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June 15, 1994

VIA HAND DELIVERY

Honorable Anne K. Bingaman
Assistant Attorney General
U.S. Department of Justice
Antitrust Division
Tenth and Constitution Ave., N.W.
Washington, D.C. 20530

Re: Business Review Request for the Mortgage
Industry Data Exchange

Dear Ms. Bingaman:

Pursuant to Title 28 of the Code of Federal Regulations § 50.6 and the Antitrust Division's expedited business review policy, the Mortgage Asset Research Institute, Inc. ("MARI") requests that the Department of Justice provide it with an expedited business review letter stating the Department's antitrust enforcement intentions with respect to an information clearinghouse MARI wishes to establish for the mortgage industry.^{1/} The clearinghouse, to be known as the Mortgage Industry Data Exchange ("MIDEX"), will contain information about non-public incidents involving fraud, material misrepresentation, and other serious misconduct by real estate and mortgage industry professionals and companies that participate in originating, insuring, selling, or servicing mortgage loans.^{2/} Information reported in the MIDEX database is limited to incidents involving mortgage professionals

^{1/} The segment of the mortgage industry using the proposed clearinghouse will be comprised initially of those organizations dealing primarily with residential mortgages (both single and multi-family). However, the clearinghouse may also be available for the report of incidents relating to commercial mortgage lending.

^{2/} We use "mortgage loan," "mortgage," and "loan" synonymously for purposes of this letter.

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and their companies. No information in the MIDEX system will be used for considering the eligibility of consumers for credit.

To facilitate the Department's review, this letter will briefly describe the need for MIDEX, outline its proposed operation, and provide the Department with information necessary for analyzing the competitive effects of the information exchange. MIDEX has been carefully structured to achieve its pro-competitive purpose of better enabling the mortgage industry to eliminate losses due to fraud, material misrepresentation, and other serious misconduct.

Background on the Mortgage Industry

In 1993, the residential mortgage industry originated over \$1 trillion in traditional mortgage loans, based on a U.S. Department of Housing and Urban Development survey of mortgage lending activity. Approximately 55% of those mortgage loans were refinances of old mortgages, and 45% were new loans, according to the Mortgage Bankers Association of America.

The process of originating and insuring mortgages, as well as the subsequent servicing and resale of mortgages to investors, depends on reliable and trustworthy professionals and companies. To originate a loan, numerous professionals and companies are involved: real estate agents, mortgage application specialists, mortgage processors (who assemble packages of loan documents), real estate appraisers, loan officers, mortgage insurers (who guarantee the repayment of the loan), closing agents, and title and escrow companies. In making the credit decision regarding whether to approve a loan, the originating institution compiles a mortgage loan file containing detailed factual information on the applicant and on the adequacy of the security for the loan. In deciding whether to insure the loan at the time of origination, the mortgage insurer also depends on the integrity of the files and of the professionals and companies involved to assure that the information provided is accurate and reliable.

In addition, other mortgage industry professionals and companies are involved with the loan after it is originated. Loans can be either held for the originator's own portfolio or sold to investors, who either hold the loans in their own portfolios or package loans into mortgage-backed securities. Finally, mortgage servicers collect monthly loan payments for investors who own the loans. These mortgage servicers also make required payments of

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borrowers' insurance and tax obligations. There is a large and active market in the purchase and sale of mortgage loans and mortgage servicing rights.

The smooth functioning of mortgage origination and markets for mortgage insurance, sales, and servicing depends on the accuracy and reliability of the information in mortgage loan files. Unfortunately, there are opportunities for unscrupulous participants to misrepresent facts critical to transactions in all these markets. Their actions often result in loans that are subsequently not repaid, causing substantial losses to the industry and additional costs to its customers.

The total loss to the mortgage industry caused by unscrupulous mortgage industry professionals and companies is not known. However, it is estimated that residential mortgage fraud costs billions of dollars per year.

Prompt detection of unscrupulous operators is currently quite difficult. Large mortgage purchasers and originators, based on their own experience, may compile internal data on professionals and companies that have been involved with fraud, material misrepresentation, or other serious misconduct. In the absence of a mechanism to exchange non-public information on a timely basis, however, an unscrupulous operator can victimize many firms before any effective action is taken to protect the industry. Information about incidents of fraud known to individual companies is not currently available to other participants in the industry.

In summary, MIDEX is intended to provide a mechanism whereby information about fraud, material misrepresentation, and serious misconduct can be exchanged by mortgage industry participants so that adequate and timely protective measures can be taken to increase the quality of mortgage loans and to reduce losses.

The Mortgage Industry Data Exchange

MARI is independently owned and operated. MARI is a for-profit company that currently provides database services to the financial and mortgage industries. MARI operates a public information database, known as FISLACH (Financial Institutions Sanctions and Legal Action Clearinghouse), which contains public information about incidents resulting in disciplinary and other actions brought against financial, real estate, and mortgage

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industry firms and professionals by federal, state, and trade oversight bodies.

Information in the FISLACH database is collected from approximately 75 different sources and contains approximately 100,000 names. More than a thousand searches are conducted of this database each month. Without FISLACH, those sanctioned by government regulators could more easily move undetected into new jurisdictions or businesses and resume the same activity for which they were previously sanctioned.

Experience with the FISLACH database underscores the utility of exchanging data about fraud, material misrepresentation, or other serious misconduct. Users of that database have uncovered many incidents perpetrated by parties that would not otherwise have become known. The availability of the FISLACH information has allowed subscribers to adopt safeguards to prevent further misconduct, thereby saving the industry and its customers from substantial losses. These safeguards include, for example, obtaining additional documentation, performing additional scrutiny of the transaction, or using other professionals.

Users of MARI's public information database urged establishment of a database for non-public information to supplement the current FISLACH public information database. In response, MARI served as manager for a research project involving a group of mortgage industry participants, known as the Mortgage Loss Prevention Forum, which studied the feasibility of such a database. However, like FISLACH, MIDEX will be owned and operated by MARI.

MIDEX will contain information about incidents of fraud, material misrepresentation, and other serious misconduct across a wider range of cases (some of which are not under the oversight of any bodies currently surveyed by MARI) and in a more timely manner (before oversight bodies process the incidents and publish their disciplinary actions). MIDEX subscribers will indicate whether they wish to have their requests for information also matched against the public FISLACH database. It is anticipated that most subscribers will use both databases.

MIDEX services will be made available to any mortgage originator, insurer, servicer, purchaser, or other mortgage industry firm that is in a position to uncover and report fraud, material misrepresentation, or serious misconduct. MIDEX users will be required to submit information, on a non-exclusive basis, arising from their own experience indicating that fraud, material

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misrepresentation, or other serious misconduct has occurred with respect to a mortgage. Users may submit requests to MIDEX for information about mortgage professionals or companies with which they are doing business or contemplate doing business.

Operation of MIDEX

As is more fully discussed below (see "Antitrust Analysis"), courts have long recognized that industry participants may exchange information about the performance (e.g., credit histories) of third parties without violating the antitrust laws, provided that participants continue to make independent decisions on the basis of such information.

MIDEX has been designed to satisfy these conditions and to avoid any risk to competition. The details of the program are set out below. Most importantly, MIDEX subscribers will exchange MIDEX reports in electronic or written form and only with regard to incidents of fraud, material misrepresentation, or serious misconduct by mortgage industry professionals and companies. MIDEX subscribers will exchange MIDEX reports only through an independent third-party vendor, MARI. Use of the MIDEX system will not involve contact between MIDEX subscribers. MARI will not identify to MIDEX subscribers the name of the party supplying the incident information or the names of parties to whom information is disclosed.^{3/} Finally, there will be no information exchanged through MIDEX regarding any decision made by a subscriber with respect to doing future business with parties discussed in MIDEX reports.

The purpose of MIDEX, as set forth in MARI's Agreement for Services,^{4/} is to provide an accurate and dependable clearinghouse for the collection and dissemination of information about

^{3/} The system will also encourage self-reporting of incidents of fraud, material misrepresentation, or serious misconduct. For such cases, the reporting firm and the firm involved with the incident are the same. The fact that the matter was self-reported may be reflected in the database.

^{4/} The current draft is attached as Appendix A. Confidential treatment pursuant to 28 C.F.R. § 50.6 is requested for Appendices A, B, and C, given the proprietary nature of the information supplied.

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incidents of fraud, material misrepresentation, and other serious misconduct by mortgage industry professionals and companies. Subscribers will submit information about incidents in their experience wherein fraudulent information was supplied as part of a mortgage transaction or in which there was other serious misconduct by a real estate or mortgage industry professional or company. To illustrate, this might be the case where an appraisal represents that there is a \$200,000 house on a piece of property when, in fact, the actual property is merely an empty lot.

MIDEX subscribers will be able to access the MIDEX database by contacting MARI and requesting a search on an individual or organization with whom the subscriber is doing business or contemplates doing business. The inquiring subscriber will be provided information about incidents relating to such party. Subscribers will use this information to determine independently whether and on what basis to do business with a reported individual or entity. A subscriber may choose to perform additional quality control audits on the work of persons or companies mentioned in reports from the database, take no remedial steps, or elect not to use such parties, depending on the nature of its experience with reported persons or companies and the nature of the report of an incident.

In addition, MARI will provide MIDEX subscribers with an update service on mortgage professionals and companies with whom the subscriber does business. Subscribers who wish to use this service will send MARI lists of professionals or companies. As new incident reports are received, MIDEX will determine whether any names in the new report match those names previously submitted by the subscriber. If so, the subscriber will be provided with this new information.

It is important to note what information will not be exchanged through MIDEX. No information will be exchanged through MIDEX about the terms on which subscribers do business with the real estate and mortgage industry professionals or firms referenced in MIDEX incident information. No MIDEX reports will be exchanged through MIDEX concerning whether the reported incidents resulted in modification or termination of the terms on which the reporting company does (or did) business with the referenced party. There will be no exchange of information through MIDEX on how parties who are referenced in incident reports are or will be treated by either a report-generating or a report-receiving subscriber. MIDEX will make no recommendation as to

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any action that should (or should not) be taken by subscribers. Each subscriber will retain the sole discretion to exercise its independent judgment concerning the professionals or firms with whom it transacts business and in what manner. No information will be exchanged among subscribers through MIDEX about the identity of reporting or using parties (although the fact that a matter is self-reported may be noted). The MIDEX Compliance Policies^{5/} outline the antitrust safeguards to be used in the operation of MIDEX.

Incident information will indicate the type of incident that took place, identify the parties involved, and contain a short description of the incident.^{6/} The Agreement for Services specifies the responsibilities of MIDEX subscribers with regard to supplying MARI information about reportable incidents, and defines the relationship between MARI and MIDEX subscribers.

The information reported by the subscribers includes the following, when known:

A. Reference information for the report:

1. Report type (original, correction, update, or replacement of former report);
2. Date of submission by reporting organization;
3. Name, network number, etc. of reporting organization (access restricted); and
4. Name and telephone number of person submitting report (access restricted).^{7/}

B. Incident information:

1. Date of incident;
2. Incident type code;

^{5/} Attached as Appendix B is the current draft of the Compliance Policies.

^{6/} Attached as Appendix C is the current draft of the incident report form.

^{7/} The information in A-3 and A-4 will not be made available to other subscribers but will be maintained solely for the administrative use of the database. The fact that a matter has been self-reported may be noted.

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3. A description of the incident;
 4. Identification of property securing loan, if a loan was made, by zip code or city & state; and
 5. A verification code indicating the level at which facts of the described incident have been verified.
- C. Information about real estate or mortgage professionals or organizations associated with the incident:
1. Name(s) used by the party involved in the incident;
 2. Address of party;
 3. Description of any licensing information about the party;
 4. Functional capacity in the reported incident (e.g., appraiser, appraisal company, loan officer, or originating lender).
 5. For individuals, the position with employing organization, date of birth, social security number, and other information to assist in uniquely identifying individuals; and
 6. For entities, federal taxpayer I.D. number or other unique identification information, if known.

MIDEX will periodically inform MIDEX subscribers about various administrative and operational matters, including the possible convening of an advisory committee, in an effort to improve its service. Any advisory committee meetings will follow written agendas that will contain the names of those scheduled to attend, and a brief description of the topics to be discussed. Antitrust counsel retained by MARI will attend all meetings, and counsel for each subscriber will be welcome to attend. Only matters such as adequacy of the service and operation of the MIDEX system will be discussed; in no event would the discussion involve either any specific MIDEX report or any information that (as described above) is not to be exchanged. After any subscriber meeting, minutes of the meeting will be promptly circulated, describing the discussions that took place.

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Antitrust Analysis

A. MIDEX Has Been Structured to Comply with the Antitrust Laws.

Attached are the current drafts of the Agreement for Services and the Compliance Policies for MIDEX. The Agreement and Compliance Policies provide the framework for MIDEX's operations, including its mission, subscriber requirements, management, and related issues.

Subscription to the MIDEX database services is open to thrifts, banks, mortgage bankers, mortgage purchasers, mortgage investors, mortgage insurers, mortgage servicers, and other participants in the real estate and mortgage industries that have a need for and capacity to develop information about incidents involving fraud, material misrepresentation, and serious misconduct relating to mortgage loans. Each new subscriber must sign the Agreement for Services, which requires compliance with the antitrust laws.

The database will be owned and managed by an independent third party, MARI. Use of the MIDEX system will not involve any direct exchange of information between MIDEX subscribers. No information will be exchanged through the MIDEX system concerning the prices, terms, or conditions under which subscribers do business with the professionals or companies whose names and/or companies appear in the databases. There will be no exchange of information through MIDEX between subscribers concerning what response should be taken with regard to any individual or company. Nor will MIDEX exchange information on what remedial actions, if any, the reporting firm has taken with respect to the entities involved.

B. Implementation of MIDEX is Pro-Competitive.

The purpose of MIDEX is to facilitate the timely identification of real estate and mortgage industry professionals and organizations who have been associated with mortgage fraud, material misrepresentation, or other serious misconduct. Implementation of the MIDEX service will enable real estate and mortgage industry participants to make informed decisions about the professionals and organizations with whom the subscribers are doing business or contemplate doing business.

Courts have found that industry information exchanges relating to the integrity of firms comply with the antitrust laws,

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provided that they are properly structured and operated. Performance-related exchanges, such as exchanges of creditworthiness and other performance data, uniformly have been held not to violate the Sherman Act. The leading case remains the Supreme Court's opinion in Cement Manufacturers Protective Association v. United States, 268 U.S. 588 (1925), in which the Court evaluated the exchange among competitors of customer credit information and of information bearing on the responsibility of buyers. The Court concluded that:

Distribution of information as to credit and responsibility of buyers undoubtedly prevents fraud and cuts down to some degree commercial transactions which would otherwise be induced by fraud . . . we cannot regard the procuring and dissemination of information which tends to prevent the procuring of fraudulent contracts or to prevent the fraudulent securing of deliveries of merchandise on the pretense that the seller is bound to deliver it by his contract, as an unlawful restraint of trade. . . .

Id. at 604. Subsequent cases have upheld exchanges of credit or like information to protect firms against fraud or other losses. See Zoslaw v. MCA Dist. Corp., 693 F.2d 870, 886 (9th Cir. 1982), cert. denied, 460 U.S. 1085 (1983); Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1048 (2d Cir. 1975) ("dissemination to competitors of information concerning the credit-worthiness of customers aids sellers in gaining information necessary to protect themselves against fraudulent or insolvent customers"), cert. denied, 429 U.S. 885 (1976); Johns v. Associated Aviation Underwriters, 203 F.2d 208, 211 (5th Cir.) (no violation of antitrust laws results from exchange of a report from association of insurance underwriters concerning commercial pilot's competence in flying aircraft), cert. denied, 346 U.S. 834 (1953); Metro Video Distributors Inc. v. Vestron Video, Inc., 1990-1 Trade Cas. Para. 68,986 at 63,352 (D.P.R. Feb. 8, 1990) ("[U]nder federal antitrust law[,] decisions involving credit have always required and produced totally different analyses from those involving prices. . . . [I]t has long been held that the exchange of information between competitors regarding the credit worthiness of customers does not violate any provision of the federal antitrust laws.").

Prior Department business reviews have provided guidance to industry data exchange efforts aimed at preventing losses. The Department has consistently approved the exchange of data through

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a third party concerning fraud and credit or loss experience, such as problem accounts, where the exchange does not involve the terms on which firms conduct their business. Such exchanges reduce losses by providing information that aids the unilateral decision-making of the subscribing firms.

For example, the Department favorably reviewed the Experience Information Bureau ("EIB"), which proposed to exchange historical loss performance data among underwriters of credit life and disability insurance, on January 14, 1992.^{8/} EIB proposed that it collect historical loss data relating to lenders to assist the subscribing insurers in evaluating risks relating to policies sold by those lenders. EIB in turn would assemble the requested data to calculate a loss ratio for each institution. Like EIB, MIDEX would make no recommendation regarding the information contained in the report. EIB was open to insurance carriers on a nationwide basis; MIDEX likewise will be open to mortgage industry firms involved in the origination, servicing, insurance, purchase, or sale of mortgages on a nationwide basis. MIDEX, like EIB, will provide its reports for information purposes only; subscribers retain the sole discretion on whether and on what terms to deal with any entity on whom information is given. Like EIB, price and other terms of the loan, mortgage, or insurance will not be exchanged.

In 1987, the Department favorably reviewed a credit exchange, the National Railroad Industry Trade Group ("NRITG").^{9/} The exchange there involved information about the creditworthiness of certain shippers. Like MIDEX, the NRITG used a third party to gather and disseminate the credit information. Like MIDEX, NRITG does not involve the exchange of pricing data nor identify the sources of information.

Earlier this year the Department approved the credit information exchange of the National Association of Credit Management.^{10/} The clearinghouse would exchange information about "problem accounts" of customers of firms in the leasing business. As with MIDEX, the exchange of data on problem accounts would not involve the exchange of information on terms

^{8/} Attached as Appendix D.

^{9/} Attached as Appendix E.

^{10/} Attached as Appendix F.

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or conditions under which members of the exchange would do business with their customers. Because members would exchange information to be used for unilateral credit-making decisions, the Exchange was found to have a pro-competitive purpose. MIDEX will serve the same function.

Most recently, the Department approved the National Telecommunications Data Exchange ("NTDE"), a credit information exchange among the telecommunications carriers.^{11/} NTDE proposes to use a third party to exchange information on closed commercial telephone accounts with unpaid balances and to provide a "skip-tracing" service to reduce the burden of toll fraud and unpaid bills. Just as is contemplated with MIDEX, the identity of the firm making a report to NTDE would not be given to the firm receiving a report. In approving the business review request, the Department found that exchange to have been "designed with sufficient safeguards [so] that the program is not likely to facilitate collusion" and that the NTDE "will have a procompetitive effect." Again, similar safeguards, such as the use of an independent third party, have been built into the MIDEX program.

MIDEX will produce similar procompetitive benefits without risk to competition. This exchange of information has the potential to prevent or reduce billions of dollars in mortgage fraud-related losses to the industry, and thereby reduce the cost of fraud to investors and the borrowing public.

Expedited Business Review Policy

In its press release of December 1, 1992, the Department of Justice committed to providing expedited treatment (i.e., within 90 days) to business review requests with respect to information exchange proposals. Consistent with that announcement, we are requesting expedited treatment of this business review letter in order to move rapidly toward addressing this significant problem which faces the real estate and mortgage industries.

The Department's press release identified information and documents that should be provided regarding proposed information exchanges. This letter and its appendices provide substantially all of the information requested. We have set forth: 1) the types of organizations that are expected to participate in the

^{11/} Attached as Appendix G.

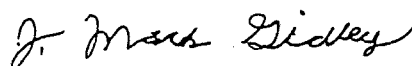
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exchange; 2) the purpose and objectives of MIDEX; 3) the nature, type, timeliness, and specificity of the information to be exchanged; 4) the method by which the information will be exchanged; 5) the general characteristics of the market(s) involved; 6) the fact that MIDEX is open to a wide range of parties in the real estate and mortgage industries nationwide; 7) the antitrust safeguards built into the program; and 8) the benefits provided by this exchange.

The only information identified in the Department's press release describing the expedited review policy that we have not provided is detailed information about the real estate and mortgage services provided by the various parties that may become involved in the program, their pricing and marketing practices, the availability of information regarding market conditions, individual transactions, and individual competitors, and the ten largest customers for MIDEX's services. Providing such information would not, in our view, add to your analysis of this information exchange, but would pose a considerable burden, given the large number of participants in various aspects of the mortgage industry. Further, the availability of such information is affected by the fact that MARI cannot predict which particular industry participants will choose to be subscribers. We note, for example, that a favorable review was issued to NTDE without this information. It would appear this information was included in the press release in anticipation that the information exchanges under review would involve the exchange of price, output, or capacity information, where the more sensitive nature of the information exchanged might warrant a review of the market structure or characteristics by the Department.

We look forward to a prompt and favorable response to our request. We believe the MIDEX program can deliver substantial benefits to its subscribers and to all mortgage borrowers, who ultimately bear the cost of losses incurred due to fraud and misrepresentation. Please contact me at (202) 663-8830 if you have any questions.

Sincerely,



J. Mark Gidley

Enclosures

cc: B. Barry Grossman, Esquire