



July 16, 2004

Federal Trade Commission  
Office of the Secretary  
Room H-159 (Annex Q)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

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

Dear Sirs and Madams:

The Mortgage Bankers Association ("MBA") appreciates the opportunity to comment on the Federal Trade Commission's ("FTC") Notice and Request for Comment ("RFC")<sup>1</sup> to aid the FTC staff in preparing "a study of the effects of requiring that a consumer who has experienced an adverse action based on a credit report receives a copy of the same credit report that the creditor relied on in taking the adverse action."<sup>2</sup> The study is mandated by Section 318(a)(2)(C) of the Fair and Accurate Transactions Act of 2003 ("FACTA").

MBA recognizes the appeal of providing the consumer with the actual credit report used by the lender in making the adverse credit decision, but believes that, in practice, the report could actually confuse consumers rather than assist them in understanding how the credit report affected the decision.

Our major concerns are as follows:<sup>3</sup>

- If consumers were routinely provided a copy of the report, many consumers would assume that the credit report was the only, or at least the major factor, contributing to the adverse action. They would be likely to focus on items in the report that had a minor impact on the credit decision and disregard other factors that were more important in reaching the decision. Consumers may not be aware, for example, that issues such as the amount of unused remaining credit on a non-delinquent account can be more important than minor delinquencies that occurred several years previously. Moreover, in the mortgage industry, non-credit report factors play a

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<sup>1</sup> 69 Fed. Reg. 33387 (June 15, 2004).

<sup>2</sup> 69 Fed. Reg. at 33387.

<sup>3</sup> Where our comment is responsive to a specific question in the RFC, the question number is noted.

major or deciding role, including loan-to-value ratio, debt-to-income ratio, and employment history and status. See **Questions 2.b** and **2.c**.

- The FTC's comparison of the disclosure of consumer reports in credit decisions to the required disclosure of the consumer report when adverse action is taken in connection with employment is inappropriate. Due to the nature of the employment decision, an employee or prospective employee is far more likely to understand which information in the report triggered the adverse action, particularly since many of the reports at issue are investigative consumer reports.
- In the mortgage industry, the general practice is to discuss any significant derogatory credit item with the consumer before a final credit decision is made. See **Question 4**. Because originators of mortgage loans receive little or no compensation for loans that do not close, they have every incentive to ensure that any erroneous items in the consumer's credit file are resolved. If the consumer disputes an item, the loan officer or mortgage broker will discuss how the error can be corrected. Both the mortgage industry and the consumer reporting industry have developed efficient mechanisms to allow errors to be corrected for purposes of approving a loan application, sometimes before the actual credit file can be corrected. These mechanisms also allow the lender to consider a change in status of an accurate item, such as the amount due on a retail credit card account, again sometimes before the change is reflected in the consumer's credit file. Loan commitment letters are often conditioned on providing evidence that an error has been corrected or another type of change has been made. Therefore, with respect to the mortgage industry, it is more likely that the report disclosed by the consumer reporting agency ("CRA") to the consumer will still include erroneous items that the lender disregarded, than that "the information [that led to the adverse action] is already corrected by the time the report is normally seen by the consumer,"<sup>4</sup> as suggested in **Question A.2.a**.
- As the FTC recognizes, the credit report provided to the lender is often in a coded form that is not "user friendly," in comparison to the report provided by the CRA in a file disclosure. See **Question A.1.f**. If the lender is responsible for providing the copy of the credit report, then consumers would likely look to the lender to explain the report, and perhaps to intercede on the consumer's behalf at the CRA. This would add substantially to the lender's compliance and customer relations responsibilities. Moreover, this would not be an efficient way for the consumer to correct any errors because the consumer would ultimately have to deal directly with the CRA. Mortgage industry lenders would not be able to direct consumers to the appropriate repository to correct an alleged error because they typically rely on

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<sup>4</sup> 69 Fed. Reg. at 33390.

merged file reports, which do not always show which repository CRA was the source of information.

- As the FTC also recognizes, mortgage lenders and other creditors commonly do not rely on the entire credit report but only on a limited subset of the report. See **Question 1.c.** In the mortgage industry, lenders and brokers commonly use automated underwriting systems provided by third parties. The system uses elements of the credit report, as well as other information such as loan-to-value ratio, property type, and employment status and history, to arrive at a recommendation. The automated system produces a recommendation and a general explanation of the basis for that recommendation, but it does not identify the specific elements that gave rise to the recommendation. If the creditor were required to provide a copy of the credit report to the consumer, the consumer might well expect the creditor to be able to explain in detail which items in the credit report affected the decision, and in the automated underwriting context, it may be difficult to do so.
- FACTA requires mortgage brokers and lenders to give the consumer his or her credit score and the major factors underlying the score shortly after it is obtained, which is often at the beginning of the application process. The disclosure of the score must be accompanied by an explanation of the role of credit scores in the credit underwriting process. This initial score will be far more effective than an after-the-fact copy of the credit report in allowing consumers to detect and correct errors in their credit reports.
- Routinely distributing credit reports to every consumer against whom adverse action is taken, regardless of whether the consumer requested the report, could increase the chances that reports would be intercepted and used to facilitate identity theft. In the mortgage context, the consumer most likely will be aware of the adverse action and will no longer be expecting important correspondence from the lender. Therefore, the consumer might simply discard the correspondence containing the copy of the report without realizing that it contains sensitive material. Consumers who have requested a file disclosure under existing law are alert to the fact that it is arriving and are less likely to casually discard it than consumers would be if every individual against whom adverse action is taken received an unexpected copy of the report. See **Question 4.d.**
- All of the concerns discussed above would be heightened if a report were distributed, not only to consumers against whom adverse action was taken, but also to those entitled to receive a risk-based pricing notice. Extending the requirement to provide a copy to those who receive a risk-based pricing notice could also substantially increase its cost.

Answers to Specific Questions:

In addition to the general points raised above, the following are answers to some of the other specific questions raised in the RFC:

**Question A.1.a. What are the different types of consumer reports that are used by a creditor (e.g., credit score, "in file" credit report, . . . merged credit report)? To what extent are credit scores, as opposed to "in file" or merged credit reports, relied on by creditors in making decisions regarding the extension of credit?**

Mortgage lenders commonly rely on a single-bureau, in-file credit report to provide a rate quote or to pre-qualify a consumer, but require a merged file report before granting final approval. The credit score, sometimes combined with an in-file report, may be sufficient to underwrite certain products such as second mortgages and home equity lines of credit.

**Question A.1.d. Are credit scores based on more information than that which appears in a file that is disclosed to consumers? For example, is information used that is blocked or suppressed from the consumer's file?**

As noted, a decision on a mortgage application is based on many factors other than the contents of the consumer's file. For example, a substantial portion of the responses from automated underwriting systems relates to factors such as loan-to-value ratio and income – items not included on the credit report.

Mortgage lenders rarely use information that is blocked from disclosure to the consumer, such as the sources of information used in investigative consumer reports.

Conclusion:

The MBA thanks the FTC for the opportunity to provide comments to assist the FTC staff in conducting its study. Should you have any questions, please do not hesitate to contact Mary Jo Sullivan at (202) 557-2859.

Most sincerely,



Jonathan L. Kempner  
President and Chief Executive Officer