Comment #: 48

July 16, 2004

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex M)
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

RE: FACT Act Section 318(a)(2)(C) Study, Matter No. P044804

On behalf of the members of the Consumer Data Industry Association (CDIA)[1] we provide the following comments on the above-referenced matter. Thank you for the seriousness with which you are approaching this study and for this opportunity to provide our thoughts. We have many concerns with this study of the question of whether or not consumers should be provided with a copy of the same consumer report that the lender relied on to take an adverse action.

One implication of this study appears to be that the data contained in a consumer report used by a lender (or other user) is not seen by the consumer when he or she orders a disclosure of the file directly from the consumer reporting agency. This is not the case. In fact, quite to the contrary the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*) requires that some data in the consumer's file only be disclosed to the consumer and not be reported to any user. Central to the success of the FCRA is the fact that consumers do in fact see all information in their files that is provided to a lender with a permissible purpose. FCRA Sec. 609(a)(1), as amended in 1996, requires disclosure of all information in the file at the time of the request. This is the best possible policy to maintain and it is one which favors clarity and simplicity for consumers.

Another implication is that in many instances consumer reporting agencies return multiple files where a single request is made by a lender. First, not all consumer reporting agencies return multiple files. Second according to CDIA members, this issue becomes progressively less relevant since the incidence of multiple files will likely drop below 0.5% of all files sold by year end. The confluence of data standards, as well as improvements in hardware and software will continue to reduce this percentage.

[1] Founded in 1906, the CDIA is the international trade association that represents more than 400 consumer data companies. CDIA members represent the nation's leading institutions in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment reporting, tenant screening and collection services.

Further, there is a fundamental flaw in the assumption that a consumer reporting agency will commonly have the "same report" for purposes of disclosure. To the contrary, a consumer reporting agency will not necessarily have the "same report" for purposes of disclosure to a consumer because the consumer report it provides to a lender, for example, is often supplemented by the lender with its own experiences and transaction information, with information the lender receives from its affiliates or with information obtained from other third parties. Clearly a consumer reporting agency is not in a position to disclose all information used by a lender in an underwriting process.

Background:

A review of the operation of select provisions of the Fair Credit Reporting Act (FCRA) is necessary to set the context for further discussion. In 1996[2], the FCRA was materially amended and several of these amendments speak to the question of how and when a consumer may obtain a file disclosure from a consumer reporting agency, or a user of consumer reports, and also the nature of what information should be provided.

Access through users of consumer reports:

The FCRA already addresses the question of circumstances where a consumer may see a copy of a consumer report which was used to make an adverse decision.

FCRA Sec. 604(b)(3) states that an employer must, before taking an adverse action, provide to the consumer a copy of the report used.

FCRA Sec. 607(c) states that "A consumer reporting agency may not prohibit a user of a consumer report furnished by the agency on a consumer from disclosing the contents of the report to the consumer, if adverse action against the consumer has been taken by the user based in whole or in part on the report." This 1996 amendment to the law offers users the flexibility to provide a copy of the "same report" used to make an adverse decision, should it make sense to do so.

FCRA Sec. 609(g) states that a mortgage lender must disclose a credit score and explanation of this score as part of the mortgage application process. This new disclosure enacted, in 2003, ensures even greater transparency and understanding for consumers of the nature of the lending decision, adverse or not.

A consumer's right of access to the entire file:

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. At that time consumer credit reporting agencies were not able to disclose copies of files since there were none, as most of the reports were made orally. However, by the 1990s, consumer

[2] PL 104-208.

credit reporting agencies were providing full file disclosures to consumers. In 1996 Congress codified this business practice and in doing so, it recognized that it was most beneficial to the consumer to see the most current version of data in his or her file and to also see all information. With a full file disclosure of the most current data, consumers are empowered to act on their rights, such as to dispute information, seek a reinvestigation, expect the deletion or modification of information in their credit file based on the reinvestigation, and request that a revised report be sent to previous recipients and to file consumer statements.

We believe that Congress was right when it enacted these provisions in 1996. 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. Any alteration of this right of access will impinge on the effectiveness and clarity with which the consumer's right of access operates today.

A consumer's right to know who has used his or her information:

Since 1970, the FCRA has required that a consumer reporting agency provide consumers not only with a disclosure of the information in their files but also a record of those which have used a consumer report for a permissible purpose. Commonly called inquiries, all consumer reporting agencies maintain a record of users of consumer reports for full disclosure to the consumer. It has always been fundamentally important to ensure that consumers can know which lenders have reviewed their credit report. However, as a business practice, CDIA's nationwide credit reporting agency members have voluntarily limited the disclosure of inquiries in credit reports used by lenders (as opposed to file disclosures provided to consumers) because some types of inquiries are the result of transactions not initiated by the consumer, such as a lender reviewing a credit report as part of a portfolio review to ensure safety and soundness. Other inquiries simply reflect a consumer's own request to review his or her file.

In 1996, the Congress codified our members' business practice by amending FCRA Sec. 604(c)(3) to state 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 argues for consumers obtaining a full and complete file disclosure from a consumer reporting agency, since the "same report that the creditor relied on" would not contain these inquiries. By obtaining a file disclosure from a consumer reporting agency, the consumer will see all information used by the lender to make a decision and also other information that cannot be viewed by users of consumers reports. Said differently, only consumers see all of the information in their files and a consumer should never see less than the entire file pertaining to him or her. If a consumer reviews a specific report used to take an adverse action, this report will not contain all of the information in the consumer's file.

Defining "adverse action" for purposes of this inquiry:

CDIA agrees with the Commission's choice to use the definition of "adverse action" as it appears in the FCRA and to exclude situations that may trigger risk-based pricing notices.

Defining "the same report that the creditor relied on":

The Federal Trade Commission (FTC) requests comment on how to define the phrase "the same report that the creditor relied on". We believe that the current system of file disclosures meets the intent of Congress to ensure that a consumer can at any time seek to review all information in the file at the time of the request. The term "file" is clearly defined in the law today. Defining the phrase "the same report that the creditor relied on" is extraordinarily complex and adds no benefit to the disclosure process. Consider the following marketplace examples, which speak to the complexity of the task:

- The FTC rightly points out that a small number of lenders base their decisions on a credit score.
- Other lenders receive only summarized data rather than a full credit report, such as when the credit decisions are based on credit criteria.
- For purposes of protecting consumer information, CDIA's national credit reporting system members voluntarily truncate some data, such as account numbers, in credit reports delivered to certain customer segments. The FACT Act requires the suppression of medical information in reports, unless certain exceptions are met. Thus, these reports purposefully do not reflect all information that would be provided to a consumer where a full file disclosure has been requested from a consumer reporting agency.
- Lenders may augment a credit report provided by a consumer reporting agency with other information from third parties (see FCRA Sec. 615(b)) and, thus, a consumer reporting agency is unable to in fact provide the "same report that the creditor relied on."
- Lenders may base their entire decision on other third-party information or affiliate-shared information and, thus, the consumer reporting agency is in no position to provide a copy of the "same report that the creditor relied on."
- Resellers may append new information or update information in credit reports they purchase from other consumer reporting agencies, thus complicating the question of from whom does the consumer make the request to obtain the "same report that the creditor relied on."
- CDIA's members may be requested to operate a proprietary score owned by a lender and in these cases, our members are not in a position to specifically know what information was selectively used by the scoring model and, thus, have no basis for producing "the same report as the creditor relied on."
- New information, whether positive or derogatory, may have been added to the consumer's file between the time a report was delivered to the user/lender and the time a consumer requests a disclosure. Keeping this new information segregated and/or undisclosed is not in the interest of consumers and would be very expensive.

Reformatting "same reports":

The Commission also requests comment on the idea of requiring that the "same report as the creditor relied on" be formatted to be more consumer-friendly. CDIA's members are as deeply concerned about the idea of reformatting data as they are about the primary idea of providing anything other than a full and complete disclosure of all information contained in the file at the

time of the request. There is no standard by which one could gauge what is consumer friendly and what is not. Further, reformatting of specific data used in a specific lending decision may result in errors in the presentation of data. For example our reseller members would be extremely concerned about reformatting data to alter the report that was sent to the lender or used by a third-party automated underwriting system.

Providing underlying data:

Our members are also concerned about any obligation to provide underlying data relating to a score or other underwriting system as the Commission suggests. Further, our members are frequently unlikely to be in a position to comply with such a duty. For example, our reseller members may not always have the full underlying data where they possess only a report, which contains summarized data and scores which were produced by other consumer reporting agencies from which they purchased the consumer reports. Alternatively, where the definition of "same report" implies disclosing only that information which was specifically used by a proprietary scoring model, none of our members is in a position to produce the underlying data, since only the owner of the score can know what data was specifically analyzed. As discussed above, CDIA's members cannot identify underlying data where an adverse action was not based on data from their files (see our comments on lender use of their own transactional or experiential data as well as alternative third-party data or affiliate shared data).

As we have stated before, a system of disclosing all information in the file at the time of the request avoids consumer confusion, and ensures that consumers see precisely how data is currently presented in their files and thus can exercise their rights as necessary. These rights include the right to dispute, to seek a reinvestigation, to request the correction or modification of disputed information, to receive the results of a reinvestigation, to include a consumer statement, and the right to a disclosure of a score and more.

Clearly, providing data which underlies the "same report" would be even more complex and more confusing to the consumer than the confusion which is already inevitable when providing the "same report as that on which the lender relied."

Multiple files disclosed to consumers or reports to users:

The Commission has posited several questions regarding the extent of the incidence of a single consumer reporting agency delivering multiple consumer reports where only one inquiry about a single consumer is involved. While some bureaus do not return multiple files to a lender, the frequency of such an event is dropping and the Commission needs to consider the context in which multiple reports may be delivered.

Trends strongly indicate that the incidence of multiple reports is dropping significantly:

VISA U.S.A. conducted a study, based on 1995 credit reporting data, of the incidences of receiving multiple reports from a single consumer reporting agency.[3] That study examined the credit reports of consumers who had been selected for credit card solicitations based on a prescreened process and who had accepted the offer. The study found that multiple files were returned on 9-14% of the consumers. In polling CDIA's members in 2004 (fully 9 years after the VISA U.S.A. data was analyzed), some of our members have ceased to deliver any multiple reports and our other members report that the occurrence of multiple files is now down to a range of less than 1% to 3.9% of all reports sold. By yearend the percentage will likely drop to less than 0.5% of all file sold by the industry on an annual basis. This trend line makes a debate centered on the issue of multiple reports less and less relevant.

Consumers and lenders play a role in how often multiple reports are delivered:

Where consumers refuse to provide full and complete identifying information, including an SSN, lenders and consumer reporting agencies are at a disadvantage. Some consumer reporting agencies will not return a report if insufficient identifying information is provided. CDIA's members have designed their systems to ensure that all lenders may choose to make use of all of the personally identifying information provided by a consumer. We believe that the majority of lenders do want to provide full identifying information. In fact, Section 326 of the U.S.A. Patriot Act requires that lenders attempt to gather minimum amounts of identifying information before opening various types of accounts although this is not a requirement which must be met before requesting a consumer report.

CDIA's members also report that some lenders require that no multiple reports be delivered even where the consumer identifying information they provide to a single consumer reporting agency results in possible matches to more than one file. CDIA's members report that they comply with these requests by lenders.

CDIA's members also report that some lenders specifically direct that where they request a report and the matching algorithm identifies more than one report, all reports must be delivered. In this case, some consumer reporting agencies may choose to provide more than one file relating to the same consumer because the files appear to relate to the same consumer. To be clear, lenders make this type of request to ensure that they make the very best lending decision possible.

Multiple files on a single consumer can exist:

Consumer reporting agencies do not want any multiple files to exist in their systems. However, this situation clearly can and does exist for a small percentage of files and for a variety of reasons. Consider the following:

- Where fathers and sons share the same name and do not use, for example, a Jr./Sr. to distinguish themselves from each other, there is some risk of an inquiry from a lender resulting in the identification of two possible files, particularly when both are living at the

[3] See VISA U.S.A., Inc., *File Fragmentation and Delayed Reporting Analysis,* March 1997.

same address. Where a consumer chooses to provide a full SSN and a date of birth, such matches between files are far less likely to occur.

- Where a consumer chooses to inconsistently use a nickname or initials, versus his or her full and complete name, the possibility of having data separated into two files exists, because the new account opened by the lender contains identifying information that does not match with an existing file in the consumer reporting agency's database. This may be particularly true if a consumer, or the lender with whom a consumer is doing business, chooses to not supply full identifying information to a consumer reporting agency including a the full name, current address, SSN and date of birth
- Where a consumer's handwriting isn't transcribed properly by an employee of a lender, or where there is an error in data entering a consumer's identifying information, the new account opened by the lender may not match with any current file in a consumer reporting agency's database thus leading to the creation of a second file.
- Where a public record contains very incomplete or stale identifying information, a separate file may be created because the record cannot be matched to an existing file.
- Where a consumer deliberately establishes a new credit identity using variations in identifying information a new file may be created. This fraudulent practice often is encouraged by credit clinics and it is known as "file segregation." The FTC has sought to prevent this practice through enforcement actions and consumer education.

Laws can interfere with ensuring that only one file exists for a particular consumer:

CDIA is troubled by some of the trends in laws, and administrative actions, as they relate to data accuracy, including how these trends may affect our members' ability to ensure that all information is contained in a single file of a 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 SSN to the last four digits for all bankruptcy data available through the PACER system. CDIA member analyses showed that consumers with common last names can also share the last four digits of an SSN. Thus the result of this action means that some bankruptcies cannot be matched to a consumer's file, leading to the creation of separate files, and the accuracy of reports will diminish. Laws, administrative actions and ordinances that limit the use and availability of key personal identification information impede our members' ability to keep all information housed in the same file.

Data matching algorithms are the same for consumers and for lenders:

The Commission requested input on whether or not the system by which a file is located for a consumer is the same as that which is used to locate a file requested by a lender. The answer is yes. Where a difference in the result may exist, it is attributable to the quality of the identifying information provided by either the consumer or the lender.

The practical effects of requiring consumer reporting agencies to give "the same report as that used by the lender" where an adverse action has been taken:

Effect on file disclosure processes:

The primary result of requiring that consumer reporting agencies disclose "the same report as that used by the lender" is confusion for consumers and for consumer reporting agencies. For example, when a consumer chooses to contact a consumer reporting agency to order a copy of his or her file due to adverse action, if the consumer has been shopping for loans recently and has had a number of adverse actions, then the consumer will have to know which report he or she wishes to order. It is impractical to think that this will be the case. In a different situation a consumer may assume that he or she did business with Sears, but in reality Citigroup owns and manages the Sears credit portfolio. There are likely thousands of affinity card and proprietary retail card programs where consumers will likely not know the name of the financial institution that actually owns the credit portfolio. The consumer reporting agency would have to know the name of the financial institution in order to locate the report requested.

Where a consumer simply orders a file disclosure not associated with adverse action, it is likely that all of the "same reports" that a consumer reporting agency would have to store in anticipation of a consumer ordering the same report as that relied on by the lender, will have to be disclosed to the consumer along with a copy of "...all information in the file at the time of the request." Thus, particularly active credit shoppers will have multiple, largely duplicative, and difficult to understand disclosures, which impedes their ability to review their files and truly act on their rights.

The current right of access to all information in the file at the time of the request ensures a clear and easy to understand standard for consumers and consumer reporting agencies. Consumers know what they have requested when they order their file disclosures, and what they expect to see. Creating a system of options for multiple historical disclosures of reports, in addition to the disclosure of a consumer's current file provides no benefit to consumers. To the contrary, it adds significant confusion.

Effect on dispute processes:

Similar to current adverse action notices, which reference a consumer's right to order a copy of their file disclosure at no charge, consumers might be provided 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 "same report" with stale and dated information. This will lead to frustrated consumers blaming creditors and consumer credit reporting agencies for apparent inaccuracies and spurious disputes of information that have already been updated in the consumer's primary file. A disclosure that facilitates disputes about information which are in fact already correct in the consumers file, is the wrong result and one that ties up valuable resources, including those of the consumer, which would otherwise be directed to reviewing and handling information the consumer's current file.

Effect on system design:

Consumer reporting agencies will not know in advance which consumer reports they have sold to lenders will result in adverse actions. Thus, to comply with a requirement to provide the "same report," consumer reporting agencies will have to design systems to store all of the reports sold. This means storing hundreds of millions of copies of reports each year per credit reporting system. Though CDIA's members are unable to provide a reasonable estimate of the costs of such a project at this time, we do know that in 2002 our members issued a total of 13.44 million file disclosures due to adverse action requests. Since this data is a compilation of all three systems, the number of consumers who ordered files is substantially less than the total number of files issued. Ultimately, how can it be cost beneficial to require the storage of hundreds of millions of credit reports per system (fully 1.5 billion reports for the entire industry) on an annual basis when no more than 0.9% of the consumers ever order a disclosure due to an adverse action?

Conclusion:

The FCRA strikes the right balance today. A consumer's right to access all information in his or her file is clear and absolute. There is no empirical data supporting the premise that consumers are not already best served by the current system of file disclosures where a consumer can review all information in his or her file in its most up-to-date and accurate form. Further, the Congress revamped a consumer's right of access in 1996. The decisions made then still stand today, and are best for consumers. 1.5 billion credit reports were sold in 2002. Less than 1% of these reports even results in a request for a file disclosure due to an adverse action. We should not seek to alter a system that is working well in favor of one that fosters confusion and costs, but no appreciable gain for consumers.

Again we thank you for this opportunity to provide you with our thinking and concerns on this important issue.

Sincerely,

Stuart K. Pratt
President & CEO