Comment #: 42

July 16, 2004

Donald Clark, Secretary
Federal Trade Commission
Office of the Secretary
Room H-159 (Annex M)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
FACTAStudy@ftc.gov

RE: FACT Act Section 318(a)(2)(C) Study, Matter No. P044804 –
Comments of the American Financial Services Association

Dear Sir:

The American Financial Services Association appreciates the opportunity to comment on the Notice and Request for Public Comment (the "Notice") issued by the Federal Trade Commission (the "FTC") that seeks information regarding the effects of requiring that a consumer who has experienced an adverse action based on a credit report receive a copy of the same credit report that the creditor used (the "Study"). The Same Report Study is required by section 318(a)(2)(C) of the Fair and Accurate Credit Transactions Act (the "FACT Act").

AFSA is the national trade association for consumer credit providers. The credit products offered by AFSA's members include personal loans, first and second mortgage loans, home equity lines of credit, credit card accounts, retail sales financing and credit insurance.

We encourage the FTC to conduct this Study, because we believe the most efficient process in this regard is also the best outcome for the consumer. Consumers should have the opportunity to review the most current information in their credit reports when investigating the reasons their application has been declined, or other adverse action has been taken against them. The current process for providing consumers with credit reports following an adverse action notice provides consumers with the most recent data and also protects consumers against potential identity theft. We encourage the FTC to evaluate fully the benefits of existing consumer protections in this regard.

In recognition of the need for consumer protection in this area and consistent with our reliance on timely and accurate credit data, we would like to offer the following comments on the Notice.

A. We Believe that Existing Consumer Rights Effectively Address this Issue, and the Proposed System Could Materially Increase the Incidence and Severity of Identity Theft.

Existing consumer rights address this issue in a very sensible way, and it is not clear that providing a consumer with a less recent credit report would better enable the consumer to identify and correct inaccuracies in their report. Under existing federal law, if a consumer receives an adverse action notice, the notice informs the consumer of up to four reasons that the lender declined the consumer's application. Typically, the letter will only list one or two reasons, the most common reasons being bankruptcy, foreclosure, loan default, and loan charge-off. Accordingly, rarely will the consumer need to review her credit report to determine why the lender declined the application.

For those situations in which a consumer also needs to review his credit report, the adverse action notice also informs the consumer that he or she may contact a Credit Reporting Agency ("CRA") to obtain a credit report. This credit report is likely to be more current than the report that the lender would have used to make its credit decision. It is also unlikely that any inaccuracy in the credit report used by the lender would be corrected or removed by the time the consumer requested the more recent credit report from the CRA, so the Study's main public policy concern – providing consumers the opportunity to fix their credit report – will be more effectively accomplished under the existing system.

In 1996, Congress recognized that it is most beneficial to the consumer to see the most current version of data in his or her file and to see all information, thus empowering the consumer to act on other rights such as dispute and error correction. FCRA Sec. 609(a)(1) states that a consumer has a right to receive "…all information in the consumer's file at the time of the request." The fact that a consumer file disclosure must contain all information in the file at the time of the request was a change from the law as enacted in 1970, which required a disclosure of "…the nature and substance…" of information in the file. We believe that this approach is the correct one for consumers, CRAs, and lenders. The law ensures that consumers always see everything in their files and that they are never confused by a question of which version of their files they are reviewing. We believe that altering this right of access will impinge on the effectiveness and clarity with which the consumer's right of access operates today.

A consumer also has the right to know who has used his or her information. Section 604(c)(3) of the FCRA states that "Except as provided in section 609(a)(5), a consumer reporting agency shall not furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by the consumer." This provision supports the policy position that consumers should be able to obtain a full and complete file disclosure from a CRA, and the "same report that the creditor relied on" would not contain these inquiries. By obtaining a file disclosure from a CRA in accordance with existing consumer rights, the consumer will see all information used by the lender to make a decision and other information that cannot be viewed by users of credit reports. In other words, a lender will not ever have the consumer's entire credit file

in their possession. Only the consumer can see the entire file, and a consumer should never see less than the entire file pertaining to him or her.

The changes being contemplated by the Study would also significantly affect existing dispute processes. Consumers have sixty days in which to order a copy of their same report as that used by the lender when they have been the recipients of adverse actions. If a consumer waits a full sixty days, and then orders the same report as that used by the lender, then he or she is reviewing a file with stale and dated information. This delay will lead to spurious disputes of information that has since been updated in the consumer's primary file. A disclosure that facilitates disputes about information which is in fact already correct in the consumers file would tie up valuable resources that would otherwise be allocated to processing true and valid disputes.

In conclusion, the purpose of supplying a consumer with an adverse action notice and opportunity to obtain a copy of the credit report upon which the adverse action was based under the FCRA provides the consumer with the opportunity to determine the accuracy of the information in the consumer's file so that it can be corrected for consideration by future creditors. As noted above, under the Equal Credit Opportunity Act, creditors already provide a written statement of specific reasons listing the principal factors for the adverse action, or inform consumers of the right to receive such a statement. This information can be used in conjunction with the free report(s) to identify errors and potentially fraudulent information in credit reports.[1] Therefore, the most current credit report is the most relevant and useful report. We encourage the FTC to reflect the details and benefits of current adverse action processes and credit reporting system in the Study.

We are also concerned that creating a new, parallel system of this sort would increase the potential for identity theft and consumer harm. Because customer identification requirements do not apply to declined applications, lenders could inadvertently send credit reports or similar information to identity thieves if lenders were required to provide declined applicants with such information. As noted above, an application may be declined for numerous reasons, including suspicion of fraud or identity theft, or a lack of sufficient information to identify the consumer. To require a creditor to send a credit report with the adverse action notice could provide perpetrators of identity theft with additional information about the consumer that may enable the perpetrator to be more successful on the next application for credit in the victim's name. Any person obtaining a credit report must be required to go through adequate identification procedures, such as those employed by consumer reporting agencies or other central sources for free reports. As a result, providing consumers with dated reports relied on in making a credit decision instead of a current report may actually foster errors in credit reports and inhibit discovery of identity theft.

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[1] In the future, discovery of these errors and fraudulent information prior to credit application and the loan review process should become more likely given that consumers will soon be able to review annually a free copy of their credit report prior to applying for credit.

Even if reports are only obtained from the consumer reporting agencies after adequate identification, obtaining old credit reports would not increase consumers' ability to identify identity theft because the information is old and would not reflect the most recent additions to consumers' files—which may include corrections to the old information. Old information can only distract the consumer from focusing on the information that is truly important—his or her consumer report file.

We recognize that exceptional situations may arise in which a consumer may need the full combination of information described above to determine why a lender declined their loan application or took other adverse action against them. However, the limited marginal benefit of sending an outdated credit report to a consumer in those exceptional situations seems insignificant compared to the operational difficulties of constructing such a system and the potential for identity theft such a system could create. We encourage the FTC to assess carefully the actual benefits of sending this additional information to consumers in these limited situations.

B. The Process that the Study Is Assessing Would Generate Significant Operational Issues for CRAs and Lenders.

Another policy concern about the process that the Study is evaluating is that it could require CRAs and users of credit reports to construct complicated operational systems that do not exist today. The outdated nature of the information being communicated, and the difficulty of translating existing raw data into a form that consumers could readily understand, would further complicate communication of that information to consumers. For instance, the CRAs do not have systems that would allow them to identify the credit report used by a creditor in connection with an adverse action, and the users of credit reports do not have systems that would allow them to convert databases into a readable credit report that matches the data used by the lender in connection with the adverse action.

Existing systems would not allow CRAs and lenders to send consumers the "credit report" used in the credit decision for several reasons:

- Lenders receive raw data that they cannot typically print out in consumer-friendly format. The data feeds from credit bureaus are designed for computers to communicate with each other. Today's systems will not allow the typical lender to generate a readable credit report from their files.
- Lenders receive incomplete reports. For instance, when consumers receive free reports they receive prescreen inquiry information which is not provided to lenders.
- Lenders receive and review multiple bureau reports for a single application decision. These reports are often merged by third parties. In addition, lenders may not use all the bureau data that is provided. As a result, it would be difficult to trace back to the origin of the bureau data for a given individual and even more complex to then format that information in a format comprehensible to a consumer.
- Different lines of business (e.g., mortgage, auto, credit card) utilize different bureau data elements from the same data feed. As a result, providing consumers with

differentiated reports based on the type of product they applied for would reveal some of the industry's most important proprietary credit modeling insights.

- Some lenders receive only summarized data rather than a full credit report.
- For purposes of protecting consumer information, CRAs voluntarily truncate some data before sending it to certain CRA customers.

Also, existing law can interfere with ensuring that only one file exists for a particular consumer. For example, the Administrative Office of the Courts of the United States implemented new rules effective December 1, 2003 which require the truncation of the social security number to the last four digits for all bankruptcy data available through the PACER system. As the comment letter filed by the CDIA notes, their member analyses showed that consumers with common last names can also share the last four digits of a social security number. Also, a proposed ordinance in Madison, Wisconsin would prohibit a landlord from refusing to process an application where the consumer refuses to provide a social security number. As a result, when a consumer has a common last name, a user of consumer reports cannot avoid the possibility of triggering more than one report being delivered due to the imprecision of the identifying information provided by the consumer. Laws, administrative actions and ordinances that limit the use and availability of key personal identification information impede the ability of CRA and lender systems to keep all information housed in the same file.

Even if CRAs or lenders were able to successfully invest in the systems required to accomplish the goal being studied, the resulting credit reports would be outdated by the time a consumer received them. We do not believe that consumer protection would be significantly advanced by providing a consumer with a credit report that may contain outdated information. The resulting conversations between the consumer and the relevant CRAs or the lender would likely be confusing and time-consuming. The costs of the contemplated changes would be disproportionate to the limited benefits created by providing an outdated credit report to a potentially unidentified person. We encourage the FTC to assess carefully these difficulties in the Study.

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In conclusion, we believe that existing consumer rights sensibly address the public policy concerns motivating the Study. Creating a new, parallel notice system would assist only a small number of consumers in extremely exceptional situations, and it would unacceptably increase the risk of identity theft. We respectfully request that the FTC reflect these positions in its final report to Congress.

We appreciate the opportunity to respond to the Notice. If you have any questions about this letter, please contact me at (202) 466-8606.

Sincerely,

Robert McKew
Senior Vice President and General Counsel