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The Honorable Mel Watt
Director
Federal Housing Finance Agency
Office of Housing and Regulatory Policy
400 7th Street Southwest, 9th Floor
Washington, DC 20219

Re: Credit Score Request for Input

Dear Director Watt:

This letter responds to the Credit Score Request for Input ("RFI") issued by the Federal Housing Finance Agency ("FHFA"), and specifically to arguments raised by various parties regarding the allegedly anticompetitive impact that would occur if FHFA were to adopt Option 3 ("Lender Choice on which Score to Deliver, with Constraints").

I represent VantageScore® Solutions, LLC ("VantageScore Solutions"),[1] and have done so since 2006, when I defended the company in a lawsuit FICO brought against it and its owners, TransUnion LLC ("TransUnion"), Experian Information Solutions, Inc. ("Experian"), and Equifax, Inc. ("Equifax"), the three national credit reporting agencies ("CRAs").[2]

VantageScore Solutions was formed in part to introduce some viable competition

[1] I am with the law firm of Berens & Miller, P.A. in Minneapolis, Minnesota.
[2] *Fair Isaac Corp. v. Experian Information Solutions Inc.*, Civ. No. 06-4112 ADM/JSM (D. Minn.).

to FICO's dominance[3] in the relevant market of generic credit scores.[4] FICO sued VantageScore Solutions within months of its formation, asserting several claims, including antitrust claims, and asking the court to put VantageScore Solutions out of business entirely.[5]

FICO readily acknowledged in that litigation that its Classic score was "the dominant credit score,"[6] which at that point in time represented, for example, "more than 94% of the business-to-business segment" of the market.[7]

The introduction of VantageScore, however, did not impede FICO's dominance.[8] And more than twelve years later, the competitive landscape, according to FICO, remains largely unchanged. Today, FICO claims, as it has for years, that its credit scores are used

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[3] *See Fair Isaac Corp. v. Experian Information Solutions Inc.*, 650 F.3d 1139, 1144 (8th Cir. 2011)(the credit bureaus joined to develop a "credit score algorithm that could compete with FICO and reduce the amount the credit bureaus paid as royalty for using FICO's algorithms"). Market participants had also expressed a desire for a legitimate alternative to FICO.

[4] Several RFI responses have focused on the CRAs' alleged dominance in the market for consumer credit data. *See, e.g.*, William Stallings, *Competition Considerations in Changing Mortgage Finance Credit Score Requirements* at 3 ("the CRAs control the data on which credit scores are based")(hereinafter "*Competitive Considerations*"). That, however, is not the relevant market for purposes of analyzing antitrust threats in the mortgage sector, as was determined in FICO's litigation against VantageScore.

[5] FICO'S Third Amended Complaint, in the Prayer for Relief, asked among other things that "The Defendants be ordered to dissolve VantageScore...." (Nov. 10, 2008)(Dkt. No. 436). FICO also claimed that its trade secrets had been copied in the development of VantageScore's algorithm, but FICO dropped that claim after one of its experts found no evidence to support that theory and the court also ordered FICO to produce all of the trade secrets it alleged had been copied.

[6] *Fair Isaac Corp. v. Experian Information Solutions Inc.*, 645 F. Supp. 2d 734, 764 n.2 (D. Minn. 2009)(FICO is the "dominant credit score")(citing FICO 3d Am. Compl. ¶¶ 22, 40).

[7] *Id.* at 738.

[8] *Id.* at 754-55 (detailing FICO's continued dominance in the credit scoring market despite the introduction of the first VantageScore credit score three years earlier).

in 90% of all of the lending decisions in the United States.[9] FICO has no evidence to support any notion that the CRAs have harmed FICO in the last twelve years.

Public statements confirm that FICO's business has continued to boom. For example, in FICO's November 9, 2017 10-K, FICO reported that:

> Scores segment revenues increased $25.3 million in fiscal 2017 from 2016 due to a $14.2 million increase in our business-to-business scores revenues and an $11.1 million increase in our business-to-consumer services revenue.[10]

Barclays made the following statement regarding FICO's January 25, 2018 earnings release:

> We saw more positives than negatives from FICO's 1Q18, and update our PT to $175 (from $150). Three key takeaways: 1) Scores showing no signs of slowing down: B2B (+13% y/y) continues to benefit from healthy consumer credit trends, and **better-than-historical pricing escalations**. B2C displayed well-rounded growth (albeit +27% in 1Q benefitted from easiest comp), supported by continued ramp with EXPN.... (emphasis added).[11]

The strength of FICO's current earnings; its recent, unilateral, and "historical" price increases;[12] its claimed dominant position in the marketplace, coupled with FICO's

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[9] *See Credit Where Credit is Due*, *DSNews* (Feb. 1, 2018)(interview with FICO's Joanne Gaskins), available at http:/dsnews.com/daily-dose/02-01-2018/future-fico-gses; *see also* Mercator Press Release, *FICO® Scores Used in Over 90% of Lending Decisions According to New Study* (Feb. 27, 2018)("New research from Mercator Advisory Group has found that in the United States, FICO® Scores were in 2016 used in more than 90% of lending decisions, including credit cards, mortgages, and automobile financing."), available at https://www.mercatoradvisorygroup.com/.

[10] This represents business that, by FICO's own admission, is sold through the three CRAs.

[11] Another Barclays' investor communication, dated December 22, 2017, noted that: "Scores business is most profitable segment (50% of profitability) and [is] all in the U.S."

[12] FICO's recent price increases put the lie to the notion, *see infra*, that the CRAs somehow control the pricing of an entity that has monopoly power.

joint, well-publicized initiatives with Experian (one of VantageScore Solution's owners); its joint development and sale of the FICO XD credit score with Equifax (another one of VantageScore Solution's owners); and all three CRAs' substantial sale of FICO scoring products underscore FICO's continued ability to compete successfully in all of those industries in which VantageScore is also accepted.[13]

Despite the foregoing and other factors, several responses to the RFI speculate that if Option 3 were to be adopted, VantageScore Solutions and/or its owners would gain some type of anticompetitive advantage and misuse that advantage to drive FICO from the mortgage space. These responses, often proffered by persons associated with FICO, argue that the maintenance of FICO's monopolistic position is the sole remedy to protect FICO from alleged extinction.

Two of FICO's outside attorneys, William Stallings, of Mayer Brown LLP,[14] and Joseph A. Smith, of Poyner Spruill,[15] have submitted responses opposing a change in the status quo, as have Tom Parrent and Ann Schnare, two consultants whose papers submitted to FHFA were funded by FICO.[16]

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[13] Indeed, Equifax's new CEO, Mark Begor, is currently on FICO's board of directors, although it is reported that Begor will be resigning from that directorship before starting with Equifax on April 16, 2018. *See, e.g.*, Jenny Surane, *Equifax Names Warburg Pincus's Begor CEO After Data Breach* (Bloomberg Mar. 28, 2018).

[14] Although Stallings asserts that his submission "is based on my independent review of the competition issues raised by the RFI," *see Competitive Considerations* at 1, Stallings represents FICO, the credit scoring company which benefits the most from the maintenance of the status quo. As Stallings acknowledges: "The Enterprises have long required the use of FICO® Scores in connection with mortgage finance credit applications." *Id.*

[15] Joseph Smith similarly states that his submission "is based on my independent review of the regulatory, supervisory, and policy issues that, in my opinion, are fundamental to FHFA's determination as to 'alternative' credit scoring," but he too concedes that he is submitting his response to the RFI "as counsel to Fair Isaac Corporation (FICO)." Joseph A. Smith, Jr. RFI Response at 1 (Jan. 29, 2018) (hereinafter "Smith").

[16] Ann B. Schnare, *Alternative Credit Scores and the Mortgage Market: Opportunities and Limitations* at 1 (Dec. 4, 2017)(FICO "provided funding for this paper)(hereinafter "Schnare's Paper"); Tom Parrent & George Haman, *Risks & Opportunities in Expanding*

Those submissions all threaten dire competitive consequences if FICO were unable to maintain its exclusive position in the mortgage space. For example, Stallings claims that "[t]he principal competitive concern . . . is that allowing the use of VantageScore would provide the CRAs both the *incentive* and the *ability* to foreclose FICO as a mortgage credit score provider."[17] "In credit information markets, mortgage or otherwise," Stallings writes, "the CRAs already control the data used to generate credit scores, set the downstream price for credit scores offered by both FICO and VantageScore, and own VantageScore itself."[18] He then goes on to imply (erroneously) that the CRAs' joint ownership of VantageScore Solutions somehow runs afoul of "the antitrust laws," a theory that was resoundingly rejected in FICO's 2006 lawsuit against VantageScore Solutions and the CRAs.[19]

Based on the foregoing, Stallings theorizes that "should FHFA authorize the use of" VantageScore credit scoring models, that "undoubtedly would harm FICO as a competitor as it would drive FICO from the mortgage market, leaving VantageScore as the only provider."[20]

Smith's submission similarly threatens dire anticompetitive consequences if VantageScore were to be offered as a choice, contending that by "[a]uthorizing a credit

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Mortgage Credit Availability through New Credit Scores (cover page indicating that "Research sponsored by FICO").

[17] *Competitive Considerations* at 1 (italics in original). Stallings claims that the competition issues that would arise if VantageScore were a permitted alternative would be "similar to those that frequently arise in connection with vertical mergers or vertical integrations," and then contends that although "many" instances "of vertical integration or vertical transactions" are admittedly "procompetitive," allowing VantageScore as an alternative would "harm" the competitive process. *Id.* at 2-3. This is ironic given that this arena is currently bereft of any competition.

[18] *Id.*

[19] *Fair Isaac Corp.*, 645 F. Supp. 2d at 747.

[20] *Competitive Considerations* at 1. Stallings' arguments are based on the unfounded (and historically inaccurate) notion that VantageScore Solutions and the three CRAs are planning to violate the antitrust laws. Those antitrust laws are designed, however, to protect competition (and not competitors), to ensure that antitrust violations do not occur, and to empower those alleging antitrust injury to seek redress. Should VantageScore or any of the three CRAs commit an antitrust violation, past history reveals that FICO is both willing and able to file suit under the federal antitrust laws.

scoring regime that includes as an option a provider owned and controlled by the three entities that are the only providers of both the credit data necessary to generate credit scores and the means to distribute them virtually guarantees a reduction in or elimination of competition."[21]

Parrent's RFI response contends that "[t]he ownership structure, pricing power and control over data wielded by the CRAs and VantageScore pose a clear danger to fair competition in credit scoring."[22] Parrent hypothesizes "that VantageScore acceptance without a complete separation of ownership from the CRAs will ultimately result in an effective monopoly in the credit scoring space."[23]

Schnare's RFI response argues, among other things, that FICO "is the only logical choice given concerns over VantageScore's ... problematic ownership structure."[24] She claims that if FHFA were to permit the use of competing scores, "it should take steps to ensure that the credit bureaus do not use their control over credit records . . . to steer the market to VantageScore."[25]

A submission by Anne C. Canfield, the Executive Director of the Consumer Mortgage Coalition, raises a similar concern, that "the ownership structure of VantageScore is . . . problematic."[26] She also charges that "Equifax, Experian, and Transunion have a shared monopoly in the consumer finance space because FHFA requires every consumer to purchase all three reports from the CRAs."[27]

The concerns raised by Stallings, Smith, Schnare, and Canfield, as well as other RFI responses threatening FICO's extinction, are unfounded.[28] This scenario is both

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[21] Smith at 1.
[22] Tom Parrent & George Haman RFI Response at 13 (Jan. 29, 2018).
[23] *Id.*
[24] Ann B. Schnare RFI Response at 2 (Jan. 17, 2018).
[25] Ann B. Schnare RFI Response Appendix A at 2 (Jan. 17, 2018).
[26] Anne C. Canfield RFI Response at 3 (Mar. 15, 2018).
[27] *Id.* at 4.
[28] Canfield's "shared monopoly" challenge is without legal support because such allegations cannot support a viable antitrust claim. *See, e.g., Int'l Longshore & Warehouse Union v. ICTSI Oregon, Inc.*, 15 F. Supp. 3d 1075, 1096 (D. Ore. 2014) ("'[A]n allegation of conspiracy to create a shared monopoly does not plead a claim of conspiracy under section 2.'")(quotation omitted); *Oxbox Carbon & Minerals LLC v.*

unlikely (given FICO's claimed and continuing dominance in all other pertinent industries despite VantageScore's presence therein) as well as ironic (given FICO's efforts to continue to remain the only scoring model that the Enterprises are allowed to accept). The notion that FICO will somehow be driven from the mortgage market if it were to be faced with legitimate competition for the first time is nothing more than a scare tactic.

Indeed, this is not the first time that FICO has raised this specter. In its 2006 lawsuit, FICO alleged that the CRAs' goal in forming VantageScore Solutions "was not merely to compete with FICO scores but to eliminate FICO scores from the credit scoring market entirely."[29] Although that situation has never occurred, FICO echoes a similar refrain here, claiming that the CRAs are again intent on eliminating FICO from a market, in this case, the mortgage market.

A review of the last twelve years shows the improbability of the threat on which FICO and its supporters focus. The CRAs could have taken steps to hamper FICO's growth anytime over the last twelve years, but it has not happened. Instead, public statements reveal that the CRAs have facilitated FICO's growth, in terms of scores sold, over the last twelve years.

Moreover, an examination of every other industry in which the two credit scores compete demonstrates via concrete evidence, as opposed to some hypothetical notions, that VantageScore's acceptance and use in those other industries has not resulted in FICO's elimination from those markets.

On the other hand, FICO has engaged in a campaign to quash any meaningful competition since 2006. In 2006, FICO encouraged the U.S. Department of Justice to

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Union Pacific Railroad Co., 926 F. Supp. 2d 36, 45 (D.D.C. 2013)(allegations of a "shared monopoly" do not support an antitrust claim).

Indeed, in *Standfacts Credit Servs., Inc. v. Experian Info. Solutions, Inc.*, 405 F. Supp. 2d 1141 (C.D. Cal. 2005), the court expressly rejected Canfield's notion that the tri-report requirement could lead to a viable monopolization claim against the three CRAs. *Id.* at 1151-52.

In fact, it is *FICO*, not VantageScore or the three CRAs, which currently enjoys a monopoly.

[29] *Fair Isaac Corp.*, 645 F. Supp. 2d at 739. The Court rejected FICO's allegation when finding that it lacked antitrust standing. *Id.* at 753.

look into VantageScore Solutions and its formation. The Department of Justice closed its inquiry of VantageScore Solutions in January of 2007 with no further action taken.

FICO also continued to pursue its lawsuit against VantageScore Solutions and the CRAs, in part because of FICO's claimed concern that the CRAs were going "to drive [FICO] out of business."[30] The court rejected FICO's theory outright, finding instead that the CRAs' "strategy of persuading the market that one product is equal or superior to another product and that the price of the first product presents a higher value proposition than does the second is the very nature of competition."[31]

Stallings argues, however, that the FICO litigation against VantageScore Solutions is without much significance because the federal district court ruled, and the United States Court of Appeals for the Eighth Circuit affirmed, the dismissal of FICO's antitrust claims on the basis of its lack of standing.[32] That argument underplays the significance of the courts' rulings that FICO lacked "antitrust standing."[33] To find a party lacks antitrust standing, a court must conclude that the complainant did not suffer "antitrust injury."[34] Such a finding goes directly to a principal element of a viable antitrust claim, that is, that the party bringing the action must be harmed in a manner that is forbidden under the antitrust laws.[35] As a result, a finding of an absence of antitrust standing is deemed a ruling on the merits.[36]

The district court in the FICO case clearly reached the merits of FICO's antitrust claims when holding that those claims failed as a matter of law because FICO lacked antitrust standing:

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[30] *Id.* at 750.
[31] *Id.* at 751.
[32] *Competitive Considerations* at 8.
[33] *Fair Isaac Corp.*, 645 F. Supp. 2d at 753, *aff'd* 650 F.3d at 1146.
[34] "An antitrust injury is 'injury of a type that the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Fair Isaac Corp.*, 650 F.3d at 1144-45 (citation omitted).
[35] *See, e.g.*, *Ethypharm S.A. France v. Abbott Laboratories*, 707 F.3d 223, 232 & n.15 (3d Cir. 2013)("antitrust standing 'is simply another element of proof for an antitrust claim, rather than a predicate for asserting a claim in the first place'")(quotation omitted).
[36] *Id.* ("failure to establish antitrust standings is a merits issue").

> Fair Isaac's antitrust claims **suffer from a fundamental, indeed fatal, flaw**. The alleged conspiracy does not employ tactics that seek to destroy or cut off competition *before it even has a chance to take hold*; rather, the alleged conspiracy is dependent on convincing the market … that greater value can be realized by switching from FICO scores to VantageScore credit scores. **This is the very essence of competition.**[37]

Permitting a choice of credit scores in the mortgage sector would also foster the "very essence of competition." A review of historical facts demonstrates that competition between FICO and VantageScore has not triggered FICO's elimination from any other industry, but has instead fostered innovation, and there is no evidence to suggest that the situation would be any different in the mortgage arena. If Option 3 were to be adopted, the antitrust laws stand ready to protect any entity that is harmed by actionable anti-competitive behavior,[38] and unfounded scare tactics should not tip the balance when all evidence regarding the value of competition supports choice rather than exclusivity.

Very truly yours,

Barbara Podlucky Berens

Barbara Podlucky Berens

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[37] *Fair Isaac Corp.*, 645 F. Supp. 2d at 752 (emphasis added; italics in the original).

[38] For example, sales of credit data or credit reports are deemed to be services subject to the protections of the Sherman Act and the Federal Trade Commission Act, as well as portions of the Clayton Act. *See, e.g.*, *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 476 F.2d 989, 991 (5th Cir. 1973)(affirming injunctive relief against company selling credit reports for violations of Sections 1 and 2 of the Sherman Act and Sections 7 and 16 of the Clayton Act); *Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, 235 F. Supp. 3d 1054, 1060 (N.D. Ill. 2017)(FTC action against company that offered credit monitoring services and online credit scores which alleged violations of the Federal Trade Commission Act and other laws).