COMMENTS
of
Consumers Union
National Consumer Law Center
(on behalf of its low-income clients)
World Privacy Forum

and

Consumer Federation of America
National Association of Consumer Advocates
National Workrights Institute
Privacy Rights Clearinghouse
U.S. Public Interest Research Group

to the

Federal Trade Commission
Project No. R611017

Board of the Governors of the Federal Reserve System
Docket No. R–1300

Office of the Comptroller of the Currency
Docket No. OCC-2007-0019

Federal Deposit Insurance Corporation
RIN 3064-AC99

Office of Thrift Supervision
Docket No. OTS-2007-0022

National Credit Union Administration
12 CFR Part 717

Notice of Proposed Rulemaking
Pursuant to Section 312 of the Fair and Accurate Credit Transactions Act

Consumers Union,[1] National Consumer Law Center ("NCLC"),[2] and World Privacy Forum[3] submit the following comments, as well as the Consumer Federation of

[1] **Consumers Union of U.S., Inc**. is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education, and counsel about goods, services, health and personal finance; and to initiate and cooperate with individual and group efforts to

America,[4] National Association of Consumer Advocates,[5] National Workrights Institute,[6] Privacy Rights Clearinghouse,[7] and U.S. Public Interest Research Group[8] regarding the Interagency Notice of Proposed Rulemaking concerning procedures to enhance the accuracy and integrity of information furnished to consumer reporting agencies ("CRAs").[9] The Fair and Accurate Credit Transactions Act of 2003 required the federal banking regulatory agencies and the Federal Trade Commission ("Regulators") to issue the Regulations and Guidelines proposed in the NPRM.[10]

We appreciate the efforts undertaken by the Regulators in drafting the proposal. We believe that significant changes must be made in the proposal in order for it to: (1) promote the furnishing of information that is accurate, timely, up to date, complete, and

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maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived form the sale of *Consumer Reports*, its other publications and services, and from noncommercial contributions, grants, and fees. Consumers Union's publications and services carry no outside advertising and receive no commercial support. Consumers Union's Financial Services Campaign team has been deeply engaged in the development of consumer protections to prevent identity theft and to enhance data security, as well as other problems consumers face in the financial services marketplace, including the consequences for consumers of errors in consumer credit reports. These comments were co-authored by Gail Hillebrand, Senior Attorney, Consumers Union.

[2] **The National Consumer Law Center** is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit transactions to determine appropriate claims and defenses their clients might have. As a result of our daily contact with these practicing attorneys, we have seen numerous examples of invasions of privacy, embarrassment, loss of credit opportunity, employment and other harms that have hurt individual consumers as the result of violations of the Fair Credit Reporting Act. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. *Fair Credit Reporting* (6th ed. 2006) is one of the eighteen practice treatises that NCLC publishes and annually supplements. These comments were co-written by Chi Chi Wu, editor of NCLC's *Fair Credit Reporting* treatise, and are submitted on behalf of the Center's low-income clients.

[3] **The World Privacy Forum** is a non-profit public interest research group focusing on in-depth analysis of privacy topics, including financial topics. http://www.worldprivacyforum.org. The World Privacy Forum is based in San Diego, California. These comments were co-authored by Pam Dixon, Executive Director, World Privacy Forum.

[4] **Consumer Federation of America** (CFA) is a nonprofit association of some 300 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through research, advocacy, and education.

[5] The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

[6] The **National Workrights Institute** is a non-profit organization based in Princeton, NJ. We believe that all workers are entitled to their rights in the workplace.

[7] The **Privacy Rights Clearinghouse** is a nonprofit consumer education and advocacy organization based in San Diego, CA, established in 1992. It offers assistance and information to consumers on a wide range of informational privacy issues. And it represents consumers' interests in public policy proceedings at the state and national levels.

[8] **U.S. PIRG** serves as the federation of state Public Interest Research Groups, which are non-profit, non-partisan public interest advocacy organizations

[9] 72 Fed. Reg. 70,944 (December 13, 2007).

[10] Pub. L. No. 108-159, 117 Stat. 1952, § 312 (2003).

fully substantiated and (2) provide a workable method for consumers to dispute information directly with the entity that furnished that information.

Credit reports and credit scores are increasingly important in the determination of who receives credit and other economic opportunities, such as insurance in some states, rental housing, and even jobs, as well as what prices consumers are offered for credit and services. The need for strong and effective Regulations and Guidelines is critical to the economic health of consumers and to the American economy. Indeed, Congress enacted the Fair Credit Reporting Act ("FCRA") in the explicit recognition that the health of the consumer banking and credit system "depend[s] upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of the banking system." 15 U.S.C. §1681(a)(1), (a)(4), and (b). Congress realized that credit decisions made on the basis of faulty information undermine the vitality of the consumer credit system and the ability of Americans to enjoy the fruits of this country's material prosperity. Failure within this system is not only expensive but also severely disruptive, while accurate, timely, up-to-date, complete and fully substantiated information keeps the system running well.

The need for strong and effective Regulations and Guidelines is especially critical given current economic conditions. During any economic downturn, there is an increased focus on credit quality. This occurs at the very time that access to jobs, services, and the price of credit take on special importance for families. The credit tightening that is occurring in response to the reverses in the subprime mortgage market gives added importance to where an individual consumer falls on a continuum of credit scores. These factors make it extremely important that the contents of consumer credit reporting files be accurate, complete, up to date and robustly substantiated.

I. Introduction

The package of proposed Regulations and Guidelines has three parts. The Regulations describe what types of disputes the furnisher must resolve if reported directly to the furnisher. In addition, the Regulations require that furnishers establish and implement policies and procedures concerning the information they furnish to consumer reporting agencies. Finally, the regulatory package contains proposed Guidelines to shape the content of those policies and procedures.

We comment on each of these parts in order. A summary of the key issues are:

- The Regulations must define "accuracy" and "integrity." We support the "Regulatory Definition Approach" because it is more substantive in its requirements and because these key definitions are much too important to be relegated to flexible Guidelines which only inform a furnisher's policies and procedures.
- The definition of "accuracy" must require that information furnished to consumer reporting agencies (CRAs) be "complete."

- The Regulations should define "accuracy" to require that information furnished to CRAs be substantiated. In addition, the Guidelines should include requirements as to what kind of substantiation is required.
- The proposal should not artificially divide "accuracy" and "integrity," because that would prevent consumers from submitting valid disputes to furnishers about errors falling in the "integrity" category.
- "Accuracy" should require that information furnished to CRAs be updated so that it is, and remains, current.
- The Regulations must clearly state that the purpose of the regulatory requirement for furnisher policies is to achieve accurate reporting of information which is timely, complete, up to date, and substantiated.
- The direct dispute Regulations should require that the furnisher in fact conduct a reasonable investigation, including an attempt to seek documentation before rejecting a consumer's dispute.
- The Guidelines should require that records about the account should be kept at least as long as the account or other relationship with a furnisher is being reported.
- The Regulations and Guidelines should provide consumers with a workable, understandable, effective system to report and obtain correction of errors, by informing consumers of what types of disputes can be presented to the furnisher and where to submit those disputes. A key element of this is to require that a furnisher refer to a CRA any dispute that the furnisher declines to investigate because that dispute is of a type that the Regulations do not require it to consider.

Finally, we would like to comment on one overall theme in the Notice of Proposed Rulemaking, which notes in numerous spots that furnishing information to CRAs is a voluntary activity. We are troubled by the implication that too much emphasis on accuracy and integrity of information might deter valuable reporting. Furnishers have significant business reasons to report. While there is no legal requirement to furnish information to CRAs, the choice to furnish provides enormous benefits for furnishers. It is a key tool for creditors to encourage consumers to comply with payment terms, and even to induce a consumer to select a particular account for payment at the expense of other household needs. For many furnishers, furnishing is indispensable – there is no realistic likelihood that they would "opt out" of the system. For furnishers such as debt collectors, reporting to CRAs is a powerful weapon in their arsenal, "designed, in part, to wrench compliance with payment terms….[and] to tighten the screws on a non-paying customer."[11]

With these tremendous benefits to furnishers, as well as the significant harms that credit reporting errors can cause consumers, it is only fair that furnishers be subject to certain duties so that the information provided is accurate and does not lack integrity. If furnishes make the choice to "voluntarily" participate in the credit reporting system, then they must do so responsibly. There is no benefit to consumers from "voluntary" furnishing that is inaccurate, incomplete, unsubstantiated, or stale.

[11] Rivera v. Bank One, 145 F.R.D. 614, 623 (D.P.R. 1993).

II. Comments on Regulation on Furnisher Policies.

A. Accuracy and Integrity Definitions (Proposed __.41(a) and (b); Guidelines I.B.)

The Regulators have proposed two alternative approaches to define accuracy and integrity: the "Regulatory Definition Approach" and the "Guidelines Definition Approach." The key differences in these Approaches are:

- Where the definitions are placed, *i.e.*, in the Regulations vs. in the Guidelines, which affects their enforceability.
- The definition of "integrity" in the Regulatory Definition Approach includes a requirement that information is complete, *i.e.*, that it "not omit any term, such as credit limit or opening date, …the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user…"
- In addition, Regulatory Definition Approach includes as an Objective in the Guidelines that information furnished to CRAs in general should "avoid misleading a consumer report user."
- The Guidelines Definition Approach takes a more procedural approach to integrity, focusing on whether the procedure for reporting is likely to avoid error rather than on the quality of the information in fact reported or omitted.

We support the Regulatory Definition Approach, which requires that the information both be without error and not omit any term that can reasonably be expected to contribute to an incorrect evaluation by a user of a credit report. We suggest this definition should be augmented to also refer to a user of a credit score.

1. *The definition of accuracy rightfully requires information to be "reflected without error," but it should be clear that such reflection must be "objective."*

In both Approaches, "accuracy" is defined to mean that information provided to a CRA "reflect without error the terms of and liability for the account or other relationship and the consumer's performance and other conduct with respect to the account or other relationship."

We support the concept in the definition of accuracy that information furnished to a CRA should "reflect without error" the actual terms of, liability for, and other conduct of the consumer about the account or relationship. It is fundamentally important that "accuracy" requires information to be accurate as a matter of fact, not simply requiring conformity between the furnisher's records and information in a CRA's database. We recommend making this absolutely clear by adding the word "objectively" before the world "reflects."

Furthermore, the definition of "accuracy" should also require that information reported to a CRA reflects without error the *furnisher's* performance or other conduct with respect to the account or other relationship.

2. *The definitions of "accuracy" and "integrity" should be set forth in the Regulations.*

We believe "accuracy" and "integrity" must be defined in the Regulations, not solely in the Guidelines. The requirement that furnishers should strive to report information with accuracy and integrity should not merely be a Guideline for consideration. This requirement should be mandatory; indeed it should be the core purpose of a furnisher's credit reporting systems. Furthermore, if these key terms are not defined in the Regulations, the failure to do so will create uncertainty about the scope of the direct dispute obligation.

3. *Accurate credit scores must be a component of accuracy.*

Any test of accuracy must be considered in context of credit scoring. What may appear to be a minor issue taken in isolation may create an enormous distortion in a credit score. Even the smallest inaccuracies in a credit report can have a significant deleterious impact on the economic opportunities offered to hardworking individuals and their families, because they can cause significant negative changes in a credit score. The classic example is the furnisher's failure to report a credit limit, which artificially drives up the utilization ratio – a factor that affects 30% of a credit score.

Thus, any standards for accuracy and integrity of information furnished to a CRA must examine not only the potential for an incorrect evaluation a user of a credit report, but also the potential for an incorrect evaluation by the user of a credit score.

4. *The definition of "accuracy" must include "completeness."*

Accuracy must include a requirement that information furnished must be complete, *i.e.*, must not omit any important terms. If the failure of the furnisher to provide complete information creates a misleading evaluation of a consumer's creditworthiness, including a different credit score if the information were included, the furnisher has reported inaccurate information.

The Regulators have proposed either requiring completeness to be part of integrity (Regulatory Definition Approach) or omitting it altogether (Guidelines Definition Approach). The Guidelines Definition Approach is simply unacceptable. Information cannot be "without error" if its omission of critical terms creates a misleading evaluation or a different credit score. Indeed, the omission of a material term that creates a misleading impression is a form of deception under the FTC Act.[12] If

[12] FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985); Sterling Drug, Inc. v. FTC, 741 F.2d 1146 (9th Cir. 1984); American Home Products Corp. v. FTC, 695 F.2d 681 (3d Cir. 1982);

information could be considered "deceptive" under the FTC Act, how can it be "accurate" under the FCRA?

The Regulatory Definition Approach is not perfect either, in that it separates completeness from accuracy, when the former is a necessary element of the other. We support a definition of "accuracy" that includes completeness. This point is critical, because nowhere else is "accuracy" defined in the Act or Regulations, yet the term is used several times in the FCRA, including requirements under Section 1681e(b) for CRAs to use reasonable procedures to assure maximum possible accuracy. We do not want a definition of accuracy that inadvertently allows CRAs to have procedures that result in incomplete, misleading information in their files.

For example, under current caselaw, "accuracy" is defined for purposes of Section 1681e(b) already to include completeness, in the cases that reject the "technical accuracy" defense theory.[13] Thus, the Regulators would weaken the current accuracy standard by suggesting that completeness is not a part of accuracy and instead somehow is an additional component under the new integrity prong. Congress clearly knew that completeness is part of accuracy under the normal rules that Congress legislates with full knowledge of existing law. Separating completeness from accuracy is a threat to accuracy as we now know it.

Furthermore, Congress must have assumed that completeness was a part of accuracy in choosing the word "accuracy" only for the dispute section. Congress could not have divided the universe of errors into two parts, to be treated differently.

If completeness is included in the definition of "integrity," then integrity should be included as a subset of, and thus part of, accuracy. The Regulations also should make it clear that any limited definition of accuracy for purposes of FCRA Section 1681s-2(e) has no effect on the meaning of the term "accuracy" under other sections of the FCRA, which impose other duties with respect to accuracy on CRAs and furnishers.

5. *Completeness should be about any item about an account or other relationship, not just the terms of the account*.

Whether completeness is a part of "accuracy" (as we support) or "integrity", it should cover omission of all material information about an account or other relationship with the furnisher. We note that the Regulatory Definition Approach's definition of integrity in Proposed __.41(b) is limited to prohibiting the omission of any "term" of the account or other relationship. We urge that completeness also prohibit omissions about

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International Harvester Co., 104 F.T.C. 949 (1984). *See generally*, National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.14.2 (6th ed. 2004).

[13] Koropoulos v. Credit Bureau, Inc. 734 F.2d 87 (D.C. Cir. 1984), Pinner v. Schmidt, 805 F.2d 1258 (5th Cir. 1987). *See also* Wilson v. Rental Research Serv.,Inc., 165 F.3d 642 (8th Cir. 1999), *rehearing en banc without published opinion*, 206 F.3d 810 (8th Cir. 2000) (by vote of an equally divided court, the district court's order is affirmed).

the liability for the account, the consumer's performance on the account, and the furnisher's conduct with respect to the account.

6. Accuracy should include substantiation.

We support the Regulators' express recognition of the need for substantiation in the furnisher's records of all furnished information. However, we believe the substantiation should be part of the definition of "accuracy." Both Definition Approaches include a requirement for substantiation, but it is either stated as an Objective for the policies of a furnisher (Regulatory Definition Approach) or an element of integrity (Guidelines Definition Approach), not as a requirement for accuracy.

We support retaining and strengthening the requirement for substantiation by placing it in the Regulations, not just the Guidelines, and by locating it in the definition of accuracy. Substantiation should not merely be an objective, nor should it be something addressed only in the Guidelines to be considered by furnishers as they develop their own policies. Instead, substantiation should be a core part of accuracy. Furnishers should be required to have in their possession documents that substantiate information they send to the CRAs. Furthermore, as discussed below, the Guidelines should include requirements as to what types of substantiation are required.

7. "Accuracy" and "integrity" should not be artificially separated.

The issues of whether "completeness" and "substantiation" should be elements of "accuracy" versus "integrity" points to another problem – that both the Regulatory Definition and the Guideline Definitions Approach artificially separate the two concepts, when they should be treated together for reasons of both policy and practicality. Integrity should be considered a subset of accuracy, and not as a category separate and distinct from accuracy.

First, artificially separating accuracy and integrity does not make logical sense. Information provided without integrity will result in inaccuracies. If information is inaccurate, it lacks integrity.

Another reason that an artificial distinction between accuracy and integrity is problematic is that the statute contemplates direct disputes about accuracy, and the Regulations define a "direct dispute" which can be pursued directly with the furnisher as only those disputes which are about accuracy. Under the proposed Regulations, some types of errors by a furnisher constitute a lack of accuracy, while other types of errors are put in the category of lacking integrity. This means that some types of real errors by a furnisher could be directly disputed, but others could not.

An artificial distinction between accuracy and integrity will be harmful to consumers if the proposed Regulations continue to permit consumers to use the direct dispute process only for accuracy and not for integrity disputes. Consumers should be able to seek and obtain direct corrections by a furnisher of erroneous information

regardless of where the error falls on an artificial line between the definitions of accuracy and integrity. A simple way to do this is to treat integrity as an element or subset of accuracy, rather than as some wholly separate category to which no right of direct dispute can attach.

8. *Accuracy requires that information be updated so that it is, and remains, current.*

The Regulators ask whether the definition of "accuracy" should include updating information as necessary to ensure that information furnished is current. Our answer is an unequivocal "yes". Similar to the issue of completeness, requiring information to be updated so that it is factually correct must be an inherent element of accuracy. Stale or out of date information cannot be accurate, especially when there is a subsequent material change in the status of the account.

For example, one of the most problematic failures to update information is the failure of furnishers to accurately report debts discharged in bankruptcy. Both the FTC Commentary on the FCRA at § 607 ¶ 6 and the instructions to furnishers for the CRAs' own standard reporting format (Metro 2) require that debts discharged in bankruptcy be reported with a zero balance. Yet often furnishers will continue to inaccurately report a debt as seriously past due with a significant balance, information which is much more negative than correctly reporting that the debt has been discharged in bankruptcy. This error deprives the debtor of the legally provided "fresh start" of a bankruptcy discharge and is time-consuming and expensive to correct.

Furthermore, this problem happens with alarming frequency. The court's opinion in two related legal decisions described how a bankruptcy lawyer's survey of approximately 900 clients found that 64% of Trans Union reports and 66% of Equifax reports erroneously listed one or more discharged debts as due and owing.[14] The same survey also found that the number of incorrectly reported discharged debts was between three and four per consumer for Trans Union reports, with some consumers having as many as ten or more errors on their reports.[15]

Thus, the Regulators should include a requirement that accuracy requires information be updated as necessary to ensure that it is current. In addition, the Regulators should require that information should be updated when the consumer requests it or disputes the current status of information. Finally, the Regulators should include recommendations in the Guidelines on how regularly information should be updated to ensure it is current.

[14] Acosta v. Trans Union, --- F.R.D. ---, 2007 WL 2137804, n. 3 (C.D. Cal. May 31, 2007).
[15] White v. Trans Union, 462 F. Supp.2d 1079 (C.D. Cal. 2006).

9. Proposed definition of accuracy.

We urge that the Regulators adopt a definition of "accuracy" that includes all of the above elements. We propose the following definition (proposed additions underlined and proposed deletions ~~marked~~):

"Accuracy" means that any information that a furnisher provides to a consumer reporting agency about an account or other relationship with the consumer:

(1) objectively reflects without error the terms of and liability for the account or other relationship; the consumer's performance and other conduct with respect to the account or other relationship; and the furnisher's performance or other conduct with respect to the account or other relationship;
(2) has integrity in that the information does not omit any term, such as a credit limit or opening date, of that account or other relationship; information about liability for the account or other relationship; the consumer's performance and other conduct with respect to the account or other relationship; and the furnisher's performance or other conduct with respect to the account or other relationship; the absence of which can reasonably be expected to contribute to an incorrect evaluation by a user of a consumer report or credit score of a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living;
(3) is substantiated by the furnisher's own records; and
(4) is updated as necessary to reflect the current status of the account or other relationship.

B. Other Comments About Definitions (Proposed __.41)

a. The definition of furnisher should only exempt individual consumers who are self-reporting. (Proposed ___.41(c))

Proposed __.41(c) exempts individual consumers from definition of "furnisher." This exemption should be limited to individual consumers who are furnishing information about themselves. Indeed, the Regulator's stated purpose for this exemption is to exempt self-reporting. 72 Fed. Reg. at 70951, column 2.

We urge the Regulators to limit this exemption to self-reporting in order to make absolutely clear that individuals who furnish information in other capacities are covered as furnishers. There should be no risk that the exemption could be interpreted to cover a debt collector who is an "individual" sole proprietor or an individual who is a landlord. Thus, the first sentence of Proposed __.41(c) should be amended to state:

(c) Furnisher means an entity ~~other than an individual consumer~~ that furnishes information relating to consumers to one or more consumer reporting agencies. An individual consumer or his/her guardian, conservator, or attorney is not a furnisher when providing information regarding that consumer to a consumer reporting agency.

b. The Guidelines Definition Approach appears to omit definitions for "furnisher," "identity theft," and "direct dispute".

As stated above, we strongly oppose the Guidelines Definition Approach. That being said, we note that the Guidelines Definition Approach appears to omit Proposed __.41(c) thru (e), or is at best confusing about this point. Since there seems to be no controversy between the Regulators over these definitions (although we have concerns about certain aspects discussed elsewhere), we assume this was an oversight.

C. The Regulation on Furnisher Policies Needs to be Strengthened. (Proposed __.42)

1. *The Regulations must clearly state that the purpose of the regulatory requirement for furnisher policies is to achieve accurate reporting of information.*

Proposed __.42(a) should require furnishers to establish and implement policies that "promote" accuracy and integrity, not just "regard" them. In addition, Proposed __.42(b) should be amended to add the basic requirement that the policies and procedures must be reasonably designed to facilitate the reporting only of accurate, complete, up-to-date information which is fully substantiated and has no tendency to mislead users of a credit report or a credit score. The statutory and regulatory requirement for policies and procedures should not be satisfied by policies and procedures that do not serve this goal, regardless of the nature or size of the furnisher. The section also should be amended to require that the policies and procedures "implement the guidelines," as required by Section 1681s-2(e)(1)(B) of the FCRA.

The regulatory text on furnisher policies and procedures in Proposed __.42(b) is weaker than the statutory requirement. The Act requires that the Regulators prescribe regulations requiring furnishers to establish reasonable policies and procedures "for implementing the guidelines," Section 1681s-2(e)(1)(B), and that the Guidelines must be "regarding the accuracy and integrity" of information furnished. The Act requires that in developing the guidelines, the Regulators shall determine whether furnishers maintain and enforce policies "to assure the accuracy and integrity" of furnished information, Section1681s-2(e)(3)(C), as well as policies and processes "to conduct reinvestigations and correct inaccurate information" furnished. Section 1681s-2(e)(3)(D).

While the proposed Guidelines address the various topics identified in the Act, the actual proposed Regulation fails to require that the furnishers' policies and procedures be reasonably designed to "implement" the Guidelines. Instead, the proposed Regulation allows furnishers to simply "consider" the Guidelines and to "incorporate those guidelines that are appropriate." How will the Congressional mandate for regulations requiring furnishers to implement the Guidelines be met if the Regulations simply allow the furnishers to comply by incorporating some of those Guidelines, without any direction about the underlying purpose which should guide that choice, and without any regulatory requirement that the policies in fact implement the Guidelines?

The absence of any requirement that the policies actually be designed to implement the Guidelines creates the very real possibility that the Regulation will be satisfied by the mere existence of policies and procedures which are unlikely to achieve the goal of assuring accuracy and integrity of furnished information.

2. Each and every furnisher should be required to have certain minimum levels of procedures and policies that promote accuracy and integrity.

Proposed section __.42(a) is troubling in that it appears to allow certain furnishers to choose a lower standard of accuracy and integrity for furnished information. The second sentence of that subsection states that a furnisher's policies should be "appropriate to the nature, size complexity and scope" of the furnisher's activities. Thus, smaller or less sophisticated furnishers appear to have leeway to furnish information that does not have the same level of accuracy and integrity as other furnishers.

The Guidelines take this idea even further. Guideline I.A allows a furnisher's policies and procedures to vary depending on the furnisher's type of business activity, nature and frequency of information furnished to CRAs, and even the technology used by furnisher. Thus, furnishers might be allowed to offer the excuse of having chosen not to invest in adequate and up to date technology to justify inaccurate reporting.

We are deeply concerned that this language will give small furnishers or even large furnishers with old technology a green light to report inaccurate information. While a small furnisher may not be expected to report as often or have the same number of personnel devoted to furnishing, there should be a minimum level of accuracy and integrity expected of all furnishers who choose to furnish information for consumer credit files.

The FCRA obliges all furnishers, regardless of size or the complexity of their businesses, to refrain from furnishing any information which the furnisher knows or has reasonable cause to believe is inaccurate. Section 1681s-2 (a)(1)(A). The statute does not authorize reporting of information that is known or should reasonably be known to be inaccurate because the furnisher is small or because credit reporting is not central to the furnisher's main line of business.

Accuracy should not depend solely on characteristics of the furnisher, such as size and sophistication, because inaccurate information has the same negative impact on consumers regardless of the size or sophistication of the furnisher. There should be some fundamentals that are required of all furnishers. Furnishers must be required to have policies and procedures to:

- Correctly identify the consumer to whom information pertains;
- Correctly provide key dates, including the date to calculate obsolescence under the FCRA;
- Correctly state the terms of and liability for the account or other relationship;

- Correctly state the conduct of the consumer and of the furnisher with respect to the account or other relationship;
- Substantiate information furnished to a CRA;
- Provide for the retention of records that substantiate information furnished;
- Update information to keep it current; and
- Conduct a reasonable investigation.

Furthermore, if small furnishers are not held to the same standards as large furnishers, the Guidelines should specify where duties of large furnishers are greater than other furnishers. For example, large furnishers should be required to conduct annual audits, to furnish information to CRAs in the standard reporting format, and to update their technology on a regular basis.

3. *The Regulations must make clear that portions of the Guidelines are mandatory under the FCRA.*

One overall concern about the Guidelines is that they are fairly general. In addition, they give a great deal of discretion, as does Proposed __.42(b), as to whether or not a particular Guideline needs to be incorporated into a furnisher's policies and procedures.

We are extremely troubled by this level of discretion. As we discuss above in Section II.C.1, furnishers should be required to implement all of the Guidelines. In addition, the particular Guidelines which should be either more specific or leave less discretion is discussed below in Section IV of these comments, which analyzes each Guideline individually.

Another reason for our concern about the excessive amount of discretion the Guidelines give furnishers is that some of the furnishers' duties described in the Guidelines are mandatory duties under the FCRA. The Guidelines cannot make these duties optional, and should not create that impression. These mandatory duties include:

- All of proposed Part II of the Guidelines.
- Requirements for:
    *preventing re-aging of old debts (at Guideline IV.G), which is required by Section 1681s-2(a)(5) of the FCRA.
    * preventing reinsertion of inaccurate information (at Guideline IV.I), which is required by Section 1681s-2(a)(2) (prohibiting furnishing of inaccurate information after correction, *see also* 1681i(a)(5)(B)(i) requiring furnishers to certify that information is accurate and complete if they reinsert previously deleted information).

The problem with including these mandatory requirements in the Guidelines is that proposed Regulations at __.42(b) merely require furnishers to "consider the Guidelines" and incorporate those that are "appropriate." As an initial matter, we believe

Proposed __.42(b) is unduly weaker than the statutory requirements, which we discuss above at Section II.C. Moreover, the statute requires more than that furnishers merely "consider" the various statutory requirements listed above. Putting these requirements in the Guidelines, without making clear they are mandatory under the FCRA, risks creating a misleading impression that the Guidelines weaken or water down these requirements.

The Regulators must make clear in Proposed __.42(b), that where the Guidelines address mandatory provisions under the FCRA, they do not introduce a level of flexibility or choice for the furnisher about compliance with those mandatory provisions. Whenever such mandatory provisions appear in the Guidelines, language must be included which clarifies that the provision is mandatory under the FCRA and that the flexibility inherent in a Guidelines-based approach does not apply. In addition, furnishers must have policies and procedures to assure compliance with all applicable aspects of the FCRA

4. Policies and procedures should be written.

The Regulators have asked for comment regarding the need for policies and procedures to be in writing. We support requiring that dispute resolution policies and procedures, and policies and procedures on accuracy and integrity in furnishing, be in writing. Companies place in writing those policies and procedures that they expect their employees to learn and follow. An oral policy or procedure would be difficult to communicate effectively to new employees, hard to enforce internally, hard for regulators to evaluate for compliance, and unlikely to send the same signal to the company's employees and contractors about the level of commitment to the policy or procedure that would be sent by a written document. Written policies and procedures also create documents against which systems can be designed, internal audits for systems compliance and employee performance compliance with polices and procedures can be conducted, and actual practices can be measured against the expectations and requirements set forth in the written policies and procedures.

5. Furnishers should be required to regularly review and update their policies and procedures for furnishing information to CRAs (Proposed __.42(c)).

Proposed __.42(c) requires furnishers to review their policies and procedures for furnishing information to CRAs and update the policies to ensure their continued effectiveness. We support this requirement, and agree that furnishers should be required to conduct periodic evaluations of their policies and procedures. More importantly, we agree that furnishers must be required to update their policies and procedures if an evaluation reveals the need to do so to ensure continued effectiveness. In addition, as mentioned above, we urge that the Guidelines require large furnishers to conduct evaluations at least annually.

6. *Proposed Revisions to __.42.*

Proposed ___.42 should be modified to read:

(a) Policies and Procedures: Each furnisher must establish and implement reasonable written policies and procedures to promote the accuracy and integrity of the information related to consumers that it furnishes to a consumer reporting agency. The policies and procedures must be reasonably designed to accomplish the furnishing only of accurate information which has integrity. They may be appropriate to the nature, size, complexity, and scope of each furnisher's activities, but must at a minimum address:

- Correctly identify the consumer to whom information pertains;
- Correctly provide key dates, including the date to calculate obsolescence under the FCRA;
- Correctly state the terms of and liability for the account or other relationship;
- Correctly state the conduct of the consumer and of the furnisher with respect to the account or other relationship;
- Substantiate information furnished to a CRA;
- Provide for the retention of records that substantiate information furnished;
- Update information to keep it current; and
- Conduct a reasonable investigation.

(b) Guidelines: Each furnisher must establish and follow reasonable policies and procedures to implement ~~consider~~ the guidelines in Appendix E of this part. ~~, in developing its policies and procedures required by this section, and incorporate those guidelines that are appropriate~~ The guidelines incorporate provisions of the FCRA that are mandatory for furnishers; as to those provisions, the policies must ensure compliance.
(c) Reviewing and updating policies and procedures. Each furnisher must review its policies and procedures required by this section periodically and update them as necessary to ensure their continued effectiveness.

III. Comments on the Direct Dispute Regulations

The most important issues in the direct dispute Regulations are that the definitions of accuracy and integrity be retained in the Regulations, be strengthened, and that integrity be treated as part of accuracy. This section further describes how failure to include integrity as part of accuracy would restrict the scope of direct disputes to a much narrower group than the Supplementary Information suggests was intended. This section then recommends additional improvements that are needed in the direct dispute Regulations to make the direct dispute a reasonable option for consumers. This section is presented as a series of problems that we foresee if changes are not made to the Regulations, along with recommended changes to avoid those problems.

A. Problem: The proposed Regulation does not permit direct disputes to correct an omission, no matter how important the omission.

How the proposed Regulations create this problem: As discussed in Section II.A.7, the Regulations segregate types of errors between the two definitions of "accuracy" and of "integrity." Proposed __.41. The Regulations require that furnishers investigate only certain types of "direct disputes." Proposed __.43(a). The Regulations define "direct dispute," however, to cover only "a dispute...concerning the accuracy of any information contained in a consumer report relating to the consumer." Section __.41(e). The effect of these interlocking sections is that unless "integrity" is defined as part of "accuracy," a large subset of issues about the quality of furnished information will be excluded from the direct dispute process.

Reasons why this is wrong: "Integrity" addresses omissions which are of special importance – omissions which the Regulatory Definition states: "can reasonably be expected to contribute to an incorrect evaluation by a user of a consumer report of a consumer's creditworthiness [and certain other characteristics]." Consumers will be told how to dispute the accuracy of information in their consumer reporting files directly with furnishers. Consumers will have no reason to make a distinction between inaccuracies caused by bad information versus inaccuracies caused by important omissions, yet the ability to dispute under the proposed Regulations is very different for these categories. A dispute about an omission may be the very type of dispute that could be most effectively and efficiently handled directly with the furnisher. A broad direct dispute avenue is particularly important in light of the ongoing practice, which consumer groups believe to be illegal, of consumer reporting agencies to decline to forward to furnishers all of the material which a consumer submits with a dispute; instead summarizing the consumer's reasons into a simple dispute code with or without a line of additional comment.

The Supplementary Information states that the proposed rule on direct disputes "is designed to permit direct disputes in virtually all circumstances involving disputes with respect to the types of information typically provided by the furnisher to a CRA, while excepting out certain types of information [for which disputes are more appropriately directed to the CRA]." 72 Fed Reg. at 70,954. It is contrary to that expressed goal to define direct disputes as limited to accuracy disputes and divide what would commonly be thought of as accuracy into the categories of accuracy and integrity.

We agree with the stated goal, and with the prediction contained in the Supplementary Information that a narrow dividing line excluding disputes about some types of information commonly supplied by furnishers will defeat consumer expectations and make it "difficult for consumers and furnishers to know whether there is a right to a direct dispute in any particular circumstance." 72 Fed Reg. at 70,954.

To achieve the goal stated in the Supplementary Information, the definition of accuracy, particularly for purposes of the "direct dispute" Regulations, must be modified

to include "integrity" as a subset of accuracy, so that disputes about important omissions are not artificially excluded from the direct dispute process.

The changes for Proposed __.41(a) are described above in Section II.A.8 of these comments and would address this issue. In addition, a conforming change would be needed in Proposed ___.41(c): to add "omitted from" after "contained in" in the definition of direct dispute. This would further clarify that omissions can be the subject of a direct dispute.

An alternative way to solve the problem of a too-narrow scope for allowable direct disputes would be to change the definition of "direct dispute" at Proposed __.41(c) to refer to "a dispute concerning the accuracy or integrity of any information contained in or omitted from a consumer report.

B. Problem: The proposed Regulations do not require that the furnisher's investigation must be a reasonable one.

How the proposed Regulations create this problem: To their credit, and consistent with the statute, the Regulations require that the furnisher "must investigate" covered disputes filed directly with the furnisher. However, there is no definition of what it means to investigate, no express requirement that the investigation go beyond the record from which the furnisher initially supplied the information, no express requirement to consider the relevant material supplied by the consumer, no express requirement to consider contradictory information in the furnisher's own records, and no general obligation that the investigation be a reasonable one from which these other duties could be inferred in an appropriate instance.

Current law already requires furnishers to conduct a reasonable investigation for disputes submitted to a CRA and then sent on to the furnisher.[16] A consumer dispute should not be subject to a lower, vague, or non-binding standard with respect to the investigation merely because the consumer submits the dispute directly to the furnisher instead of submitting it through a CRA. The Guidelines do discuss the need for the investigation to be a reasonable one, but it is the Regulations which will actually define the requirements for furnisher conduct in handling a direct dispute.

We do not favor a restrictive or comprehensive definition of "investigate," but it is essential that the Regulations require that the furnisher investigation be a reasonable investigation. Without this requirement, furnishers might simply look at their files to see if there is any documentation for what the furnisher supplied, without considering whether that information is wrong and without considering the additional information provided by the consumer.

[16] *See* Johnson v. MBNA Am. Bank, NA, 357 F.3d 426 (4th Cir. 2004); Hurocy v. Direct Merchants Credit Card Bank, N.A., 371 F.Supp.2d 1058 (E.D.Mo. 2005); Schaffhausen v. Bank of America, N.A., 393 F.Supp.2d 853 (D.Minn. 2005).

Medical identity theft presents another illustration of why the Regulations must require that the investigation be a reasonable one, without attempting to describe the exact contours of a reasonable investigation for all circumstances. In cases of medical identity theft, a reasonable investigation may require review of information which the consumer provides, or which is available to a furnisher who is a health care provider or insurer. This may include documentation from doctors, dentists,o ther health care providers, and other HIPAA-covered entities.

Congress plainly intended that furnishers be required to consider all relevant information provided by the consumer. Section 1681s-2(a)(8)(C) of the FCRA applies paragraphs (D)-(G) to those disputes filed with furnishers covered by the Regulations, and subsection (E) requires the person receiving the dispute to both "conduct an investigation" and "review all relevant information provided by the consumer with the notice."

Recommended change: Add Section __.41(f) "Investigate" as used in __.43(a) of those regulations means a reasonable investigation.

C. Problem: The proposed Regulations do not require a creditor or other furnisher to report the accurate credit limit, *even when a consumer disputes the failure to do so.*

How the proposed Regulations create this problem: The proposed Regulations require the furnisher to investigate a direct dispute if it relates to the terms of the credit account or other debt, and give as an example a dispute about "the amount of the *reported* credit limit." This example leaves it unclear whether the failure to report a key term, such as the credit limit, is also covered by Proposed __.43(a)(2). The general catch-all requirement in subsection (4) will not cover failure to report the credit limit, because that section is limited to information "contained in" a consumer report. A material omission is not information contained in the report, and so will not be covered by Proposed __.43(a)(4).

Reasons why this is wrong: When the credit limit is not reported, a credit scoring model may treat the actual balance as the credit limit, which can make it falsely appear that the consumer is using a high percentage of his or her available credit. This depresses the credit score. This problem has been brought up numerous times by consumer advocates.[17] The OCC has told its regulated national banks that their "ability to make prudent underwriting and account management decisions may be adversely affected by incomplete credit bureau files" in a cover memo transmitting an FFEIC memo specifically addressing non-reporting of credit limits.[18] The direct dispute Regulations

[17] National Consumer Law Center, et al, *Comments to Regulators' Advanced Notice of Proposed Rulemaking: Furnisher Accuracy Guidelines and Procedures Pursuant to Section 312 of the Fair and Accurate Credit Transactions Act*, May 2006; Evan Hendricks, et al, *In Re: OCC and Docket Number 06–04 RIN 1557–AC89 12 CFR Part 41 ''Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies,''* May 2006.

[18] *See* OCC Bulletin 2000-3, Consumer Credit Reporting Practices, http://www.ffiec.gov/ffiecinfobase/resources/retail/occ-bl2000-3_ffiec_consumer_credit_report.pdf.

should be modified to clarify that consumers can use the direct dispute process to get the true credit limit reported.

Recommended changes:

At Proposed __.43(b)(2), delete "reported" so that the obligation to investigate will apply to all direct disputes about "the amount of the ~~reported~~ credit limit" on an open-end account.

At Proposed __.43(a)(4), after "contained in" add: "or omitted from."

D. Problem: The proposed Regulations allow a furnisher to reject a detailed, well documented dispute as frivolous or irrelevant if the topic of the dispute is outside of the types of disputes covered by the Regulation. This rejection need not tell the consumer that this type of dispute can still be pursued through a CRA.

How the proposed Regulations create this problem: The definition of "frivolous or irrelevant" disputes in Proposed __.43(e)(iii) includes all disputes that the furnisher is not required to investigate under the direct dispute section. Proposed __.43(e)(2) requires a notice to the consumer that the dispute was determined to be frivolous or irrelevant and the reasons for such determination. However, same subsection permits the notice to "consist of a standardized form describing the general nature of such information" which is missing and required. A consumer with a well documented dispute might receive a form letter that says, in essence: "We determined that your dispute was frivolous or irrelevant for one of these reasons: 1) It was not a type we must consider, or 2) You did not provide enough information. You must provide this type of information (categories)."

Reasons why this is wrong: A rejection of a direct dispute due to its type is fundamentally different from a rejection because the dispute comes from a credit repair organization or because the consumer did not provide all of the necessary information. If the only reason a dispute will not be investigated is that the furnisher is not required by law to pursue it, consumers should be told that this is the case. We agree with the policy choice that consumers must receive notice from the furnisher about any dispute which the furnisher rejects or declines to investigate, including those which are rejected or declined because they do not fit the category of allowable direct disputes. However, permitting a general "frivolous or irrelevant" notice to be sent about disputes that are rejected due to their type will be both insulting and potentially misleading to consumers. A consumer who goes to the trouble of providing careful documentation to a furnisher and receives a rejection may be unaware of the right, or even be dissuaded from, filing that same well-documented dispute with a CRA. It goes against common sense to expect that a furnisher who has rejected a dispute will examine that same dispute more carefully if it is refilled with a CRA, yet in fact that is the effect of Regulations that permit some disputes to be rejected solely based on the type of dispute.

In addition, when a furnisher rejects a dispute on the ground that the dispute is of a type that the furnisher is not required to consider, the furnisher must be required to provide with that rejection a clear written statement advising the consumer that he or she may dispute this information with the CRA, providing the address to do so, and stating that the furnisher will have an obligation to investigate the dispute once the CRA forwards the consumer's dispute to the furnisher. Without this disclosure, consumers could be misled into thinking that it would be pointless to file a dispute with a CRA after the furnisher has rejected that dispute. Where the reason for the rejection was "wrong place of filing," nothing could be further from the truth.

The Regulations should require different and additional notice when the reason for the rejection is that the type of dispute does not fall within the direct dispute Regulations.

Recommended changes:

This section sets forth all of the suggested changes to Proposed __.43(e), including some which are discussed in the next several sections.

(e) Frivolous or irrelevant disputes. (1) A furnisher is not required to investigate a direct dispute if the furnisher has reasonably determined that the dispute is frivolous or irrelevant. A dispute may be frivolous or irrelevant if:

(i) The consumer did not provide sufficient information to investigate the disputed information as required by paragraph (d) of this section <u>after a request for that information, which request identified what type of information was missing with respect to the particular dispute</u>;

(ii) The direct dispute is substantially the same as a dispute previously submitted by or on behalf of the consumer, either directly to the furnisher or through a consumer reporting agency, with respect to which the furnisher has already satisfied the applicable requirements of the Act or this section; provided, however, that a direct dispute is not substantially the same as a dispute previously submitted if the dispute includes information listed in paragraph (d) of this section that had not previously been provided to the furnisher; or

(iii) The furnisher is not required to investigate the direct dispute under this section.

(2) Notice of determination. Upon making a determination that a dispute is frivolous or irrelevant, or that the furnisher is not required to investigate the direct dispute under this section, the furnisher must notify the consumer of the determination not later than five business days after making the determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the furnisher.

(3) Contents of notice of determination that a dispute is frivolous or irrelevant, or that the furnisher is not required to investigate the direct dispute under this section. Where the reason for the determination is the absence of information required to investigate the disputed information, a notice of determination that a dispute is frivolous or irrelevant must include the reasons for such determination, and identify any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information, plus checked boxes or other indication of what type of information was missing with respect to the particular dispute. Where the reason for the determination is that the furnisher is not required to investigate the direct dispute under this section, the notice shall include a statement that: "We are not required to investigate all types of disputes that you file directly with us. We chose not to investigate your dispute because it is not the type that the law requires us to consider when you file it directly with is. If you refile the same dispute with a consumer reporting agency, we will be required by law to investigate that dispute after the consumer reporting agency refers it to us. You can file your dispute with a consumer reporting agency by contacting (address to all three CRAs, or at least the ones this furnisher provides information to.)"

E. Problem: The furnisher may reject a dispute even if the missing information is readily available in the furnisher's own files.

How the Regulations create this problem and why it is wrong: The Regulations allow the furnisher to reject a dispute if certain information is missing, without checking whether the required information is in fact already on file with the furnisher. For example, the Regulations require that every direct dispute notice include the name, address, and telephone number of the consumer. If the consumer omits the phone number, but that information is readily available in the furnisher's own files, why should this form a basis to reject the dispute? In an identity theft allegation, the consumer may have already filed extensive material with the furnisher's fraud department, indeed the dispute might refer to that prior correspondence with the furnisher. A dispute notice should not be deficient because it refers to previously submitted material instead of re-filing that material.

Recommended change: Section __.43(d)(5) add: (5) Notwithstanding (1)-(4), the dispute notice is not deficient if the missing information is identifiable from the notice and is readily available in the furnisher's files."

F. Problem: The proposed dispute Regulations allow a furnisher to reject a dispute without telling the consumer what else should be supplied.

How the proposed Regulations create this problem: Under the notice section, the consumer could simply receive a form that says: "We have determined that your request to investigate a problem with the information that we supplied to a consumer reporting agency was frivolous or irrelevant because you did not give us enough information. You

must give us information sufficient to investigate the dispute such as your name, address, and phone number, sufficient information to identity the account or other relationship in dispute, the specific information that you are disputing and an explanation of the dispute, and all supporting documentation or other information reasonable required by us to substantiate the basis for the dispute."

The consumer won't receive this notice until his or her dispute has already been rejected. This notice won't even tell the consumer which category of items was deficient, and it won't give the consumer any hint of how to refile with more complete information. How is the consumer to know what else is required if the notice is so general? Why allow a furnisher to make the consumer go through a rejection of the dispute before telling the consumer what is missing?

The Guidelines do include a provision that the furnisher attempt to obtain necessary information before rejecting a consumer's dispute as frivolous or irrelevant. This obligation belongs in the Regulations. The direct dispute option will have little meaning for consumers if the furnisher can comply with the Regulations by rejecting a dispute before asking the consumer for the information that the furnisher believes is necessary to investigate the dispute.

Recommended changes:

Proposed __. 43(e)(1)(i): after: "The consumer did not provide sufficient information to investigate the disputed information as required by paragraph (d) of this section," add: "<u>after a request from the furnisher for that information, which request identified what type of information was missing with respect to the particular dispute</u>."

Proposed __.43(e)(3): After "general nature of such information" add: "<u>plus check boxes or other indication of what type of information was missing with respect to the particular request</u>."

G. Problem: The dispute Regulations won't help consumers add information about the furnisher's conduct that would help to show that a debt is a duplicate because the furnisher has transferred, sold or engaged in similar conduct with respect to the debt.

How the Regulations create this problem: Proposed __.43(a)(3) requires a furnisher to investigate a direct dispute concerning the "consumer's performance or other conduct concerning an account" but it omits any requirement to act with respect to a dispute about what the furnisher fails to report or concerning other aspects of the furnisher's conduct with respect to the account.

Reasons why this is wrong: When an account goes to an outside collection agency which reports to a CRA, it will look like two unpaid accounts on the credit report if the initial creditor fails to properly instruct the CRA to delete the tradeline or show that

it has been transferred Duplicate tradelines are a significant problem, as discussed below in Section IV.1.B of these comments. We appreciate the Guidelines addressing the need to prevent duplicate tradelines, and we urge that Proposed __.43(a)(3) be revised to provide a parallel ability for consumers to use a direct dispute when a furnisher fails to prevent a duplicate tradeline.

> Recommended change: Proposed __.43(a)(3) should be amended to read in relevant part: "the consumer's or the furnisher's performance or other conduct with request to the account, or other relationship between the consumer ~~with~~ and the furnisher, such as …"

> **H. Problem: The restriction to direct disputes about liability and terms to debts "with" the furnisher may exclude some disputes about information furnished by collection agency which is collecting a debt on behalf of another.**

How the Regulations create this problem: Proposed __.43(a)(1) and (2) address only direct disputes with respect to "a credit account or other debt *with* the furnisher." Proposed __.43(a)(3) and (4), by contrast, cover both accounts with and other relationships with the furnisher. If a collection agency is collecting on behalf of another entity, the account and the debt are with that other entity, not with the collection agency. This is probably a technical drafting error rather than a policy choice.

Reasons why this is wrong: If "with the furnisher" restricts direct disputes to debts owed to the furnisher and excludes debts being collected by the furnisher for another party, then the consumer's only recourse with respect to liability or terms – the items covered by Proposed __.43(a)(1) and (2) - could be to dispute the debt with the CRA. The CRA's investigation will be an inquiry to that same furnisher – the debt collection agency. If the debt collection agency simply confirms the debt, the consumer will be left with no simple way to get either the CRA or the collector to look at the underlying issues of whether the consumer was ever responsible for this debt in the first place, and whether the recorded amount of the debt is correct. The use of the word "with" in subsections (1) and (2) could exclude a group of disputes that are very appropriate for use of the direct dispute mechanism, and that are permitted when the debt collector has purchased the debt, making the debt "with" the collector.

> Recommended change: The references in Section __.43(a)(1)-(2) to an account "with the furnisher" should be modified to refer to "an account with or being collected by the furnisher or other relationship with the furnisher…"

> **I. Problem: The furnisher may reject the dispute because it has requested information that is not reasonably available to the consumer, and the examples of what the furnisher may require are overbroad.**

How the proposed Regulations create these problems: Proposed __.43(d)(4) requires that the consumer to provide all information "reasonably required" by the furnisher. However, it contains no escape hatch to allow the dispute to go forward when

the furnisher seeks information which is not reasonably *available* to the consumer. The examples set forth in Proposed __.43(d)(4) illustrate this problem. They refer to "account statements," but it is particularly inappropriate to require a consumer to provide account statements when the consumer is disputing information due to either a very old or discharged debt, or because the debt arises from identity theft. A key aspect of accounts opened by identity thieves is that the statements usually go to the thief. For discharged debts, the consumer may no longer have the old account statements, and the same is true for very old debts which are resurrected in a debt sale (what is sometimes called "zombie debt").

A requirement that consumers provide information that they can't be reasonably expected to have could unduly obstruct a dispute that might otherwise reveal that the furnisher lacks substantiation for the information it has furnished about the debt. The consumer should be required to provide only that information which is both reasonably required by the furnisher and reasonably available to the consumer.

A related problem in Proposed __.43(d)(4) arises from the broad list of examples of what the furnisher may insist that the consumer provide as part of the dispute. This proposed subsection appears to permit a creditor to insist that the consumer include a copy of his or her consumer report with any dispute. This raises potentially significant privacy concerns. A consumer should not have to reveal his or her full consumer report to a furnisher in order to dispute one entry on that report.

Finally, we are concerned that Proposed __.43(d)(4) includes as examples, "police report, a fraud or identify theft affidavit, court order…." Clearly, these examples are only appropriate for some types of disputes and not for others. The implication that a furnisher can insist on a police report or even a court order in a case when an identify theft affidavit filed with the FTC would be sufficient opens the door for mischief against the consumer. This list should be deleted from the Regulation because the items in it will not be appropriate in all cases.

Recommended change: Section __.43(d)(4) should state:

> (4) All supporting documentation or other information reasonably required by the furnisher and reasonably available to the consumer to substantiate the basis of the dispute. ~~This documentation may include, for example: A copy of the consumer report that contains the allegedly inaccurate information; a police report; a fraud or identity theft affidavit; a court order; or account statements~~.

J. Problem: A furnisher can ignore a well-documented dispute which actually comes to its attention if the dispute was sent to the wrong address.

How the proposed Regulations create this problem: While we generally support the address structure in the proposed Regulations, the Regulations make no allowance for a dispute filed at the wrong address that comes to the actual notice of the furnisher.

Why this is wrong: If the consumer sends the direct dispute to the wrong address but it actually comes to the attention of the furnisher, the Regulations should not permit the furnisher to simply treat it as frivolous or irrelevant.

Recommended change: Section __.43(c)(2) add at the end of this subsection: "any other address at which the dispute actually comes to the attention of the furnisher; or"

K. Problem: The Regulations should plainly state that there are other statutory obligations with respect to direct disputes under Section 1681s-2(a)(8)

The proposed direct dispute Regulations address part, but not all, of the elements of the direct dispute process. Because Congress asked the Regulators to develop regulations on what types of direct disputes must be considered, the Regulations are focused on the types of disputes, what missing information permits a dispute to be rejected, and the type of notice to the consumer in the event of a rejection. In effect, the Regulations incorporate the statutory requirements for consumers to provide a notice and documentation to the furnishers, but do not mention any of the furnisher's duties under 1681s-2(a)(8)(E). The Regulations should at least include a section clarifying that furnishers also have these other duties.

Recommended change: Add a new Section __.43(g): These regulations do not describe all of the statutory obligations of a furnisher with respect to direct disputes. For example, additional furnisher obligations are imposed by Section1681s-2(a)(8).

L. Problem: the proposed Regulations must be amended to provide consumers with a workable, understandable, effective system to report and obtain correction of errors.

Effective notice and efficient referral are key elements to making the direct dispute process more than just an empty procedure. In particular, when a dispute is rejected because it is of a type that should have been filed with the CRA rather than the furnisher, it is inherently misleading for a furnisher to reject the dispute without telling the consumer that the consumer can send the dispute to the CRA, and that this will start a process in which the furnisher will have to investigate a dispute that it was not required to consider as a direct dispute.

Without this information and required cross referral, consumers may be misled and may subsequently fail to pursue a valid dispute via the CRA dispute channel because they received no resolution after first filing that dispute with a furnisher – even if the only reason there was no satisfactory resolution was that the type of dispute was a type that should have been filed with a CRA instead of with the furnisher.

The Regulations should require that:

1. Each furnisher must communicate effectively to the public, including on its web site:

- The address(es) for filing a direct dispute;
- A description of the types of disputes that the consumer can file with the furnisher; and
- A clear and conspicuous statement that other types of disputes can be filed directly with the CRAs, along with the addresses to do so, and a plain statement that the filing of a dispute with the CRA can trigger a process leading to an investigation by the furnisher even if the dispute has been rejected by the furnisher as not appropriate under the direct dispute process.

2. Each furnisher must forward directly to any CRA to whom it furnishes information any dispute which the furnisher rejects because it is of a type not required to be considered by the furnisher, excluding only disputes that the furnisher determines to be substantively frivolous or irrelevant for reasons other than that the dispute should have been filed with the CRA rather than with the furnisher. A regulatory interpretation may be required so that CRAs must treat those referred disputes as if they had been filed by the consumer with the CRA.

3. When a furnisher rejects a dispute on the ground that the dispute is of a type that the furnisher is not required to consider, the furnisher must be required to provide along with that rejection a clear written statement advising the consumer that he or she may dispute this information with the CRA, providing the correct address to do so, and stating that the furnisher will have an obligation to investigate the dispute once the CRA forwards the consumer's dispute to the furnisher. Without this disclosure, consumers can be misled into thinking that it would be pointless to file a dispute with a CRA after the furnisher has rejected that dispute. Where the reason for the rejection was "wrong place of filing," nothing could be further from the truth.

4. Each furnisher must make public, on its web site and upon request by any member of the public, its policies for furnishing information to CRAs and for handling disputes about that information.

Recommended changes:

Automatic referral:
Section __.43(f)(1): <u>"If the furnisher rejects a direct dispute on the grounds that it is not the type of direct dispute which may be filed with a furnisher, the furnisher shall, within one business day, forward to each consumer reporting agency to which the furnisher provided the disputed information the following: (i) a notice that a dispute is being referred to the CRA, (ii) the dispute; and (iii) all information provided by the consumer in connection with the dispute. A CRA receiving such a referral shall treat the dispute as a dispute filed by the consumer under FCRA Section 611(a), from the date of its receipt by the CRA."</u>Notice of right to file directly:

Web site policies disclosure:
Section __.43(f)(2): Each furnisher must communicate effectively to the public, including on its web site, all of the following: (i)The address(es) for filing a direct dispute; (ii) a description of the types of disputes that the consumer can file with the furnisher; and (iii) a clear and conspicuous statement that other types of disputes can be filed directly with the CRAs, along with the addresses to do so, along with a plain statement that the filing of a dispute with the CRA can trigger a process leading to an investigation by the furnisher even if the dispute has been rejected by the furnisher as not appropriate under the direct dispute process.

Notice of right to file directly:
This change is included with the other proposed changes to Section __.43(e).

IV. Comments on Proposed Accuracy and Integrity Guidelines

We address the Proposed Guidelines on a section by section basis, except for the issue of the "accuracy" and "integrity" definitions (*i.e.*, the different Approaches being proposed). This latter issue is addressed earlier in Section II.A. of these comments, as it is the most important issue in this proposal.

Part I

Guideline I.A. Nature and Scope

As discussed above, we are extremely concerned about this Guideline, because it appears to allow certain furnishers to abide by a lower standard of accuracy and integrity for furnished information. We recommend that all furnishers be subject to minimum standards, as discussed above in Section II.C.2 of these comments, and that the following sentence be inserted after the first sentence in this Guideline:

"However, all furnishers must have written policies and procedures to addressed the subjects listed in Section __.42(a)."

We are particularly concerned about paragraph 3 in this Guideline, which permits a furnisher's policies and procedures to vary depending on the technology it uses. We recommend that it be deleted or modified to state:

3. The type of technology used by the furnisher to furnish information to consumer reporting agencies; however, furnishers must maintain and update technology as necessary to ensure the accuracy and integrity of information furnished to CRAs.

In addition, we recommend that this Guideline include another element -- the probable impact of the type of information commonly reported by that type of furnisher:

4. The impact on evaluations of the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living or on the consumer's credit score, of the type of information reported by the furnisher on consumers.

An alternative way to accomplish this would be to add as part of paragraph 2:

"and the impact of that type of information on evaluations of the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living or on the consumer's credit score"

We believe that this fourth element is necessary to protect consumers from inaccuracies in information that are especially harmful. For example, a debt collector reports a type of information that is far more likely to have a negative impact on the consumer's credit report, and a depressive impact on predictive scores about the consumer, than a report from another type of furnisher of the very same size. The proposed Guideline refers to the nature of the furnisher and the nature of its information, but it should more directly acknowledge that some types of information are more harmful to consumers than other types and that the obligations of furnishers who choose to provide those types of information to CRAs must be higher.

Guideline I.B. Objectives

Paragraph 1. In the Regulatory Definitions Approach, the "Objectives" Guideline is missing one element found in the definition of accuracy, which should be added. That element is "liability for" the account or other relationship. Paragraph 1(b) should be modified to read: (b) Accurately reports the terms of and liability for those accounts and other relationships."

The omission appears to be a technical oversight, since the liability for the debt is found in both the definition of accuracy in the regulatory definition in Proposed __.41(a) and also in the alternative Guidelines Definition approach. The obligation in the Guidelines should match the definition of accuracy, which includes accurately reporting who is liable for the account or debt. The continuance of the identity theft epidemic makes it important to include liability in any section listing the elements of accuracy.

Paragraph 4. This paragraph addresses the need for updating. As stated above in Section II.A.8 of these comments, we strongly support a requirement that all material information about an account be updated as necessary to be current. Furthermore, we believe this requirement should be added as an explicit element of "accuracy," set forth in the Regulations.

As currently proposed, this Paragraph only mentions two types of updating – to reflect transfer of an account and to reflect the consumer's cure of a default. This Paragraph could be misinterpreted to be limited to those circumstances. It should be modified to state:

4. Ensure that it updates information it furnishes as necessary to reflect the current status of all material information concerning the consumer's account or other relationship, including but not limited to:

For example, this paragraph omits the example of the need to update an account discharged in bankruptcy. This is a critical issue for the reasons stated in Section II.A.8 above. The Guidelines should make very clear that accuracy requires updating an account to reflect that it has been discharged in bankruptcy. At a minimum, this paragraph should include a third example stating:

(c) Any discharge of an account or other debt in bankruptcy, including that the amount owed is zero and a notation that the account is "included in bankruptcy".

Furthermore, the first example (a) regarding transfer of an account should require that the furnisher take reasonable steps to prevent duplicate tradelines. Accounts that are sold or transferred to others for collection often result in duplicate tradelines, especially acute with student loan and collection accounts. They are especially harmful, because credit grantors do not expect duplicate from the Metro 2 industry standard. Thus, they falsely appear to multiply the amount of outstanding debt, either magnifying adverse information or making the consumer appear overextended.

Finally, the second example (b) requires furnishers to update information to reflect a consumer's cure of a default or delinquency. We strongly support this provision. Failure to reflect a cure is a reprehensible omission by a furnisher. Furthermore, consumers often make payments to cure a default pursuant to negotiated settlements specifically pitched to consumers as a method to "fix" their credit files. Failing to reflect a cure in this case deprives the consumer of the benefit of these settlements.

Part II

This part consists of a list of obligations that furnishers have under the FCRA. While this list is a good reminder to furnishers, as we stated above, we recommend that the Regulators made clear that these obligations are mandatory, and further indicate that there are other laws as well that address the furnished information. These two changes would be added by modifying the first paragraph to state:

A furnisher's policies and procedures must assure ~~should address~~ compliance with all applicable requirements imposed on the furnisher under the FCRA~~, including the duties to:~~ These FCRA requirements are mandatory, and include*:* [1]

[1] This is not a complete listing of furnisher duties relating to furnished information. Furnishers should consult the FCRA to determine what additional duties may apply. In addition, furnishers should consult other statutes that impose limitations with respect to the furnishing of information or other obligations with respect to such information, such

as the Health Insurance Portability and Accountability Act, Gramm-Leach-Bliley Act, Truth in Lending Act, Real Estate Settlement Procedures Act, and the Fair Debt Collection Procedures Act.

Part III

In general, this Section suffers from the problem of allowing furnishers too much discretion in whether to establish and implement key procedures that promote accuracy and integrity of furnished information.

Guideline III.A.

This Guideline addresses review of existing practices and policies that can compromise accuracy and integrity. However, each of the procedures it enumerates is given as an optional example because the Guideline states "such as by:" We urge the Regulators to strike the words "such as".

Paragraph.A.1. This paragraph sets forth the concept of an audit as an example only. It does not require an audit, no matter how large or sophisticated the furnisher is. We strongly urge that this paragraph substitute "including an audit for large furnishers" instead of "such as through an audit" at the end of this paragraph.

Paragraph A.2. This paragraph discusses reviewing a furnisher's own historical records. However, even this relatively simple step within the control of the furnisher is optional, because this paragraph permits furnisher to choose to review unspecific "other information relating to the accuracy and integrity of information provided by the furnisher" to the CRAs. We recommend this paragraph require the furnisher to review historical records.

Paragraph A.3. This paragraph discusses obtaining feedback, but allows the furnisher to choose to look to any one of these: customers, CRAs, even the furnisher's own staff OR "other appropriate parties." Thus, obtaining feedback from all or any of these sources is optional. We urge that this paragraph require feedback from all of these sources, by substituting the word "and" instead of "or."

Guideline III.B.

This Guideline requires furnishers to evaluate their effectiveness of their existing policies and procedures on accuracy and integrity, and to consider whether to update them. However, there is no requirement to adopt new policies or update policies if the existing ones are found to be deficient by an evaluation. We recommend the addition of the following at the end of this Guideline "and adopting new, additional or different policies and procedures or modifying existing ones if such an evaluation reveals the need

to do so to ensure the accuracy and integrity of information furnished to consumer reporting agencies."

Part IV

Guideline IV.A

As with Proposed __.42(a) of the Regulations, this Guideline should be amended to add the basic requirement that the policies must be reasonably designed to facilitate the reporting only of accurate, complete, up to date information which is fully substantiated and has no tendency to mislead users of a credit report or credit score. It should also refer to the minimum standards for furnishers set forth in our recommended additions to that subsection.

Guideline IV.B.

This Guideline addresses the need to use a standard data reporting format and standard procedures for compiling and furnishing data, where feasible. The current standard format would be the Metro 2 format. We strongly agree that furnishers should be required to use Metro 2 or any format that replaces it as the standard reporting format. In fact, we urge the Regulators to strengthen this Guideline by stating that furnishers should use standard reporting unless *infeasible*, not just where feasible.

We also urge that this Guideline require furnishers to complete all applicable fields in the current standard reporting format Metro 2. Failure to fully complete the Metro 2 format can create significant inaccuracies. For example, the failure to fill out a co-borrower's address in Metro 2 results in the primary borrower's address being listed for the co-borrower. We recommend this Guideline be revised to state:

> B. Using standard data reporting formats, including completing all applicable data fields, and standard procedures for compiling and furnishing data, unless infeasible ~~where feasible~~, such as the electronic transmission of information about consumers to consumer reporting agencies.

Guideline IV.C

This Guideline addresses substantiation and recordkeeping. It is a KEY Guideline, as these elements are essential to promote accuracy

> **This Guideline should specify the types of documents necessary for substantiation.** As stated above, we strongly support a requirement in the Regulations that furnishers substantiate the information they initially furnish, and remove any disputed information that cannot be substantiated at the time of the dispute. In addition, we believe the Guidelines should include requirements as to what kind of substantiation is required. Otherwise, a furnisher may claim it has

substantiation merely because its electronic records reflect the same information which it furnished to the CRAs.

To prevent any misunderstanding, this Guideline should specify that certain documents must be in the possession of the furnisher in order to constitute substantiation. For example, credit card companies should be required to have in their possession account applications, agreements, and billing statements. Most importantly, debt buyers should be required to have certain evidence (that the consumer is the current individual liable on the account, account agreements, billing statements, and payment records) in their possession, and to have reviewed such information before furnishing to a CRA.

Indeed, in one of the few enforcement actions by a federal regulator against a furnisher, the FTC required a debt buyer to obtain and review the files of an original creditor in its enforcement action against Performance Capital Management.[19] This standard should be applied to all debt buyers, assignees, and collection agencies.

Time period for recordkeeping. The Regulators have asked whether the Guidelines should specify a time period for furnishers to retain records. We support a requirement that records should be kept as long as the account or other relationship with a furnisher is being reported. There should not be a specific time limit; the standard should be "as long as necessary to substantiate information." Even a time limit of 7 years, the period of obsolescence for most information under the FCRA, would be inadequate, because documentation can be required to substantiate liability for an account beyond 7 years.

For example, with a credit card account, the furnisher must be required to retain the original account application as long as the furnisher is reporting the account in order to substantiate that the consumer is liable on the account. This is especially important to determine whether a second person listed on the account is a co-borrower or merely an authorized user. It may be many years, if not decades, before a credit card account becomes delinquent (or the primary borrower dies). We have seen many cases in which a credit card lender will pursue liability against the secondary party on the account, including authorized users. The Guidelines should require that the credit card issuer must retain the records substantiating that the secondary party is actually a liable joint borrower and not just an authorized user before it reports to a CRA that the secondary party is liable.

The Guideline as currently proposed would require records to be kept "not less than any applicable recordkeeping requirement,…" This language is ambiguous, and could be interpreted as merely requiring records to be kept as long as another federal statute or regulation requires. Other federal statutes,

[19] U.S. v. Performance Capital Management (Bankr. C.D. Cal 2000) (consent decree), *available at* www.ftc.gov/opa/2000/08/performconsent.htm.

however, have much shorter time periods, such as two years under the Equal Credit Opportunity Act or the Truth in Lending Act/Regulation Z. These statutes are primarily concerned with the granting of credit and the disclosure of terms at the outset. The FCRA in contrast, governs the furnishing of information over the entire length of the relationship while it is being reported, including liability for the account.

In addition, the Regulators should specifically state the failure to keep records on file substantiating information, including original account application information, requires that the furnisher report the results of the dispute as unverifiable and instruct the CRA to delete the information. The Regulators acknowledge that lack of substantiation should require that information be deleted, but they do so only in the Supplementary Information. 72 Fed. Reg. at 70,953. This acknowledgement should be in the Guideline, not just the Supplementary Information.

Finally, the Regulators should also state that the requirements of substantiation and recordkeeping requirement are also applicable to furnisher investigations triggered by disputes sent to a CRA.

Recommended Change:

C. Ensuring that the furnisher ~~maintains~~ retains ~~its own~~ records for as long as necessary to substantiate the accuracy and integrity of any information it provides or has provided to a consumer reporting agency, including the terms of and liability for the account or other relationship and the performance or other conduct with respect to the account or other relationship by the consumer and by the furnisher.

i. In the case of a credit card account or other account for unsecured revolving credit, such records should include but are not limited to: original account applications, original account agreement, any addition or substitution of a person to an account and the nature of that addition, revisions to the agreement, billing statements, records of payments and credits, and any records of disputes made and the resolution of those disputes.

ii. In the case of real estate secured loans, such records should include but are not limited to: the contract, other loan-related material from the real estate settlement package , any contract modifications, records of payments and credits, forbearance agreements, changes in payment schedules, and any records of disputes made and the resolution of those disputes.

iii. A debt collector, assignee, or purchaser must have in its possession records that include but are not limited to: the evidence necessary under i, or ii, depending on the type of account or debt, evidence that a consumer is the correct individual liable on the account, proof of assignment, account applications, account agreements, billing statements, record of payments and credits and any records of

disputes made and the resolution of those disputes. The debt collector, assignee, or purchaser must have reviewed these documents and determined that they substantiate the information to be provided before providing information to a consumer reporting agency.

If a consumer disputes information either directly with the furnisher or with a consumer reporting agency, the furnisher's failure to retain records substantiating that information requires the furnisher to report the results of its investigation as unverifiable and to instruct the consumer reporting agency to delete the information.

~~for a reasonable period of time, not less than any applicable recordkeeping requirement, in order to substantiate the accuracy of any information about consumers it furnishes that is subject to a direct dispute~~.

Guideline IV.D.

This Guideline discusses appropriate internal controls "regarding" the accuracy and integrity of information, "such as by" implementing standard procedures, verifying random samples, and conducing regular reviews. This Guideline allows furnishers too much discretion in whether to establish and implement key internal controls. We recommend that this Guideline substitute "including" instead of "such as by." Furthermore, the Guideline should require establishing internal controls that "promote" accuracy and integrity of furnished information, not just "regarding" them.

Guideline IV.E

This Guideline addresses the need to train staff. Such trainings should cover dispute procedures as well as the procedures for the furnishing of information to CRAs.

Guideline IV.F

This Guideline addresses oversight of service providers. We appreciate the Regulators pointing out the need for such oversight. Too many times, we have seen examples of furnishers attempting to "pass the buck" and shift their responsibilities under the FCRA to service providers. This Guideline should make clear that furnishers, not the service providers, are ultimately responsible for both the accuracy and integrity of information as well as for handling disputes.

Guideline IV.G

This Guideline addresses the furnishing of information to CRAs following mergers, portfolio acquisitions or sales, or other acquisitions or transfers of accounts or other debts. The Guideline states that after such an event, a furnisher's policies should address reporting in a manner that prevents re-aging of information, duplicative reporting, or other problems affecting the accuracy or integrity of the information furnished.

Of course, we support the general concept of preventing re-aging, duplicative reporting and other errors after a sale or transfer. Such errors are a common cause of inaccuracies in credit reports. In some cases, re-aging errors are even deliberate.

As stated above, we note that re-aging is prohibited under the FCRA already under Section 1681s-2(a)(5), which requires furnishers to provide the date of the delinquency on an account that preceded charge-off or placement for collection. We recommend that this Guideline make this clear by stating that the furnisher's obligation to provide a correct date of delinquency to prevent is mandatory under the FCRA. However, we appreciate re-aging being addressed, because despite the clear mandates of the FCRA, debt collectors and buyers continue to re-age accounts. This points to another gaping problem – the need for adequate enforcement against furnishers who violate the FCRA, especially since most furnisher obligations (with the exception of 1681s-2(b)) cannot be addressed by the very consumer harmed by violations.

With respect to duplicative information, we urge that this Guideline be modified to specify how a furnisher should avoid creating a duplicate tradelines. The transferee/buyer furnisher should be required to follow Metro 2 Guidelines by not changing any account numbers, identification numbers, portfolio types, and/or date opened. In addition, the transferor furnisher should be required to instruct the CRAs to whom it reports to delete the account.

> Recommended change: Add to the end of Guideline IV.G.: "<u>Measures to avoid duplicative reporting should include instructing a consumer reporting agency to which a furnisher provides information to delete an account after sale or transfer, and following the instructions of the most current industry reporting format to prevent duplicate accounts, such as by utilizing the same account identifiers as were used before the transfer of an account by the furnisher who purchases or holds the account after transfer</u>."

Guideline IV.H.

This Guideline states that furnishers should attempt to obtain the information listed in Proposed__.43(d) from a consumer before determining that the consumer's direct dispute is frivolous or irrelevant. As we stated above in Section III.F. of these comments, this measure should be required in the direct dispute Regulation at Proposed __.43(e)(1)(i).

Guideline IV.I.

This Guideline addresses the issue of ensuring that deletions, updates and corrections reported to a CRA are reflected in the furnisher's systems, *i.e.*, that furnishers should have procedures to avoid reinsertion of erroneous information. As stated above in Section II.C.3, we note that avoiding reinsertion is mandatory already under Section 1681s-2(a)(2) of the FCRA, which prohibits the furnishing of inaccurate information after

correction. In addition, Section 1681i(a)(5)(B)(i) of the FCRA requiring furnishers to certify that information is accurate and complete if they are reinserting previously deleted information.

We recommend that this Guideline make this clear by expressly stating that avoiding reinsertion of erroneous information is mandatory under Section 1681s-2(a)(2) and that if previously deleted information is reinserted as correct, the furnisher must so certify under 1681i(a)(5)(B)(i). However, we appreciate re-aging being addressed, because despite the clear mandates of the FCRA, furnishers continue to reinsert erroneous information that was previously corrected. Again, this continued and flagrant violation of the FCRA points to the need for more enforcement by the Regulators.

Guideline IV.J.

This Guideline calls for the efficient resolution of direct disputes. We are unclear what is meant by "efficient resolution." Of course, furnishers must have procedures to respond to direct disputes within the statutory time period required by Section 1681s-2(a)(8)(E)(iii). However, if furnishers are responding in a timely manner, it is far more important that their procedures promote accurate and integrity than speed. Efficient resolution may not be accurate resolution, if taking reasonable steps to investigate a dispute is sacrificed in favor of speed. We urge that this Guideline substitute the word "effective" for "efficient."

Guideline IV.K

This Guideline addresses the need for furnishers to have technology and other means of communication with CRAs that prevent errors. We urge the Regulators to require furnishers to upgrade their technology when necessary to ensure the accuracy and integrity of information furnished to CRAs. Furthermore, this Guideline should make clear that outdated technology cannot be used as excuse for the furnishing of inaccurate, incomplete, outdated or unsubstantiated information.

Guideline IV.L.

This Guideline requires furnishers to provide sufficient information to the CRAs properly identify a consumer. This Guideline should specify that furnishers must provide the name, address, and entire social security number (SSN) of consumers whom they furnish information about to CRAs. The failure to report a consumer's full SSN, in order to match the SSN that the CRAs already has on file, contributes to the problem of mixed files. Although the CRAs are primarily responsible for mixed files, the Guidelines should address the problem to the extent furnishers play a role by reporting information without an SSN.

Guideline IV.M

This Guideline states that furnishers should conduct a "periodic" evaluation of its practices, CRA practices, dispute investigations, corrections and other factors that may affect the accuracy and integrity of information furnished to CRAs. As stated above in Section II.C.5, we agree that furnishers should be required to conduct periodic evaluations and we urge that large furnishers should be required to conduct evaluations at least annually.

V. Policy Choices in the Proposed Regulations Which We Support

The Guidelines and Regulations make several important policy choices which we support. These include:

1. We support defining accuracy to include the absence of a factual error. This is of fundamental importance. We support this choice made in the definition of "accuracy" in Proposed __.41(a). Both the Regulations and the Guidelines must require that accuracy includes "without error." We believe, however, that the definition of accuracy must be strengthened in the ways we discuss in Section II.A of these comments.

2. We support express recognition of the need for substantiation in the furnisher's records of all furnished information. As discussed above, we believe that substantiation should be part of the definition of accuracy. While the Regulations and Guidelines do not yet accomplish this, both the Regulatory Definition and Guideline Definition Approaches do include a substantiation objective in the Guidelines. We support retaining and strengthening this objective by adding it to the definition of accuracy. We also believe the Guidelines should specify the types of documents necessary for substantiation.

3. We support permitting direct disputes with the furnisher for all types of information which a furnisher may provide, not just disputes arising from ID theft, fraud claims, or areas of special complexity. The Supplementary Information indicates that some furnishers have suggested that direct disputes be limited to disputes about liability for the account, such as identity theft and fraud disputes. We support the approach in the Regulation to refuse to so drastically narrow the direct dispute process. We recommend, however, more broadly defining direct disputes to cover every type of dispute except specific identified categories such as public record and identifying information. The Regulators assert in the Supplementary Information that this "everything except" approach is the approach that was chosen. It will make the direct dispute process more flexible and useful for consumers going forward, as new types of information may be furnished in the future. As discussed above, we are deeply concerned about the use of an artificial distinction between accuracy and integrity and we strongly oppose any regulatory language that would limit direct disputes solely to a reading of "accuracy" which excludes completeness or integrity.

4. We support requiring that policies and procedures on accuracy and integrity in furnishing and on dispute resolution be in writing.

5. We support the requirement that furnishers periodically review and update their policies as necessary to ensure their continued effectiveness. This should occur as a matter of good business practice, but consumers may suffer if it does not.

6. We support requirements for employee training in dispute resolution and in the accuracy of initial reporting. Training both for in-house employees and for service providers is essential to promote compliance. We also believe the Guidelines should make clear that furnishers, not the service providers, are ultimately responsible for both the accuracy and integrity of information as well as handling disputes.

7. We support permitting the consumer to send the direct dispute to the address shown on the consumer credit report as the furnisher's address in addition to any other address designated by the furnisher. Consumers are most likely to learn of the need to file a dispute from reviewing their consumer reports. The furnisher can work with the CRA to ensure that the address listed for the furnisher on the CRA's reports provided to consumers is an address at which the furnisher can receive and process direct disputes. It would be a recipe for disillusion and delay to allow furnishers to reject direct disputes simply because the dispute was sent to the very address shown on the consumer credit report that also shows the disputed information.

8. We support requiring updating of information as necessary to ensure that information furnished is current. As discussed above, we believe that updating should be part of the definition of "accuracy." We also believe that the Guidelines should make clear that its provisions regarding updating to reflect transfer of an account and to reflect the consumer's cure of a default are only examples, and that all material information about the account must be updated.

9. We strongly agree that furnishers should be required to use Metro 2 or the current standard reporting format. In fact, we urge the Regulators to strengthen this Guideline by stating that furnishers should use standard reporting unless infeasible, not just where feasible. We also urge that this Guideline require furnishers to complete all applicable fields in the current standard reporting format Metro 2.

10. We support the requirement in the Guidelines that furnishers retain records to substantiate the information they provide to CRAs. We believe that furnishers should be required to retain these records as long as the account or other relationship is being reported.

11. We appreciate the Guidelines recognition of the problems of re-aging, duplicate tradelines, and re-insertion of inaccurate information. We recommend that the Guidelines make clear the mandatory nature of the furnisher's obligation to provide a correct date of delinquency to prevent re-aging, and to avoid reinsertion. With respect to

duplicative information, we urge this Guideline to specify how a furnisher should avoid creating a duplicate tradelines

VI. Responses to Specific Questions Posed by the Regulators

Q: Questions on accuracy and integrity.

A: The discussion about accuracy and integrity, above, responds to many of the specific questions posed address the alternative definitions of "integrity" and the alternative placement of the definitions of "accuracy" and "integrity" in regulatory text or in the Guidelines. In brief, we submit that these definitions must be placed in the Regulations, that the definition of accuracy should include integrity as a subset of accuracy rather than as something separate from accuracy, that completeness and the existence of substantiation should both be plainly and explicitly included in the definition of accuracy, and that there be no set of disputes with respect to types of information commonly supplied by a furnisher (as opposed to information most commonly acquired by CRAs from other sources, such as personal identifying and public record information) which is excluded from the meaning of "accuracy" for purposes of determining what can be directly disputed.

Q: "Whether the proposed definition of 'accuracy' is appropriate for the direct dispute rule, and, in particular, whether the definition of 'accuracy' needs to be clarified in order to more clearly delineate those disputes that, while subject to the CRA dispute process, would not be subject to the direct dispute rule."

A: As already discussed at some length, we are deeply troubled by the apparent assumption in this question that certain types of disputes about types of information commonly provided by a furnisher could be disputed only through the CRA dispute process, and not through the process mandated by the direct dispute Regulations. Even if it may be appropriate as a matter of efficiency for the direct dispute Regulations to exclude that type of information that generally does not come from a furnisher, such as public record information or identifying information, it would significantly undermine the right of direct dispute to limit direct disputes to only certain types of disputes about commonly furnished information.

We believe that the most appropriate form of direct dispute regulation would permit direct disputes for all information provided by a furnisher, perhaps excluding by category only certain limited categories such as public record information that generally are acquired by CRAs in a manner other than reporting by furnishers.

Q: "Whether the Agencies' approach to direct disputes appropriately reflects the relevant considerations, or whether a more targeted approach would represent a more appropriate balancing of relevant policy considerations?"

A: For the reasons described above, a narrower category of information which can be subject to direct dispute would be directly inconsistent with the purpose of the direct

dispute right – which is to create a process the consumer can use directly with the entity who supplied the information to improve its accuracy. In this context, accuracy should have a plain meaning which includes items that the more technical guidelines may treat as completeness or integrity. In short, the proposed direct dispute Regulations should not be more targeted, they are too narrowly targeted now.

Q: "Whether proposed §_.43(c)(2) should be amended to permit furnishers to notify consumers orally of the address for direct disputes and, if so, how an oral notice can be provided clearly and conspicuously?"

A: Permitting solely oral notice would be a significant mistake. The requirement of providing the notice of the required address "in writing or electronically" in Proposed __.43(c)(2) will not prevent a furnisher from also choosing to give this information to a consumer by live or prerecorded customer service. However, the writing requirement provides a degree of notice that allows a consumer who is trying to determine what his or her choices are with the ability to get that information before first making contact with the furnisher. Provision of the information only through a customer service center creates the very real possibility that the consumer could be dissuaded from exercising his or her rights before getting to the portion of the oral or prerecorded customer service center that is tasked with disclosing the address. In addition, providing oral notice creates the very real risk that the address will be stated incorrectly, or the consumer will incorrectly copy it down, perhaps because the information will be read too quickly. Written notice avoids those pitfalls.

We also note that the allowance for electronic delivery if there has been an agreement for that form of communication should be conditioned on the electronic provision of the address meeting the requirements of the Electronic Signatures in Global and National Commerce Act, (E-Sign), which requires that the information provided electronically be done so in a manner which the manner of collected the consent indicates which in fact be accessible to the consumer. The FTC itself, in a joint report with the Department of Commerce, the NTIA, and other agencies, has indicated that "The consumer consent provision in ESIGN appears to be working satisfactorily at this stage of the Act's implementation."[20]

Q: "What additional mechanisms should be required, if any, for informing consumers of their direct dispute rights?"

A: As discussed above, we recommend that the Regulations require furnishers to communicate effectively to the public, including but not limited to on any public web site of the furnisher:

- The address(es) for filing a direct dispute;

[20] Dept. of Commerce, Federal Trade Commission, et. al., *Electronic Signatures in Global and National Commerce Act, The Consumer Consent Provision in Section 101(c)(1)(C)(ii)* (June 2001), *available at* http://www.ftc.gov/os/2001/06/esign7.htm.

- A description of the types of disputes that the consumer can file with the furnisher; and
- A clear and conspicuous statement that other types of disputes can be filed directly with the CRAs, along with the addresses to do so, and a plain statement that the filing of a dispute with the CRA can trigger a process leading to an investigation by the furnisher even if the dispute has been rejected by the furnisher as not appropriate under the direct dispute process.
- The furnisher's policies with respect to both furnishing and disputes.

We further recommend that the Regulations require furnishers to forward disputes which they reject on the grounds of "wrong type of dispute for a direct dispute" to each CRA to whom the furnisher supplied the information, and that this referral have the same legal effect as if the consumer had filed that dispute directly with the CRA on the date it is received by the CRA.

Q: "How direct dispute requirements would affect furnishers to smaller and specialty CRAs, such as CRAs that report medical information, check writing history, apartment rental history, or insurance claim filings?"

A: Direct dispute rights are just as essential for consumers who have been the subject of reported information to a specialty CRA that the consumer believes is erroneous or creates a misleading impression. The information held by specialty CRAs can determine whether an individual can find an apartment for rent, and in what neighborhood. This information can determine whether the consumer can open a checking account, and what price he or she must pay for critically important auto or homeowners insurance.

Q: "Whether the guidelines should incorporate a specific time period for retaining records in order to provide for meaningful investigations of direct disputes, and, if so, what record retention time period would be appropriate?"

A: We believe that the record retention time period for records substantiating furnished information should be kept as long as the account or other relationship with a furnisher is being reported. There should not be a specific time limit; the standard should be "as long as necessary to substantiate information." Entities that do not wish to retain substantiating information should choose not to report.

Q: "Whether §_.42(c)(2) should exclude certain types of business addresses, such as a business address that is used for reasons other than for receiving correspondence from consumers or business locations where business is not conducted with consumers."

A: No. Proposed__.42(c)(2) is already limited to an address specified by the furnisher. The furnisher should not select an address that doesn't work for it. If this question was meant to refer to Proposed ___.42(c)(1), the address provided by the furnisher and included in the consumer report, the answer is still no. The furnisher can work with the CRA to ensure that the address found in this spot on the consumer report is an address convenient to the furnisher. Finally, if the furnisher does not choose to specify an

address under Proposed __.42(c)(2), then some of its addresses which a consumer might select in the absence of the designation should not be off limits for this purpose. Proposed __.42(c)(1) and (2) allow the furnisher to limit the available addresses to only the address on the consumer report and the same or another address designated by and subject to notice by the furnisher. If a furnisher declines to take advantage of Proposed __.42(c)(2), it should not have some of its addresses excluded under Proposed __.42(c)(3).

Q: "The Agencies recognize that small institutions operate with more limited resources than larger institutions. Thus, the Agencies specifically request comment on the impact of this proposal on small institutions' current resources, including personnel resources, and whether the goals of the proposal could be achieved for small institutions through an alternative approach."

A: Concern about resource impacts on small institutions must be offset by concerns about the quality of information contained in consumer reporting files which shapes the economic opportunities available to individuals and by the recognition that errors in consumer reporting files can distort the business decisions made by credit grantors of all sizes. Small financial institution furnishers, like large ones, already have obligations to investigate various other types of errors under other statutes, such as the Electronic Fund Transfer Act and the Fair Credit Billing Act. Small furnishers also have the ultimate safety valve of choosing not to report if they believe that the obligation to report accurately and with integrity is too burdensome. While consumer advocates see value in a wide range of furnishers, that value does not exist if the information furnished it not consistently accurate, timely, up-to-date, complete, and substantiated. Consumers can be harmed just as much by erroneous information furnished by a small furnisher as by a large one. Consumers have less choice than small furnishers; consumers become part of the consumer reporting system as a result of the decisions of furnishers. Consumers' only choice when there has been a furnisher error is between enduring the economic cost of that error and undertaking the burden of working to correct the error.

Q: The Agencies invite comment from individuals and public interest and consumer advocacy organizations on the effect this proposal may have on consumers and the credit reporting industry.

A: This proposal will benefit consumers, CRAs, and users of consumer reports and consumer credit scores *if* it is modified to require the initial reporting only of accurate, timely, complete and up to date information which is fully substantiated by the furnisher's own files, and which qualifies as accurate only if it meets standards for both accuracy and integrity. The direct dispute Regulations will benefit consumers and others in the credit reporting system, including CRAs and potential creditors, if they provide an effective, easy-to-use avenue for consumers to obtain corrections to bring information supplied by furnishers up to the standard of accurate, timely, complete, up to date and consisting only of information that is both fully substantiated in the furnisher's own files and not reasonably contradicted by independent evidence provided by the consumer. If

the Regulations and Guidelines are not modified to accomplish these goals, then they will not deliver benefits to consumers or to the system as a whole.