3], so as neither to turn longstanding FCRA processes on their head nor to advance rules based on unachievable assumptions.

Accuracy and Integrity

It is clear that the Agencies have attempted to consider many of the Congressional concerns in their analysis of accuracy and integrity. But we do not think it necessary to define these terms. The concept of "accuracy" has existed in the FCRA for decades, and the evolved law has expressed its meaning within a credit reporting environment, Attempting to codify that now, or create from whole cloth a definition of integrity (especially before the courts have considered the question and when there is disagreement among senior members of Congress) is unnecessary.

At this point in time a conceptual understanding would be sufficient. From that context, a fundamental question to be addressed is: What is the meaning of "accuracy and integrity" in a consumer reporting context? The answer may not be the same as an academic reading of the phrase might suggest, or as set forth in the Agency proposals. As was noted, the consumer reporting system contains a large number of voluntary actors with differing incentives. These have been harnessed over

[3] Including an assessment of the impact of direct disputes on the "integrity" of consumer reporting process, as was outlined in NRF comments on the ANPR, highlighted in the second Congressional factor, but nowhere discussed in the NPR.

time to create a mechanism for allocating scarce resources, such as credit, not on a perfect basis, but on the best basis which the system has, to date, been capable.

Information placed into the system by some actors is quite extensive. Information provided by others is more akin to "one off" data. Users of reports have developed mechanisms (personal review, scoring models, etc.) for assessing the relative likelihood of customer performance based on reports and other factors. They use and weigh different information in reports based on their particular needs and experience and the data available. But none of this is perfect. It cannot be. Not least because users are attempting to make predictions about behavior based on available data from the past. The very act of predicting inherently limits the precision of the conclusions that can be drawn. The selection of underlying criteria, and the fact that not all of the same information is ever likely to available for all persons (due to the voluntary nature of reporting and disparate consumer behavior), further constrains consumer reports' usefulness.

So what does this suggest? For one thing it indicates that in discussing integrity, one classic definition of integral (essential for completion of the whole) cannot be achieved in so disparate and voluntary an environment. While one could attempt to force furnishers to each provide identical categories of information about every consumer with whom they deal, the likelihood that many would simply choose not to report, rather than assume significantly greater and more regimented burdens, makes it just as likely that the resulting less diverse reports would be less useful for predictions than are the current heterogeneous models.

So what is "accuracy and integrity"? In this instance the two concepts are distinct but interrelated in goal. NRF would suggest that accuracy is nearly synonymous with "correctness" and, in light of the use to which consumer reports are put, integrity relates to the reliability (i.e. the "soundness") of the information reported. In other words, the users of the reports not only want to know that the data within them is a correct reflection of that which was transmitted to the consumer reporting agencies by the furnishers, but that the methods for determining what goes into any individual report is premised on sufficiently sound practices such that the users of reports can reasonably rely on the validity of the report itself.

In another context, a pollster wants to ensure that the responses he is provided accurately reflect what was said to the field workers. But that pollster also wants assurance that the polled individuals were not chosen by so skewed a process that their answers, however accurate, are meaningless input into his ultimate prediction (i.e. that the process has integrity).

Now this definition of integrity covers a number of fronts. It means, for example, that one wants procedures designed to minimize the likelihood that consumer reporting agencies will place the data of one individual in the file of another. It also means that one wants to minimize biases in the manner in which furnishers choose to report such that they might be induced to compromise the accuracy of what

they provide.[4] In all cases, we must recognize that procedures, however desirable and reasonable they may appear in the abstract, must not overwhelm the voluntary nature of the system. The integrity of the consumer reporting process can be damaged by excessive burdens.

For these reasons, NRF would not support the regulatory definition of integrity set forth in the NPR. Attempting to require that all information relevant to a credit granting decision must have been furnished before any data is deemed to have integrity is akin to requiring that the subjects of a poll must have revealed every facet about themselves that might conceivably affect a pollster's analysis before conceding that a poll might be valid. At the outset, the amount of information necessary to make a decision will vary dramatically with the user of the information. If a retailer simply wants to determine whether a consumer is likely to write a valid check, information about six year old credit limits on revolving accounts is most certainly immaterial. Yet such information might be useful, though not compelling, to a creditor about to underwrite a mortgage. Since any piece of data might arguably have a bearing on a consumer's "creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" the regulatory definition of integrity places too great a burden on the reporting of data whose value might at best be exceptional.

The regulatory approach also shifts to furnishers obligations that properly reside with the consumer reporting agencies. How much work in terms of "perfecting" reports should be affirmatively place on furnishers? Some small businesses will report to their local bureau the fact that a particular customer has failed to pay for work performed in the customer's home. This information is valuable for other tradesmen who might otherwise invest many hours of labor and material in an untrustworthy endeavor. Subjecting the local businessman to elaborate legal requirements might at best discourage him from reporting in the first instance, and will do nothing to protect other similarly situated local businesses. That the businessman reports a failure to pay, without more, and is subject to existing FCRA dispute rights, reinvestigation, and the consequences of failing to do so, is all that can reasonably be expected unless one's goal is to diminish the amount of accurate information reported.

The Guidelines Definition Approach is the better of the two alternatives. It better recognizes the fluidity existing with the consumer reporting system and places fewer dubious burdens on information furnishers. It recognizes that some information, if consistently reported, can be probative, without demanding that furnishers must

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[4] As was mentioned in NRF's comments on the ANPR, forcing a credit granting retailer to directly and starkly choose between a longstanding customer's personal demand to be better reported to a consumer reporting agency versus losing that customer's future economic patronage could undermine the integrity of the credit reporting process.

Note, that this last point appears to be the opposite of the statement in the NPR that: "Industry commenters also stated that furnishers have a business incentive to maintain and report accurate information in order to maintain good customer relations..." and not because the quoted sentence is untrue. The statement is true because, in general, most reported information is positive. Businesses' and their customers' interest align. However, when the information reported is negative, involving the furnisher and the consumer too directly in an assessment of the information reported can have biasing consequences against accurate reporting, because it undermines the integrity of the process.

provide every element of data incident to that they do report. The guidelines definition of integrity goes part way to addressing the issue of soundness, by encouraging greater coordination between furnishers and consumer reporting agencies and reasonably suggests that furnishers should maintain evidence confirming the information they report. However, it does not specifically address the broader issues surrounding the underlying assumptions of the system, most important, efforts to maintain voluntary reporting.

A related concern with the Guidelines approach is the number of new "accuracy" based requirements it would impose. The extensive numbers of new (albeit not strictly mandatory) obligations are somewhat inconsistent with the common practice of negative reporting. That is for those furnishers, who merely report aberrant negative behavior (e.g. "the customer's check was twice dishonored") the proposed additional furnishing responsibilities are troublesome. The important data sought by users of reports is that which was furnished: the customer's check was twice dishonored. It is such occurrences that will cause other merchants to consider whether to accept a consumer's checks. One might question why it should be the merchant's obligation (as opposed to the consumer's) to immediately update consumer reporting agency files into which it does not regularly report, should the customer, six months later, deem to make a partial payment.

It is inconceivable that small merchants (whether community stores or literal mom and pop operations) who make up the majority of businesses in the United States will adopt, keep on file and routinely update the procedures proposed absent massive, ongoing education by the Agencies. For many of them, furnishing occurs too irregularly for it to be incorporated into their business. Moreover, to the extent these small merchants furnish at all, they do so according to the consumer reporting agency's stated policies and procedures, which are included in the agreement or written communications between the consumer reporting agency and the merchant. The final rule should state that small merchants and those who furnish to check service companies and similar consumer reporting agencies may comply with the rule's requirements for "reasonable policies and procedures concerning accuracy and integrity of furnished information" by following the written policies and procedures of the consumer reporting agency to which they report.

Finally, since we wholly disagree with the Agencies' analysis and conclusions with respect to direct disputes, we support the decision not to apply the definition of "accuracy" in that context at this time.[5]

Conclusion

Despite our very real disagreements with some elements of the Agencies' proposals, we appreciate their consideration of these comments. We recognize that the mandates for Agency review entails a very comprehensive examination of the

[5] In the event that a focused direct dispute requirement is developed, either in this or a subsequent rulemaking, NRF would support further clarification that challenges under that system would be confined to the "accuracy" of the reported information. We also note that "integrity" is not a statutory element of reinvestigations and should not, as proposed, by rule or guideline be read into the law as either an objective or requirement.

consumer reporting system, on the one hand, and yet may necessitate very targeted responses, if harm to the system is to be minimized, on the other. It is not an easy task.

We hope that these and other comments will better clarify issues confronting those primarily responsible for making the system work, and allow the Agencies to further refine the NPR so as to focus on that which it is essential to accomplish, while revisiting the need for the more expansive intrusions. NRF would be happy to answer additional questions in that regard.

ADDITIONAL COMMENTS

Proprietary credit is issued directly by the retailer, in its own name, to its customers. It is the traditional form of "retail credit" from which the current consumer credit system, including the concept of "credit bureaus," first developed. As its name implies, in a proprietary program all management of the credit relationship takes place completely within the retailer's operations. Application, approval, billings, additional extensions and collections are managed by the retailer. Proprietary retail credit was the predominate method of consumer credit extension for much of the past century. Today, relatively few large stores employ it. Over the past several years retail credit programs increasingly have shifted into private label. As a result of that trend and the proliferation of general-purpose bankcards, true proprietary retail credit is becoming the province of smaller, regional operations.

Far more prevalent are private label programs. Private label cards are issued by a bank on behalf of a retailer (in the retailer's name), to the retailer's customers for use in its stores. The issuing bank may be a corporate affiliate of the retail organization or it may be a distant third party. In the former case a private label card operation might appear to be similar to that of a proprietary card. However, responsibility for managing the portfolio and other aspects of the account resides with the financial institution, subject to contractual agreements between the financial institution and the retailer. Thus, for example, applications for credit may be completed and approved from the retailer's premises in the customer's presence. Monthly statements typically arrive in envelopes bearing the retailer's name and may include information about store events. From the customer's perspective a private label program may be nearly indistinguishable from that of a proprietary card. While the preceding discussion focused on revolving lines of credit tied to a card, comparable closed end installment arrangements also exist.

Finally, one step further removed are co-branded cards or those that have access to multiple accounts. The cards may bear both the retailer's name as well as that of one of the major general purpose bankcard issuers. These cards may incorporate distinguishable lines of credit for the named retailer and a separate line for general-purpose use (generally a Visa or MasterCard).

In each of these instances, the entity responsible for day-to-day operations of the account is also the entity responsible for communicating with any consumer

reporting agencies to which the entity reports. In general these entities have developed back-office operations commensurate with the responsibilities they have voluntarily undertaken in connection with their reporting activities.

History

In order to appreciate the extent of that role, and to gauge the effect of steps taken to enhance the accuracy and integrity of information furnished to consumer reporting agencies, it may be helpful to review briefly the U.S. history of reporting activity.

Years ago, merchants offered extended payment periods to allow their customers to purchase provisions throughout the agricultural season. The reliability with which a customer's repayments were made was one factor considered by the merchant in deciding the "terms" it would extend in the future.

While the financial reputation of each household, and its members, might have been known by most merchants in a small town, over time the town's growth and the proliferation of merchants meant that word of mouth between retailers became an increasingly important resource in determining to whom one could safely offer terms. This often confidential merchant-to-merchant exchange of their experiences with individual customers was of benefit to the merchants, and their better customers. For the merchants it helped ensure that they would not provide extended terms to individuals whose failure to repay might result in hardship or even bankruptcy for the retailer. For the customers it meant that they did not have to repeatedly re-earn their reputations over a period of years; they were able to use existing merchant relationships as references.

A few things are evident from this model. The cobbler had to rely on the dry goods seller to provide reasonably accurate information. Each of their businesses depended upon it. The nature and frequency of the information conveyed was not always comparable. One merchant might experience singular purchases that were quickly paid off, while another might encounter large purchases paid for over an extended period of time. Therefore, the exchanged information was, at best, a guide. The information might be summary (X pays well); detailed (Y has been advanced this amount and repaid it several times with few difficulties); or selective in nature (Z has yet to pay me for his last purchase). But regardless of its form, it is more valuable to the merchant, and the town's commerce, than no information at all.

As towns grew into cities and the number of merchants expanded further several additional factors emerged. It became far less likely that any merchant would know the financial status of even a substantial portion of his or her potential customers. The effort required to seek out and share repayment information became an exponentially greater burden. While a customer might provide "references" to demonstrate his or her reputation, it was not in the customer's interest to volunteer the names of those merchants who had not been repaid. And, as towns grew into cities it was more likely that those merchants with experience might be direct competitors of

those with which a customer wished to do business, a situation that could undermine the mutual trust on which the reference system relied.

To help alleviate these factors merchants developed mutual benefit associations: retail associations or chambers of commerce to which they all sought to belong. One of the primary functions of these associations was to provide a place for merchants to record, in an organized fashion, their financial experience with various customers. The nature of the information collected was not necessarily consistent. It might consist solely of negative files (Z hasn't paid) or some combination of observations. Nor was the manner in which each association compiled the information the same. Regardless, centralizing it reduced search costs, lessened the likelihood that potential competitors would receive skewed information (information was generally available to members of the association to the extent they contributed), and improved the participating merchants' financial health. Those who contributed to and used the shared resource were likely to make better financial arrangements with their customers. It also allowed them to more reliably allocate fair terms and conditions among consumers.

As the country grew and its citizens became more mobile, these associations became increasingly important. Some began to share information with nearby cities and towns, eventually becoming regional operations. By the second half of the last century these "credit bureaus" began to encourage merchants to volunteer their information in a more routinized manner to facilitate comparisons among merchant reports. To help defray the costs of the operations, bureaus began selling access to the association's files to merchants who had not contributed data, while simultaneously encouraging them to become data furnishers in hopes of making the files more complete.

In time many of these local and regional associations were purchased by or became affiliated with the major consumer reporting agencies that are the primary subject of the Fair Credit Reporting Act and its subsequent amendments. While those laws have structured the behavior of credit bureaus, they have not changed the underlying dynamic on which they are based. This is an important factor to keep in mind when considering the proposed changes.

Direct Dispute Regulations

The most significant inquiries in the NPR are those dealing with the possibility of direct disputes. As was discussed above, the credit reporting system provides significant benefits to consumers and to the businesses that use them. But the system itself rests upon a series of behaviors and assumptions that have grown organically over the past century. Fundamental to these is that the balancing of competing interests, incentives and economic commitments that cause the system to operate are, at base, voluntary.

Performing furnishers' duties cost money. A merchant, or its affiliated bank in a private label context, must invest in equipment and personnel to interact with the consumer reporting agencies to which it furnishes data and to help ensure that the

data provided is accurate. In addition to those employees managing the credit program, at a minimum it must hire staff to address Section 611 disputes that cannot be resolved adequately through automated processes.

Consider certain competing factors. It is indeed a delicate sense of obligation and self-interest that causes one merchant to invest time and money to furnish information that will benefit its competitor. Historically, the merchant associations addressed this issue in part by encouraging a sufficiently large body of businesses to contribute whatever they could afford to the system such that the benefits to a merchant of receiving information about unknown customers from a wide variety of sources, and its desire to encourage that process, outweighed the costs of providing information to businesses with whom it competed. However, the cost/benefit assessment of that trade-off is not the same for all merchants or other furnishers.

As the Agencies are aware, some furnishers will not disclose all of the information they have about all of their customers to the same extent as do other furnishers. For example, some restrict disclosure of the size of their customers' credit lines, or even the amount of their maximum purchases, above a preset limit. In some cases, this is done for reasons of customer privacy. But in others, it represents a compromise between the desire to provide some information for the benefit of the credit reporting system, and a desire not to cost the furnisher the consequences of revealing the profitability of its very best customers.

From the merchant's perspective, disclosing that a customer routinely spends $10,000 or more on merchandise, and repays promptly, is deemed to be sufficiently indicative of the customer's financial capability as to warrant reporting; while not revealing to his competitors that the customer is a $90,000 a year buyer. The merchant has made an assessment, whether justified or not, that detailed identification and possible loss of a few such customers could quickly overwhelm the benefits of hiring staff and maintaining equipment in order to furnish in the first instance.

Merchants have a choice not to furnish and instead purchase the reports of those who do.[6] That decision potentially makes the system less representative and potentially less robust. In attempting to determine whether there are instances in

[6] In a sense the credit reporting system model is analogous to that of a volunteer fire department. No member of the volunteer corps has an immediate incentive to rise from his bed when the alarm sounds at night if his house is not burning, other than to encourage fellow members of the force to continue to respond in the event his home caught fire in the future. At first blush members of the department have no incentive to douse the fire in the home of an individual who does not volunteer until one considers that stopping the spread of fire potentially spares their homes as well.

On the other hand, if a fire breaks out in a distinct neighborhood from which no volunteers are drawn, while support of their fellow citizens may still be a motivating factor, the members of the department have somewhat less incentive to risk their lives extinguishing that remote blaze, unless that neighborhood has contributed something of value – e.g. the cost of maintaining the firehouse or equipment – such that the loss of that neighborhood would harm the department. In a sense, the members of the remote neighborhood are in a position comparable to merchants or credit grantors who pay to use the credit reporting system but do not furnish information. Given the other alternatives available, the costs of furnishing are greater than they are willing to bear.

which direct disputing to furnishers might be imposed, you should recognize there is a possibility that the costs of reporting will drive merchants to underreport, or not to report at all. Therefore, we suggest the Agencies exercise extraordinary caution.

Discussion

In light of the foregoing, and the other provisions of the amended FCRA, NRF members are hard-pressed to determine circumstances under which furnishers should be required to investigate directly filed disputes. While the information in consumer reports is gathered from a number of sources, the report itself is the product of the consumer reporting agency. The report's content, its format, the points it chooses to emphasize, the manner of reporting, coding and categorization of the data are all determined by the consumer reporting agency. As the history suggests, no two CRAs necessarily treat information in the same way. Therefore the final reports, even though they may be drawn from similar sources, will undoubtedly differ in some respects.

Currently disputes are directed, in the first instance, to the entity that is responsible for compiling the product about which the consumer has questions: the CRA. While there is a benefit in having numerous locations where consumers might dispute reports, CRAs already have a number of avenues to resolve the consumers' complaints. In some cases it is a matter of explaining how the report is constructed. Consumers may not understand why historic data is suppressed in some companies' reports but not in others. They may not understand why one report contains trade lines that another does not; or understand the display of trade lines established before a marriage or a divorce. This lack of understanding may result in a dispute. But a direct dispute to the merchant or other furnisher is not likely to assist the consumer in understanding how or why CRAs handle information in the manner they do.

The merchant is unlikely to have the disputed reports. They would need to be provided in a form comparable to that given to consumers and the merchant would need to retain employees to explain the CRAs' products. Even if the merchant were supplied with copies and had the staff on hand, it is unlikely that the merchant adequately could explain vagaries in the manner different CRAs codify information, nor do anything to change those differences if it could explain them. Even if the matters touched on the retailer's trade lines, in many instances complaints concerning how the merchant's data was reflected in the report could not be resolved by the merchant. At a minimum, someone with access to the report would need to explain to consumers the differences between the kinds of data susceptible of being influenced by furnishers and that which is not. The entity best situated to perform this task is the CRA. Otherwise, every furnisher would need to have trained staff on hand to address the possibility that a question might arise about products they do not create.[7] Logic strongly suggests that cost of staffing and training all, or nearly all, furnishers to duplicate the work now done by the CRAs would dwarf any benefit from having additional avenues for inquiries.

[7] By extension, would every courthouse, registrar of deeds, state office housing publicly available data, or any other source of CRA information be required to do the same thing?

Since they are the primary source for explaining their reports, CRAs are also in the best position to determine whether a consumer inquiry likely is addressing a matter beyond their control and is more appropriately directed to a merchant or other furnisher. In most such cases, disputes are filed with furnishers electronically for reinvestigation. These are often sent with a particularized dispute code reflecting the complaint the CRA understands the consumer to be lodging. If the consumer could dispute directly to the furnisher as well, there is no guarantee that the consumer will not simultaneously lodge the same complaint both places. At a minimum this could mean that each such dispute is reviewed twice, once under the Section 611 procedure and a second time under the proposed Section 623 procedure. This doubles the time, cost and effort of resolving disputes for all of the parties.

In addition, it is entirely possible that the consumer reporting agency and the furnisher could code the dispute differently, meaning that the same information is reviewed from two different perspectives. Depending on the timing of the inquiries a reinvestigation that results in a correction could find itself "uncorrected," because the dispute in the second inquiry is deemed to be without merit, confirming the tape data and thus overriding the earlier "correction." Unless there is a mechanism (beyond merely asking consumers not to dispute more than once) for ensuring that multiple requests are coordinated the likelihood is that they will introduce more costs and greater opportunities for error and fraud into the system.

In fact, some direct disputing with furnishers occurs today. It can result in changes to the information contained in CRA files, but it is not necessarily an improvement in terms of accuracy or integrity.

Most furnishers already have on staff individuals responsible for customer service in the credit area. These employees assist with responses to electronic inquiries, with payment terms, account status, credit line inquiries and so forth. They also receive complaints from some consumers concerning the reporting of their accounts to the bureaus. In many cases the complaints are not true disputes, our members tell us that consumers often inadvertently acknowledge that the information the merchant is reporting is accurate, but instead claim that the reporting of it is unfair, or harmful, because it does not accord with the view of himself the consumer wishes to portray to another potential creditor. Or the consumer may argue that there were undisclosed circumstances which he or she believes, had the furnisher been aware of them, would have led the furnisher not to report the derogatory information. Extended vacations, marital disputes, and irresponsible friends are often cited as reasons one or more payments were not made on time.

There are mechanisms for explaining these circumstances within the current FCRA. They may be added to a report as a statement if the consumer disagrees with the manner in which a dispute is resolved. But if the goal is to enhance the accuracy and integrity of the system, addressing these disputes through an intermediary, such as the CRA is a better means of doing so than disputing them directly to the furnisher. Again, recognizing that no one is perfect, the goal of the credit reporting system is to determine whether payments were timely made and comparing that payment record, to the extent feasible, with that of other imperfect consumers. To the extent some individuals' imperfections are selectively excused, the reliability of the system is

compromised. The charge to the CRA, when a dispute with a merchant is tendered, is to initiate a reinvestigation of the accuracy of the disputed information. The CRA is a neutral party. If the accuracy of the information is confirmed, it is not changed. Since the goal of each CRA is to offer more accurate information than its competitors, it has no incentive to change information it has collected that has been shown, upon reinvestigation, to be accurate. Similarly there is strong incentive for the CRA to modify the report if inaccuracies are established during the reinvestigation process. The central, neutral role of the CRA is an important bulwark against inaccuracy.

On the other hand, a furnisher, especially a furnisher who has multiple relationships with a consumer, may have incentives to convert accurately reported information into inaccurate information if doing so will avoid damaging other, potentially more profitable relationships with that consumer. If the government specifically directs consumers to furnishers for purposes of disputing, furnishers will be placed under increased and direct pressure to balance potential damage to the credit reporting system against the immediate risk of losing a longstanding customer. Further, some merchants may feel conflicted at being placed in a role of "adjudicating" the "validity" of reasons their customer may have missed payments. This will further undermine the premise of the reporting system – to simply report the fact that payments are on time or late rather than attempting to characterize the reason for a particular payment behavior. In many cases a furnisher might resolve a customer dispute not by affirmatively reporting inaccurate information, but rather by reporting no information about the consumer. Since, as was discussed above, the incentives for fully supporting the system itself are not compelling for some merchants, introducing pressures that further undercut incentives to maintain the system's accuracy or completeness must serve an unusually high purpose if they are to be adopted. We do not believe such a purpose exists.

Other Costs

As was discussed above, furnishers already have in place methods and procedures for servicing their customers and complying with existing obligations under the FCRA. Direct disputing would expand these obligations. Merchants who use electronic reinvestigation processes, such as those available under E-OSCAR, must familiarize their staff with operational aspects of those programs. They must recognize the significance of the various codes delivered by the system, but they generally need not analyze each customer inquiry and convert it into code form. Direct disputing necessarily will mean additional staffing. Anecdotally, our members inform us that only six to seven percent of trade lines disputed at the credit bureau result in information actually being blocked from appearing on subsequent credit reports. That means only a small percentage of disputes are ever actually found to be valid during routine reinvestigations. It is uncertain what percent of the remaining 93% of consumers would then initiate a direct dispute with the furnisher, but needing to process and reinvestigate even a modest percentage of that number would greatly increase the number of employees required.

By way of example, one large merchant reports that it received approximately 478,000 automated disputes in 2005, up from 364,000 in 2004. In addition to

managing those, in 2004 its staff of 27 also handled 178,000 personalized requests on a voluntary basis. Assuming no duplication of disputes, it would have needed to have more than doubled the number of staff if substantially all of its disputes were directly submitted in the first instance. This additional cost would need to be replicated for every other furnisher, for an uncertain consumer benefit, if any.

There are additional costs not captured by this calculation. Currently furnishers have limited legal obligations with respect to disputes. If direct disputing were legally sanctioned, far more robust compliance programs than currently exist for discretionary accommodations would be needed. Worse, the existence of the obligation would open an additional avenue for abuse by credit repair organizations.

At present, credit repair organizations, while a threat to the system as a whole, have had only somewhat troublesome effects on furnishers. Typical credit repair organization tactics, to file serial disputes of the same item or to file multiple disputes of an item in such a manner as to provoke different codes creates difficulties for the CRAs who must determine whether the disputes are genuine. Masked among thousands of other disputes it is often difficult to determine whether a dispute is an attempt to introduce inaccurate information or a good faith effort to better explain a previously rejected dispute. CRAs have the unfortunate advantage of exposure to millions of such activities, providing them a larger base from which to extract evidence of repeated credit repair organization patterns. Few, if any, furnishers would have the breadth of exposure as to allow them to as readily detect such patterns. In light of the fact that CRAs have estimated that as many a 1/3 of the disputes they receive are illegitimate efforts at credit repair, it is evident that unleashing that many disputes directly on furnishers will disrupt the fragile balance currently encouraging reporting.

The risks to the system are high. Creditors could easily avoid potential legal liability, and the considerable economic costs of responding, ab initio, to an overwhelming number of disputes by choosing either to furnish very limited information, or provide none at all. As was common at one time, merchants might choose only to provide notice of write-offs or defaults. The number of consumers who default on obligations is fairly small. By electing to limit furnishing only to that group, a creditor correspondingly limits the number of potential disagreements (and therefore likely disputes) with the information it is furnishing. While it would encounter legal compliance costs, absent unusual circumstances, its staffing workloads are unlikely to be increased substantially.

Of course the potential costs to the credit reporting system and consumers of this approach are very high. The amount of information provided by such furnishers would be of only limited value: a consumer who did not default or file for bankruptcy necessarily would be deemed to have "paid as agreed," regardless of his or her actual pattern of payment practices. However, a system that reports only one extreme of behavior is a very blunt instrument for distinguishing among consumers in a general population, especially since the current system has led to the development of highly predictive credit scoring models. (Indeed, the fundamental purpose of credit scoring is to predict future repayment behavior based on detailed historical experience.)

As the higher information costs of providing data to the system were borne by a decreasing number of furnishers, the data they supplied would become increasingly critical in separating good, from mediocre, from poor credit risks. Perversely, the data they provided, being among the only distinguishing data available, would become the target of greater interest by other creditors and by affected consumers. Said another way, if all classes in a typical public high school were graded on a pass/fail bases, the detailed scores provided by the SAT would take on far greater significance in the college admissions process than if those scores were accompanied by a range of graded classes for consideration as well. The increased attention given to the remaining traditional information furnishers would have the adverse effect of making their reporting subject to even greater pressure from direct disputes – further increasing the costs associated with their furnishing information. At some point, they too will decide that the cost of providing detailed data for the benefit of others is less valuable than the information they receive from the system in return.

For consumers, the effect of increasingly being graded on a default/no default system is that they would have fewer means of demonstrating their creditworthiness. Creditors, in order to minimize their risk would need to provide less credit, or extend it on less favorable terms, to the entire pool of eligible applicants, until such time that each could determine on its own which of their customers had demonstrated a pattern of responsible behavior. This would take us closer to the credit system that existed early in the last century than the one we have today. To the extent availability of credit is a societal good, it would be reduced.

The foregoing assumes that some merchants initially only reduce the quantity of information they are furnishing. If the perceived costs of adapting to the new system are sufficiently high, many merchants and other furnishers might well be induced to stop providing data altogether. In that case, the effects on otherwise creditworthy consumers and the credit system generally, would be profound.

The consumer reporting system is not perfect. It is the consequence of a long history of economic and social tradeoffs that have resulted in the sharing of information now deemed essential to the distribution of a scarce resource: consumer credit. Those who furnish information to the system do so for a combination of economic inducements and social incentives. So long as they can benefit both their businesses and the greater good while not unduly burdening their operations, we hope they will continue to do so. Adjusting the system should not be undertaken lightly. Once incentives for desirable behavior have been broken, a mere reversal of an erroneous decision provides no certainty that companies will again undertake the expense necessary to reestablish the common good. A merchant who out-sources its credit operation is unlikely to bring it back in-house. Similarly, a merchant who stops furnishing is unlikely to invest in new technology and staffing necessary to reestablish that practice. It required considerable persuasion over the past century to develop the current system, government should be careful not to devalue that effort.

As to the information itself, the consumer reporting agencies compete on the completeness and accuracy of the data they provide. This competition is tempered by their desire to collect data in a manner least burdensome to those who are supplying

it. While they have standardized some processes, the very competition that drives their operations militates against reports among the firms being identical. The multiple new requirements imposed by the NPR seek to achieve laudable goals. However, our members tell us that these new burdens will discourage merchants (especially small merchants who are not regular reporters) from reporting and these real burdens will outweigh the potential benefits.