



NATIONAL ASSOCIATION
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Federal Trade Commission
Office of the Secretary
Room H-135 (Annex M)
600 Pennsylvania Ave., NW
Washington, DC 20580

[Transmitted by e-mail: <https://secure.commentworks.com/ftc-redflags>]

Re: The Red Flags Rule, Project No. R611019

Ladies and Gentlemen:

On behalf of more than 1.3 million members of the National Association of REALTORS® (NAR), I am pleased to submit comments to the Federal Trade Commission (FTC) for the consideration of the Commission and each of the agencies that published the Interagency Proposed Rule on Identity Theft Red Flags and Address Discrepancies under the Fair and Accurate Credit Transactions Act of 2003 (FACT Act).

The National Association of REALTORS®, “The Voice for Real Estate,” is America’s largest trade association, including NAR’s five commercial real estate institutes and its societies and councils. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of 1,400 local associations or boards and to 54 state and territory associations of REALTORS®.

Overview of Proposed Rule

The proposed rules, tailored by each agency to reflect their respective jurisdictions, cover three main subjects:

- Guidelines on reasonable policies and procedures for users of consumer reports (often referred to as credit reports) to follow when they receive notices of address discrepancies from consumer reporting agencies (CRAs, often referred to as credit bureaus).
- Red flag guidelines for financial institutions and creditors, requiring them to establish reasonable policies and procedures for identifying and dealing with identity theft.

- Rules requiring credit card issuers to determine the validity of requests for a change of address in certain situations. NAR has no comment on this aspect of the proposed rules.

Applicability of the Proposed Rules to the Real Estate Industry

To the extent real estate firms are users of consumer reports or affiliated with a financial institution or other creditor, they will, for the most part, be subject to the Federal Trade Commission (FTC) regulations. The banking agency and NCUA regulations generally will not apply to real estate brokers or agents because they are engaged in commercial, not financial, activities and real estate firms generally are not affiliated with banks and other insured depository institutions. Some state laws, however, permit state-chartered banks to affiliate with real estate brokerage firms. In addition, federal savings associations and federal credit unions may own a real estate brokerage as a service company subsidiary, and a grandfathered unitary thrift holding company may do so as well. In these cases, the applicable banking agency and NCUA regulations appear to apply. Accordingly, NAR is submitting comments that apply primarily to the proposed rules of the FTC but also apply to the proposed rules of the other regulators (except the Office of the Comptroller of the Currency).

REALTOR[®] Concerns

REALTORS[®] support ongoing efforts to make the consumer reporting system strong and effective and to fight identity theft. Our members have a vital stake in accurate consumer reports so consumers have accurate credit histories, receive accurate credit scores, and qualify for the full amount of credit they have earned. The availability of mortgage credit is central to the home purchase transaction that, in turn, is central to the businesses of REALTORS[®].

REALTORS[®] are also affected when they rely on consumer reports in connection with managing, selling, buying, and leasing residential rental property and other commercial property, act as mortgage brokers, or are affiliated with a mortgage lender. When a consumer seeking to become a homeowner or tenant has credit problems, the REALTOR[®] is often called upon to help resolve the problem. REALTORS[®] see first-hand the negative impacts on consumers when flawed credit information makes it hard or impossible for consumers to purchase homes or lease apartments.

Duties of Users Regarding Address Discrepancies

The proposed rule would require each user of consumer reports to develop and implement policies and procedures for verifying the identity of consumers for whom it both receives consumer reports and receives from a CRA a notice of address discrepancy. In addition, the user must reasonably confirm the accuracy of the consumer's address and furnish it to the CRA, but only if the user—

- Can form a reasonable belief it knows the identity of the consumer;

- Establishes or maintains a continuing relationship with the consumer; and
- Regularly, in the ordinary course of business, furnishes information to the CRA.

These requirements will primarily cover real estate professionals that manage residential rental real estate and use consumer reports to check on the credit history of applicants. It will also apply to REALTORS[®] that are employers and use a consumer report in making hiring and related decisions. In addition, some of our members may obtain consumer reports in connection with assisting homebuyers to pre-qualify for a mortgage loan. REALTORS[®] that are mortgage brokers will also be subject to the requirements. Finally, some of our member firms are affiliated with mortgage lenders, and these mortgage lenders will be covered.

The statutory requirements being implemented by the regulation narrow their scope and minimize regulatory burden for most of NAR's members. Even where the rule requires the user to confirm the consumer's address with the CRA, the options for confirming the consumer's address appear to be flexible and not unduly burdensome. The proposed rules appear to strike a reasonable approach to implementing the statutory requirements.

Red Flag Guidelines

The proposed FTC red flag guidelines apply to financial institutions and creditors. The term "creditor" for purposes of the Fair Credit Reporting Act has the same meaning as in the Equal Credit Opportunity Act (ECOA) and means those that regularly extend consumer credit and meet other requirements.¹

Most if not all of our members that are affected by this rule are affected solely through their affiliation with a mortgage lender that qualifies as a creditor. This conclusion is confirmed by the structure of the proposed rule. The rule requires each creditor to develop and implement an Identity Theft Prevention Program (Program). The Program must address identity theft risks of its customers. Real estate brokers and agents do not have customers, as defined by the proposed rule. The term "customer" is defined as someone who has an account with a financial institution or creditor, and the term "account" means a continuing relationship to provide a financial product or service that a financial holding company could offer. The examples included in the definition are consistent with the general use of that term to refer to financial accounts, such as loans, savings accounts, and checking accounts, and do not include real estate brokerage services that are commercial, not financial, activities. Accordingly, we assume that the scope of this regulation does not cover real estate brokers and agents, unless they separately qualify as a creditor.

We urge the FTC to include a statement in the preamble to the final rule explicitly stating that the red flag guidelines only apply to creditors as defined in ECOA and not to

¹ See § 603(r)(5) of FCRA (15 U.S.C. § 1681a(r)(5)) and § 702 of ECOA (15 U.S.C. § 1602(f)).

others who refer consumers to creditors. The question arises because the Federal Reserve Board's rule implementing ECOA defines creditor to include, among others, anyone "who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, . . ." ² NAR strongly opposes applying the Fed's regulatory definition in the context of the red flag guidelines because it would extend inappropriate and burdensome requirements to the large majority of our members who have only a peripheral role in helping their clients obtain mortgage loans. And as noted above, the structure of the proposed rule makes no sense in the context of real estate broker and agent activities.

We are pleased to note that the red flag guidelines require that the creditor's Identity Theft Prevention Program be "appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities." This is an excellent statement of principal and we urge the agencies, in their oversight of the implementation of these requirements, to be especially vigilant to permit smaller entities, including many of the mortgage lenders that are affiliated with our members, to adopt reasonable programs that do not impose an undue burden and yet are appropriate in fighting identity theft. Considering the extremely low number of burden hours estimated by the FTC, we believe this is your intent.

Conclusion

Thank you for the opportunity to comment on the proposed rules. If you have any questions, please contact Jeff Lischer, Manager, Financial Services, 202-383-1117, jlischer@realtors.org.

Sincerely yours,



Joseph M. Ventrone
Managing Director, Regulatory and Industry Relations

² See 12 CFR § 202.1(l),