



March 30, 2012

The Honorable Richard Cordray  
Director  
Consumer Financial Protection Bureau  
1500 Pennsylvania Avenue NW (Attn: 1801 L Street NW)  
Washington, DC 20220.

Re: Potential Violation of Equal Credit Opportunity Act's Anti-Retaliation Provisions

Dear Director Cordray:

The undersigned consumer groups write to bring to your attention troubling policies that are violating the spirit, if not the letter, of the Equal Credit Opportunity Act's anti-retaliation provisions. Unfortunately, this violation is being committed by another federal agency, the Federal Housing Administration (FHA).

The FHA has instituted the following policy, effective April 1, 2012:

If the borrower has individual or multiple disputed credit accounts or collections with singular or cumulative balances equal to or greater than \$1,000, the accounts must be resolved (e.g., payment arrangements with a minimum three months of verified payments made as agreed) or paid in full, prior to, or at the time of closing.

See Attachment A – HUD Mortgagee Letter 2012-3, at pages 3 and 4.

We understand that Fannie Mae and Freddie Mac may have similar policies (see Attachment B – articles from Privacy Times)

As you know, the right to dispute the accuracy of information in a credit account is a right provided by several laws under the Consumer Credit Protection Act, including:

- The Fair Credit Reporting Act (FCRA) – Section 611(a) of the FCRA, 15 U.S.C. § 1681i(a), gives consumers the right to dispute inaccurate or incomplete information on their credit reports with the consumer reporting agencies. Section 623(a)(8) of the

FCRA, 15 U.S.C. § 1681s-2(a)(8) gives consumers a similar right to dispute inaccurate information on their credit reports with the furnisher of the information.

- Fair Credit Billing Act (part of the Truth in Lending Act) – Section 161 of TILA, 15 U.S.C. § 1666, provides consumers with the right to dispute billing errors in their credit card or other open-end credit accounts. Section 170 of TILA, 15 U.S.C. § 1666i, gives consumers the right to withhold payment from credit card issuers for claims and defenses they have against a merchant.
- Fair Debt Collection Practices Act (FDCPA) – Section 809 of the FDCPA, 15 U.S.C. § 1692g(b), gives consumers the right to seek verification of a debt from a debt collector.

When consumers send a dispute pursuant to these Acts, the tradelines on the consumer's credit are marked as disputed by the credit reporting agencies. This denotation is required by most of these laws. *See, e.g.*, 15 U.S.C. § 1666a (FCBA); 15 U.S.C. § 1681s-2(a)(3)(FCRA).

Under the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(3), a creditor may not discriminate against an applicant for credit because that person has exercised, in good faith, any right under the Consumer Credit Protection Act. This includes the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Fair Credit Billing Act/Truth in Lending Act. The intent of this ECOA provision is to protect consumers from retaliation in the form of credit denials when they exercise their legal rights.

We believe that the FHA's new policy violates Section 1691(a)(3) of the ECOA. It requires consumers to pay off accounts over \$1,000, even when they have disputed these accounts in good faith under the CCPA, in order to obtain approval for credit. In other words, the FHA policy penalizes or discriminates against consumers who have exercised their legal rights by disputing errors in their credit accounts.

The FHA policy does have exceptions for identity theft or unauthorized use. However, those exceptions do not cover the range of legitimate disputes that a consumer may have, and is entitled to assert, under the above federal laws. For example, the Fair Credit Billing Act permits a consumer to dispute a charge on a credit card account for merchandise not received by the consumer, including merchandise priced over \$1,000. 15 U.S.C. § 1666(b)(3). This dispute would not fall into the categories listed above. If the consumer wanted to obtain an FHA mortgage, he or she would be forced to pay for the charge even though the merchandise was never received. The FHA's policy would clearly result in the consumer being forced to choose between obtaining a mortgage or preserving his/her rights under FCBA, a violation of the ECOA's anti-retaliation provision.

We realize that the FHA, as well as Fannie Mae and Freddie Mac, may not be considered "creditors" under the ECOA because they do not grant the mortgage, but only guarantee it. However, it certainly violates the intent and spirit of these laws to force applicants to pay off disputed accounts in order to obtain credit. We urge you, as the agency charged with implementing the ECOA, to intervene with these entities and persuade them to rescind their discriminatory policies.

Thank you for your consideration of this letter. If there is a need for follow-up, please contact Chi Chi Wu at [cwu@nclc.org](mailto:cwu@nclc.org) or 617-226-0326.

Chi Chi Wu  
National Consumer Law Center  
(on behalf of its low-income clients)

Linda Sherry  
Consumer Action

Evan Hendricks  
Privacy Times

Ellen Taverna  
National Association of Consumer Advocates

cc: (by mail) Carol Galante, Acting Federal Housing Commissioner, Federal Housing  
Administration  
(by email)  
Bayard Stone; Thomas Oscherwitz, CFPB  
Patrice Ficklin, CFPB  
Genger Charles, FHA

**ATTACHMENT A**



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

WASHINGTON, DC 20410-1000

ASSISTANT SECRETARY FOR HOUSING-  
FEDERAL HOUSING COMMISSIONER

**Date: February 28, 2012**  
**To: All Approved Mortgagees**  
**Mortgagee Letter 2012-3**

**Subject** Miscellaneous Underwriting Issues

**Purpose** The purpose of this Mortgagee Letter (ML) is to:

- Modify documentation requirements for self-employed borrowers,
- Provide new guidance on disputed accounts, and
- Expand the current definition of family members for identity of interest transactions.

**Effective Date** The effective date of the new guidance is stated in each section of the ML.

**Affected Topics** This ML affects topics found in HUD Handbook 4155.1 listed in the table below. Additionally, this ML affects the corresponding references to these requirements in Mortgagee Letter 05-15 TOTAL Mortgage Scorecard Update, relating to Tolerance Level and Documentation Relief, and the FHA TOTAL Mortgage Scorecard User Guide, Chapter 2, relating to Credit Issues and Disputed Accounts. HUD will integrate these changes into the relevant FHA Single Family On-Line Handbooks shortly.

<b>HUD 4155.1, Mortgage Credit Analysis for Mortgage Insurance</b>
2.B.2.a, Definition: Identity of Interest Transactions
2.B.2.b, Maximum LTV for Identity of Interest Transactions
4.D.4.f, TOTAL Scorecard Accept/Refer Requirements for Self-Employed Borrowers
4.C.2.e, Paying Off Collections and Judgments
9.1.f, Glossary of Handbook Terms, Definition of Family Member



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ASSISTANT SECRETARY FOR HOUSING-  
FEDERAL HOUSING COMMISSIONER

**Mortgage Letter 2012-3, Continued**

**Summary –  
Income  
Documentation  
Requirements for  
Self-Employed  
Borrowers**

The new guidance in this section of the ML is effective for case numbers assigned on or after April 1, 2012, and will apply to all FHA insured loans except non-credit qualifying streamline refinance loans and Home Equity Conversion Mortgage loans.

Below is a matrix with old and new documentation requirements for self-employed borrowers.

REFERENCE AND DOCUMENT TYPE	IF FHA TOTAL MESSAGE IS	OLD GUIDANCE	NEW GUIDANCE
HUD 4155.1 4.D.4.f Year-to-Date Profit & Loss (P&L) and Balance Sheet	Accept	A P&L and Balance Sheet are not required <i>unless</i> income used to qualify the borrower exceeds the two-year average of the tax returns; then either an audited P&L statement or quarterly tax returns are required to support the greater income stream used to qualify.	<b>P&amp;L and Balance Sheet required if more than a calendar quarter has elapsed since date of most recent calendar or fiscal-year end tax return was filed by the borrower – with no exceptions.</b>  <i>Additionally, if income used to qualify the borrower exceeds the two year average of tax returns, an audited P&amp;L or signed quarterly tax returns obtained from IRS are required.</i>
	Refer	A P&L and balance sheet, or income information directly from the IRS is required if both of the following conditions exist: <ul style="list-style-type: none"> <li>• more than seven months have elapsed since the business tax year's ending date, and</li> <li>• income to the self-employed borrower from each individual business is greater than 5% of his/her stable monthly income.</li> </ul>	Same requirements as an "Accept".

When reviewing income documentation, lenders are still required to comply with requirements of HUD Handbook 4155.1 4.D.4.g, which states: To determine if the borrower's business is expected to generate sufficient income for his/her needs, the lender must carefully analyze the business financial strength, including the source of the business income and general economic outlook for similar businesses in the area.

Annual earnings that are stable or increasing are acceptable, while businesses that show a significant decline in income over the analysis period are not acceptable, even if the current income and debt ratios meet FHA guidelines.

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**Mortgagee Letter 2012-3, Continued**

**Summary – Handling of Disputed Accounts, Public Records, FHA Total User Guide Chapter 2**      The new guidance in this section of the ML is effective for all case numbers assigned on or after April 1, 2012, and applies to all FHA insured loans except non-credit qualifying streamline refinances.

OLD GUIDANCE	NEW GUIDANCE
<p>If the credit report reveals that the borrower is disputing any credit accounts or public records, the mortgage application must be referred to a DE underwriter for review.</p>	<p>If the Automated Underwriting System using the TOTAL Mortgage Scorecard rates the mortgage loan application as an Accept, the mortgage application will no longer be referred to a DE underwriter for review due to disputed accounts, as long as these accounts meet both of the following conditions:</p> <ul style="list-style-type: none"> <li>• The total outstanding balance of all disputed credit accounts or collections are less than \$1,000, and</li> <li>• Disputed credit accounts or collections are aged two years from date of last activity as indicated on the most recent credit report.</li> </ul> <p>If the borrower has individual or multiple disputed credit accounts or collections with singular or cumulative balances equal to or greater than \$1,000, the accounts must be resolved (e.g. payment arrangements with a minimum three months of verified payments made as agreed) or paid in full, prior to, or at the time of closing. The lender must obtain documentation supporting the payment arrangements or that the debt has been paid off. The payments arranged for the accounts must be included in the calculation of the borrower’s debt-to-income ratios.</p> <p>Disputed credit accounts or collections resulting from identity theft, credit card theft, or unauthorized use, etc., will be excluded from the \$1,000 limit under the terms shown below. The mortgagee must provide in the case binder, a credit report or letter from the creditor, or other appropriate documentation, to support that the borrower filed an identity theft or police report to dispute the fraudulent charges. Mortgagees must provide documentation in the case binder to show all disputed or collection accounts are resolved, verified as not a debt to the borrower, arrangements made for payment, or paid in full.</p>

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**Mortgagee Letter 2012-3, Continued**

**Handling of Disputed Accounts/Public Records (continued)**

<p><b>HUD 4155.1 4.C.2.e</b></p>	<p>FHA does <i>not</i> require that collection accounts be paid off as a condition of mortgage approval. However, court-ordered judgments <i>must</i> be paid off before the mortgage loan is eligible for FHA insurance endorsement.</p>	<p>If the total outstanding balance of all collection accounts is equal to or greater than \$1,000 the borrower must resolve the accounts (e.g. entered into payment arrangements with minimum three months verified payments- paid as agreed) or paid in full at the time of, or prior to closing. Mortgagees must document the case binder showing each account was resolved or paid in full.</p> <p>If the total outstanding balance of all collection accounts is less than \$1,000, the borrower is not required to pay off the collection accounts as a condition of mortgage approval.</p> <p>FHA continues to require judgments to be paid off before the mortgage loan is eligible for FHA insurance.*</p>
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**\* Exception:** An exception to the payoff of a court-ordered judgment may be made if the borrower has an agreement with the creditor to make regular and timely payments, and provides documentation indicating that a minimum of three months payments have been made according to the agreement. The monthly payment must be included in the borrower's debt-to-income ratio.

Examples of acceptable documentation to support the resolution of disputed accounts or the payoff of accounts would be a letter from the creditor outlining the terms of the payment arrangements, or verifying payoff of debt, cancelled check(s), or a supplement to the credit report verifying payoff or payment arrangements.

**Note:** *Paying "down" of balances on disputed accounts and collections to reduce the singular or cumulative balance to below \$1,000, is not an acceptable resolution of accounts.*

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## Mortgagee Letter 2012-3, Continued

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### Summary – Identity of Interest Transaction

The new guidance in this section of the ML is effective for all case numbers assigned on or after April 1, 2012, and applies to all FHA insured loans.

#### Old Guidance

For the purposes of Identity of Interest transactions, a family member is defined as a borrower's:

- child, parent, or grandparent
- spouse
- legally adopted son or daughter, including a child who is placed with the borrower by an authorized agency for legal adoption, and
- foster child.

*Note:* A child is defined as a son, stepson, daughter, or stepdaughter.

#### New Guidance

For the purpose of Identity of Interest transactions, the definition of family member includes:

- child, parent, or grandparent
- spouse
- legally adopted son or daughter, including a child who is placed with the borrower by an authorized agency for legal adoption
- foster child
- brother, stepbrother
- sister, stepsister
- uncle, and
- aunt

*Note:* A child is defined as a son, stepson, daughter, or stepdaughter. A parent or grandparent includes a step-parent/grandparent or foster parent/grandparent.

As stated in handbook HUD 4155.1 2.B.2.b, identity-of-interest transactions may result in a reduced maximum loan-to-value limitation.

*Reference:* For current definition of family members, see HUD 4155.1.9.1.f.

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## Mortgagee Letter 2012-3, Continued

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**Questions**

If you have questions regarding this Mortgagee Letter, please call FHA's Resource Center at 1-800-CALLFHA (1-800-225-5342).

Persons with hearing or speech impairments may reach this number via TTY by calling the Federal Information Relay Service at 1-800-877-3339.

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**Signature**

Carol J. Galante  
Acting Assistant Secretary for Housing-Federal Housing Commissioner

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**ATTACHMENT B**

# PRIVACY TIMES

EDITOR: EVAN HENDRICKS

Volume 29 Number 19 October 23, 2009

**CAPITAL INSIGHTS:** *National Security Archive, on behalf of several popular musical groups, has filed a Freedom of Information Act request aimed at uncovering what songs were used during harsh interrogations of detainees at the U.S. Govt.'s Guantánamo facility. Joining the archive were R.E.M., Trent Reznor and Pearl Jam Tom Morello and Jackson Browne. Based on public documents and interviews with former detainees, the archive said, Guantánamo prisoners were played loud music, including songs by AC/DC, Britney Spears and Marilyn Manson, as well as advertising jingles and "Sesame Street" tunes, in their cells and in preparation for interrogations. Thomas Blanton, the archive's director, told The Associated Press, "At Guantánamo, the U.S. government turned a jukebox into an instrument of torture." A spokeswoman for Joint Task Force Guantánamo, which handles the care and custody of detainees, said loud music had not been used with prisoners since the fall of 2003. . . . After a four-year legal battle, an Illinois jury has ordered North American Corp. to **pay a former employee \$1.8 million for obtaining her telephone records** without her permission and under false pretenses. Such pretexting was an invasion of her privacy, the jury found. The company filed post-trial motions to get the verdict thrown out. North American claimed it was investigating the employee on suspicion that she was stealing from the company. . . . ChoicePoint again must pay a fine (\$275,000) to resolve charges that it failed to implement data protection measures required by the agency after its 2004 security breach, The Federal Trade Commission (FTC) announced. The company experienced yet another breach in 2008. The FTC said ChoicePoint failed to detect that a "key" electronic access monitoring tool had been turned off for four months, during which time a hacker gained access to sensitive customer information. The company will also be required to beef up security and produce regular reports to the FTC for two years.*

## MAJOR STORIES IN THIS ISSUE

**PT Exclusive: Equifax, Utilities  
Blacklisting Consumers . . . 1**

**EPIC Hits DHS Privacy Office  
For 'Form Over Substance' . 7**

**Fannie-Freddie Admit Scanning  
For Credit File Disputes . . . 5**

**FOIA Ct. Roundup: CIA-DoD  
Torture; Treasury Fees . . . . 8**

**In Brief: Klayman Loses To Judicial Watch;  
MySpace Data Admissible; Calif. Law Not Preempted By FCRA . . 10**

Similarly, it broadly defined the term “consumer reporting agency” as “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.”

Finally, it defined the term “file,” as all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

“This is not even a close call. It’s clearly covered by the FCRA,” said one government attorney with years of FCRA experience.

Dr. Michael Turner, President of the Policy & Economic Research Council (PREC) and an expert on “full file reporting” by utilities, agreed the FCRA clearly covered NCTUE and that consumers were entitled to see their files and correct errors. He noted that in the 2003 FACT Act amendments, Congress broadened the FCRA’s definition of credit to be consistent with the Equal Credit Opportunity Act (ECOA).

“This includes energy utility and telecoms services as forms of credit – to the extent that NCTUE data is being used for credit decisioning – that would be risk-based pricing,” Turner said. “As such, any adverse actions based upon NCTUE data, including denial of service or the requirement to maintain a security deposit, must automatically generate an adverse action notification to be sent directly to the consumer by NCTUE members.”

### **FANNIE MAE, FREDDIE MAC ADMIT TO SCANNING CREDIT REPORTS FOR DISPUTES**

In the wake of a *Privacy Times* story, mortgage underwriting giant Fannie Mae said it was “reviewing” its policy of blocking the automated underwriting of mortgage applications accompanied by credit reports with an account notated as “disputed by consumer,” according to Ken Harney, the syndicated columnist.

Fannie Mae’s “review” implicitly acknowledges the potential controversy over a quiet change in its policy that effectively punishes honest consumers for exercising their rights to dispute credit report errors.

Because Fannie did not respond by our deadline, *Privacy Times* reported last issue that it “appeared” that the mortgage giant had begun rejecting applicants whose credit reports showed the “disputed by consumer” notation.

After our story broke, and after Harney inquired about the practice, Fannie Mae Spokeswoman Amy Bonitatibus conceded that its key program, “Desktop Underwriter,” had begun scanning credit reports for the term “dispute.” But she said Fannie itself wasn’t rejecting

applications outright. Instead, it was kicking applications back to lenders and requiring them to determine if consumers' disputes were valid.

"Fannie Mae's eligibility requirements do not prohibit the delivery of a loan to Fannie Mae where the borrower has disputed information on their credit report. In order to protect borrowers from adverse impacts resulting from inaccurate reporting data, our policy requires the lender to determine and document whether or not the disputed information is accurate and underwrite the borrower's credit accordingly," Bonitatibus said.

*PT's* story recounted how several consumers with excellent credit histories complained of being denied loans because of Fannie's program. Eddie Johansson, president of Credit Security Group, a Texas-based firm that works with mortgage applicants and their lenders to improve credit reports so that consumers can qualify, had witnessed several such cases. The most recent involved a borrower who had excellent credit scores and met all the other loan qualifications yet was rejected for a home loan because a credit card account was marked "Consumer Disputes." The account was paid up with no late payments. "There's no good reason to reject this borrower," said Johansson, whose firm was working to resolve the issue and so the application can be approved.

Fannie actually adopted the policy late last year. But it appears that Fannie's only mention of it came in the October 16, 2008 "Release Notes" for Desktop Underwriter Version 7.1, under the section "Miscellaneous," in which it told lenders:

"The following Verification message will be issued on DU Version 7.1 loan casefiles to remind lenders of this requirement: DU identified the following tradeline(s) as disputed by the borrower and did not include the tradeline(s) in the credit risk assessment. The lender must verify the accuracy of the tradeline(s) by determining if it belongs to the borrower and by confirming the accuracy of the payment history. If the tradeline does not belong to the borrower, or the reported payment history is inaccurate, no further action is necessary. If the tradeline does belong to the borrower and the reported payment history is accurate, it must be taken into consideration in the credit risk assessment. To ensure it is considered, the lender may obtain a new credit report with the tradeline no longer reported as disputed and resubmit the loan casefile to DU, or the lender may manually underwrite the loan."

[www.efanniemae.com/sf/guides/duguides/pdf/current/rndodu71.pdf](http://www.efanniemae.com/sf/guides/duguides/pdf/current/rndodu71.pdf)

Fannie's notes did not mention that consumers' have a legal right under the Fair Credit Reporting Act (FCRA) to dispute, with both credit bureaus and creditors, any information in their credit reports. In fact, they are encouraged to do so by the Federal Trade Commission, consumer groups and the news media.

Christopher Cruise, a Maryland-based mortgage originator and a founding member of the National Association of Responsible Loan Officers, told Harney that "there's no question - when there are lots of other applications and business is good," applications requiring extra time and hands-on research "just aren't going to move."

Harney also reported that Freddie Mac's policy on disputed tradelines is broadly similar to Fannie Mae's, according to spokesman Brad German. Though the specific requirements of its automated system are "proprietary," he said in an e-mail, "the presence of disputed tradelines will affect (the system's) determination of a borrower's credit reputation and its decision to accept the application or refer it to the lender for manual underwriting."

**EPIC ASSAILS DHS PRIVACY OFFICE,  
SEES LACK OF SUBSTANCE IN PIAs**

Led by the Electronic Privacy Information Center, privacy groups have blasted the Dept. of Homeland Security Chief Privacy Officer (CPO) Mary Ellen Callahan, and her predecessor, Hugo Teufel III, for failing their duty to safeguard privacy, charging that they were more focused on process than substance.

In a letter to Rep. Bennie Thompson (D-MS), chairman of the House Committee on Homeland Security, EPIC called for creation of an alternative oversight mechanism, accusing the CPOs of being captive tools of DHS rather than an independent force for privacy protection.

EPIC said that the CPOs devoted too much effort to conducting "Privacy Impact Assessments" at the expense of more substantive actions to reign in privacy-threatening programs.

It was particularly critical of four programs:

- Fusion Centers and the Information Sharing Environment
- Whole Body Imaging
- Closed-Circuit Television (CCTV) Surveillance
- Suspicionless Electronic Border Searches

"In each of the above cases, the Privacy Office has failed in its statutory duty to assure that the use of technologies does not erode privacy protections relating to use, collection, and disclosure of personal information. It has written Privacy Impact Assessments, but these Assessments have no force, no meaningful effect on the Department's activities," the groups wrote.

"It is true that the assessment process is a possible avenue for the Office to protect privacy. The report gives at least one example of this taking place: the PIA for the USCIS Fraud Detection and National Security System Data System. According to the report, the PIA identified a risk and set forth a solution: procedures that USCIS must follow in certain circumstances to mitigate the risk. The report only describes a handful of other PIAs, leaving the full list to an appendix, but in none of the other examples cited does the Office report that the PIA actually had a meaningful effect on the Department's activities," it continued.