COMMENTS
of the National Consumer Law Center
(on behalf of its low-income clients)

and

Consumer Federation of America
Consumers Union
National Association of Consumer Advocates
U.S. Public Interest Research Group

to the
Office of the Comptroller of the Currency
12 CFR Part 41
Docket No. 06-04

Office of Thrift Supervision
12 CFR 571
No. 2006-06

Federal Reserve System
12 CFR 222
Docket No. R-1250

Federal Deposit Insurance Corporation
12 CFR 334
RIN 3064-AC99

National Credit Union Administration
12 CFR 717

Federal Trade Commission
16 CFR Parts 660 and 661
RIN 3084-AA94

Advanced Notice of Proposed Rulemaking: Furnisher Accuracy Guidelines and Procedures Pursuant to Section 312 of the Fair and Accurate Credit Transactions Act

The National Consumer Law Center ("NCLC")[1] submits the following comments on behalf of its low income clients, as well as the Consumer Federation of America,[2] Consumers

[1]**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

Union,[3] National Association of Consumer Advocates,[4] and the U.S. Public Interest Research Group[5] regarding the Interagency Advance Notice of Proposed Rulemaking concerning procedures to enhance the accuracy and integrity of information furnished to consumer reporting agencies ("CRAs").[6] The Fair and Accurate Credit Transactions Act of 2003 required the federal banking regulatory agencies and the Federal Trade Commission ("Regulatory Agencies") to issue guidelines regarding furnisher accuracy and integrity as well as regulations governing when furnishers are required to investigate direct disputes from consumers.[7]

I. PRELIMINARY DEFINITIONAL ISSUES: WHAT IS "ACCURACY"?

One of the fundamental issues that the Regulatory Agencies will need to address is what constitutes "accuracy." There are a number of definitional issues, which are discussed below.

a. "Accuracy" Should Be Defined to Mean that Information is Factually Correct in the Real World.

The term accuracy is not defined in the FCRA, but it is a critical concept in the statute. While one would think there would be no reason to disagree over what constitutes "accuracy", the matter is not so simple. The Regulatory Agencies must address this issue and define "accuracy" as information that is objectively true.

For years, furnishers have used a different standard of accuracy. They have treated a piece of information as accurate if it matches the data in their records. This is not enough. Accuracy is not simply "Conformity to data records." It is conformity to truth, to the objective

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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* (5th ed. 2002) and *Credit Discrimination* (3rd ed. 2002) are two of the eighteen practice treatises that NCLC publishes and annually supplements. These comments were written by Chi Chi Wu, Staff Attorney, with the assistance of Richard Rubin, Gail Hillebrand, Travis Plunkett, Ian Lyngklip, Evan Hendricks, Robert Hobbs, and Carolyn Carter. They are submitted on behalf of the Center's low-income clients.

[2] The **Consumer Federation of America** 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 advocacy and education.

[3] **Consumers Union**, the nonprofit publisher of Consumer Reports magazine, is an organization created 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 maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications. And noncommercial contributions, grants and fees. Consumers Union's publications carry no advertising and receive no commercial support.

[4] 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.

[5] **U.S. PIRG** serves as the federal lobbying office for the state Public Interest Research Groups, which are non-profit, non-partisan public interest advocacy organizations.

[6] 71 Fed. Reg.14419 (March 22, 2006).

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

reality of what is correct. For example, the first entry in the American Heritage dictionary defines accuracy as: "Conformity to fact"[8]

This controversy over "accuracy" has manifested itself most often in the area of disputes, discussed further in our Response to A.8. Furnishers have not conducted real investigations, but simply considered information accurate if they could verify it against their computer records. For example, in the notable case of Johnson v. MBNA, employees of a major credit card issuer testified that "in investigating consumer disputes generally, they do not look beyond the information contained in the [MBNA computerized Customer Information System] and never consult underlying documents such as account applications."[9]

As the jury found in Johnson, and other courts have held,[10] this method of ensuring accuracy is entirely unacceptable. The Regulatory Agencies should issue guidelines stating the same.

b. "Accuracy" Must Consider The Issue Of Credit Scoring.

Any test of accuracy must be considered in context of credit scoring. What may seem to be a minor issue standing alone may create enormous inaccuracies with respect to credit scoring. For example, the failure to report a credit limit by itself is a slight omission, except for the fact that Fair Isaac's credit score models base 30% of a credit score on the ratio of credit used to credit available.[11] Thus the failure to report a credit limit can significantly depress a credit score (see Response to A.1 below).

Another example where credit scoring matters is when a furnisher deletes a tradeline instead of correcting inaccurate adverse information. Not only does the deletion make the consumer report incomplete, which makes it inaccurate, such a deletion may have a tremendous impact on a credit score. The tradeline could be worth significant additional "points" in a credit score if properly corrected, if for example, it is the oldest account in the consumer's file or it affects the consumer's utilization ratio.

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[8] The American Heritage Dictionary of the English Language, (4th Ed. 2000). The first entry in the Merriam-Webster Online Dictionary is similar - "freedom from mistake or error." Available at http://www.m-w.com/dictionary/accuracy

[9] Johnson v. MBNA Am. Bank, NA, 357 F.3d 426 (4th Cir. 2004).

[10] Cushman v. Trans Union Corp., 115 F.3d 220, 224-25 (3d Cir. 1997) (perfunctory investigation improper once a claimed inaccuracy is pinpointed); Henson v. CSC Credit Services, 29 F.3d 280, 286-87 (7th Cir. 1994) (must verify accuracy of initial information); Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151, 1160 (11th Cir. 1991) (whether error could have been remedied by uncovering additional facts); Dynes v. TRW Credit Data, 652 F.2d 35-36 (9th Cir. 1981)(single effort to investigate inadequate); Bryant v. TRW, Inc., 689 F.2d 72, 79 (6th Cir. 1982) (two phone calls to the creditors insufficient; Swoager v. Credit Bureau, 608 F. Supp. 972, 976 (D.C. Fla. 1985) (merely reporting whatever information a creditor furnished not reasonable; *In re* MIB, Inc., 101 FTC 415, 423 (1983) (FTC ordered the CRA to include as part of such reinvestigation a reasonable effort to contact original sources); *In re* Credit Data Northwest, 86 FTC 389, 396 (1975) (FTC ordered a credit reporting agency to "request[] examination by the creditor, where relevant, of any original documentation relating to the dispute in addition to its own records). These cases predate the 1996 amendments to the FCRA.

[11] Fair, Isaac, *What's In Your Score,* available at www.myfico.com/CreditEducation/WhatsInYourScore.aspx.

c. Technical Accuracy is Not "Accurate": Information Must Be Complete and Non-Misleading

A third key definitional issue is whether information can be considered "accurate" if it is technically true in some narrow sense, but is overly general, incomplete, out of date, or misleading. We believe that technical accuracy is not enough; a report should not be misleading or incomplete, even if true in the narrowest sense.[12] This standard for accuracy is not *sui generis*. The omission of a material fact constitutes misrepresentation under common law and deception under the Federal Trade Commission Act.[13] This view is also supported by the FTC in its Commentary and other interpretations.[14]

"Technically accurate" but misleading or incomplete reports have the potential to wreak great havoc on consumers and the integrity of the credit reporting system. For example, a report might be technically accurate if it stated that a debt was turned over to a collection agency, but neglected to include that the debt was subsequently fully paid.[15] It might be technically accurate if it reported a suit against an individual, but omitted that the individual was sued in his official capacity as deputy sheriff.[16] Even if "technically accurate" and complete, a report still will be inaccurate when it is misleading or ambiguous in view of the jargon or understanding within the community or industry of its intended users.[17] Each of these reports is not truly accurate because it misleads the reader or omits critical information.

A review of the congressional history provides clear support that the FCRA has never contemplated a "technically accurate" standard. Consider, for example, an exchange between Senator Bennett, the industry spokesman in debates, and Senator Proxmire, the drafter of the Act:

> **Sen. Bennett**: "It doesn't take any judgment in the end to discover whether or not something is accurate in terms of treatment."
> **Sen. Proxmire**: "Well, here is a situation that has developed. One man's file had the charge in it that he had suffered a charge of assault. This was in the file. The information was not in the file that the charge had been dismissed because under the

[12] *See, e.g.,* Dalton v. Capital Associated Industries, 257 F.3d 409, 415-16 (4th Cir. 2001); Sepulvado v. CSC Credit Services, 158 F.3d 890, 895 (5th Cir.1998); Henson v. CSC Credit Services, 29 F.3d 280 (7th Cir. 1994); Pinner v. Schmidt, 805 F.2d 1258 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987); Koropoulos v. Credit Bureau, Inc., 734 F.2d 37 (D.C. Cir. 1984); Thompson v. San Antonio Retail Merchants Ass'n, 682 F.2d 509 (5th Cir. 1982); Neal v. CSC Credit Services, Inc., 2004 WL 628214 (D. Neb. Mar. 30, 2004) (Wilson turns on warning that information might be inaccurate); Agosta v. Inovision, Inc., 2003 WL 22999213 (E.D. Pa. Dec. 16, 2003) (misleading or materially incomplete entry is inaccurate). Curtis v. Trans Union, L.L.C., 2002 WL 31748838 (N.D. Ill. Dec. 9, 2002); Alexander v. Moore & Assoc., 553 F. Supp. 948 (D. Haw. 1982) (technical accuracy is not the standard; a consumer report must be accurate to the maximum possible extent); Bryant v. TRW, Inc., 487 F. Supp. 1234 (E.D. Mich. 1980), *aff'd*, 689 F.2d 72 (6th Cir. 1982); Tracy v. Credit Bureau, Inc. of Georgia, 330 S.E.2d 921 (Ga. Ct. App. 1985). *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) (case involved disclaimers placed in consumer reports).
[13] 15 U.S.C. § 45; National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2 (6th ed. 2004).
[14] FTC Official Staff Commentary §§ 607 items 3F(1), (2), (3), 611 items 5, 6.
[15] Todd v. Associated Credit Bureau Services, Inc., 451 F. Supp. 447 (E.D. Pa. 1977), *aff'd*, 578 F.2d 1376 (3d Cir. 1979), *cert. denied*, 439 U.S. 1068 (1979).
[16] Austin v. Bankamerica Service Corp., 419 F. Supp. 730 (N.D. Ga. 1974).
[17] Cassara v. DAC Services, Inc., 276 F.3d 1210 (10th Cir. 2002).

circumstances what had happened was that he had witnessed the mugging of an elderly person in the dark in the street and had gone to the elderly person's defense and in the course of doing this he had to assault the person who was mugging the elderly person. He was a hero. The person who had engaged in the mugging sued him for assault. Of course, it was dismissed.
You can have a report which is accurate but not complete and not fair. I think this is one of the reasons why you have to go a little further than simple accuracy."
Sen. Bennett: "I don't think a report that is that incomplete can be said to be accurate. But now we are talking about words."[18]

In the alternative, the Regulatory Agencies should issue guidelines that information lacks "integrity" if it is only technically accurate but omits critical information. The integrity of the credit reporting system depends on information that does not mislead the reader.

Further discussion of the problems of incomplete consumer reports is discussed in the Response to A.1 below.

II. RESPONSES TO SPECIFIC QUESTIONS IN THE REGULATORY AGENCIES' REQUEST FOR INFORMATION

Below are specific responses to some of the Regulatory Agencies' request for information

A1. *Please describe, in detail, the types of errors, omissions, or other problems that may impair the accuracy and integrity of information furnished to consumer reporting agencies. . . .*

Out of date information[19]

One of the most frequent errors is the "re-aging" of old debts by debt collection agencies and debt buyers, in which these furnishers report the date of last activity as a date later than what is legally permitted under the FCRA. There are numerous reported cases involving debt buyers and collectors re-aging debts,[20] including two major enforcement actions by the Federal Trade Commission.[21]

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[18] *Hearings on S. 823, Subcommittee on Financial Institutions on the Senate Banking and Currency Committee 91st Cong., 1st Sess. 34 (1969)*.

[19] The comments of Evan Hendricks contain additional information regarding this issue and we refer the Agencies to those comments.

[20] Rosenberg v. Cavalry Investments, LLC, 2005 WL 2490353 (D. Conn. Sept. 30, 2005) (re-aging of a decades-old debt by debt buyer; summary judgment denied to debt buyer on FDCPA and FCRA claims); Thomas v. NCO Financial Systems, 2002 WL 1773035 (E.D. Pa. July 31, 2002) (approval of settlement involving FDCPA claims for re-aging). *See also* United States v. Gallant, 2006 WL 278554 (D. Colo. Feb. 3, 2006) (criminal case where defendant re-aged entire portfolio); Gillespie v. Equifax Information Services, 2006 WL 681059 (N.D. Ill. March 9m 2006) (example of re-aging case, summary judgment for CRA because obsolete information was never disclosed in a consumer report)

[21] United States v. Performance Capital Management (Bankr. C.D. Cal 2000) (complaint), available at www.ftc.gov/opa/2000/08/performance.htm; United States. v. NCO Group, Inc., 2004 WL 1103323 (E.D. Pa. 2004) (consent decree requiring monitoring of FCRA complaints, particularly regarding delinquency date).

Debt buyers and collectors "re-age" debt by placing an incorrect "date of last activity" in the relevant field (Base Segment, Field 25) in the Metro 2 format. This field is extremely important as it sets the date for calculating the start of the obsolescence period under section 1681c of the FCRA. This date is supposed to be the date of first delinquency, i.e., 180 days after charge off or placement for collection. The Credit Reporting Resource Guide ("Metro 2 Manual") states *repeatedly* that this date of first delinquency of the debt is the operative date.[22] This is true regardless whether the debt was sold to subsequent entities. The date is also unaffected by subsequent repayment arrangements. When a buyer of bad debt purchases an account, the original owner should zero out the "current balance" field and inform the purchaser of the debt the date the account first became delinquent.[23]

Despite the clear directions of the Metro 2 manual, debt buyers and collectors are all too likely to report the date of first delinquency as the date of their acquisition of the debt and not, as required, the first delinquency experienced by the original creditor. This failure to comply with the Metro 2 industry standard effectively (and illegally) extends the FCRA obsolescence period. This error -- one that we have found is regularly committed intentionally[24] -- is economically beneficial to the collector because it causes the debt to be reported well beyond the time it is legally obsolete, thus illustrating the truism that reporting a debt to a CRA is "a powerful tool designed, in part, to wrench compliance with payment terms….[and] to tighten the screws on a non-paying customer."[25]

Omission of credit limits [26]

The deliberate withholding of credit limit information by credit card furnishers is an extremely serious and widespread problem, as the Regulatory Agencies well know. One Federal Reserve Board study indicates about 70% of consumers have at least one revolving account in their credit files that does not contain information about the credit limit.[27] A later study by the FRB found that the percentage of consumers whose credit files had missing credit limit information had declined to 46%, due to efforts to encourage reporting of credit limits.[28] Still, nearly half of all consumers, and 14% of all credit card accounts remain affected by the practice.

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[22] Credit Reporting Resources Guide, *Consumer Data Industry Association* (2003), at 4-17,10-4 (hereinafter "Metro 2 Manual").
[23] *Id.* at 6-8.
[24] Of course, intentionality is not and never should be required to show an FCRA violation. Willful and negligent inaccuracy is just as harmful for consumers.
[25] Rivera v. Bank One, 145 F.R.D. 614, 623 (D.P.R. 1993); *accord*, Matter of Sommersdorf, 139 B.R. 700, 701 (Bankr. S.D. Ohio 1991); Ditty v. CheckRite, Ltd., Inc., 973 F.Supp. 1320, 1331 (D. Utah 1997); Sullivan v. Equifax, Inc., 2002 WL 799856, * 4 (E.D.Pa.).
[26] The comments of Evan Hendricks contain additional information regarding this issue and we refer the Agencies to those comments.
[27] Robert Avery, Paul Calem, Glenn Canner, and Raphael Bostic, *An Overview of Consumer Data and Credit Reporting*, Federal Reserve Bulletin, February 2003, at 71. *See also* Federal Financial Institutions Examination Council*, Advisory Letter*, January 18, 2000 (stating that "certain large credit card issuers are no longer reporting customer credit lines of high credit balances or both."), available at www.ffiec.gov/press/pr011800a.htm (last viewed July 2003).
[28] Robert B. Avery, Paul S. Calem, and Glenn B. Canner, *Credit Report Accuracy and Access to Credit*, Federal Reserve Bulletin, Summer 2004, at 306.

Furthermore, the latter study found that over 60% of these consumers would have experienced an increase in their credit score if the credit card issuer had not withheld the credit limit information.

The withholding of credit limit information has a considerable impact on the consumer's credit score. Fair Isaac states that, for its scoring models, the ratio of credit used to credit available accounts for 30% of an individual's score.[29]

It appears that credit card issuers not only deliberately withhold credit limit information, they do so to maximize their profit at the expense of the consumers and the integrity of the credit reporting system. One major credit card issuer has admitted that it deliberately failed to report credit limits of its customers as a way to artificially depress credit scores, citing "competitive advantage."[30] The Regulatory Agencies should promulgate guidelines that specifically prohibit withholding of credit limits by credit card furnishers.

One researcher has theorized that requiring the reporting of credit limits might even help in part to address the one of the most vexing problems with respect to the use of credit scoring -- its apparent disparate impact on certain minority populations, as shown by study after study finding that African Americans and Latinos have lower credit scores as a group.[31] The Brookings Institution has speculated that part of the reason for the racial divide in credit scoring may the failure of certain lenders to report complete information such as credit limits.[32]

Incomplete Files

As discussed above, an accurate consumer report is one that at a minimum has complete information. Yet a significant problem with credit reports is that they are frequently incomplete, in that they do not paint a complete picture of a consumer's credit record and other history. First of course, we know a consumer's files usually does not include information from non-subscriber creditors, such as landlords, where the consumer's regular payments would reflect positively on the consumer's overall creditworthiness.

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[29] Fair, Isaac, *What's In Your Score,* available at www.myfico.com/CreditEducation/WhatsInYourScore.aspx.
[30] Kenneth Harney, *Credit Card Limits Often Unreported*, Washington Post, December 25, 2004; Michele Heller, *FCRA Hearing to Shine Spotlight on Credit Reports*, American Banker, June 12, 2003, at 10.
[31] The most recent study is from the Brookings Institution, which found that "[c]ounties with relatively high proportions of racial and ethnic minorities are more likely to have lower average credit scores." Matt Fellowes, *Credit Scores, Reports, and Getting Ahead in America*, Brookings Institution, May 2006 at 9. Studies of insurance credit scores, which have not relied on geographic location as proxies for race, have produced similar findings. Texas Department of Insurance, *Report to the 79th Legislature - Use of Credit Information by Insurers in Texas*, December 30, 2004; Brent Kabler, *Insurance-Based Credit Scores: Impact on Minority and Low Income Populations in Missouri*, Missouri Department of Insurance – Statistics Section, January 2004. For other studies showing the correlation between race and credit scores, *see* Raphael W. Bostic, Paul S. Calem, and Susan M. Wachter, *Hitting the Wall: Credit as an Impediment to Homeownership*, Joint Center for Housing Studies of Harvard University, February 2004; Robert B. Avery, Paul S. Calem, and Glenn B. Canner, *Credit Report Accuracy and Access to Credit*, Federal Reserve Bulletin, Summer 2004, at 313 (Table 2); Freddie Mac, *Automated Underwriting: Making Mortgage Lending Simpler and Fairer for America's Families*, September 1996, at 27.
[32] *See* Matt Fellowes, *Credit Scores, Reports, and Getting Ahead in America*, Brookings Institution, May 2006 at 10 (suggesting that failure to report complete information may affect the relationship between race and credit scores).

More troubling for consumers is the inclusion of information concerning preliminary actions that reflect negatively on the consumer without any follow up as to an eventual outcome that is more favorable to the consumer. For example, an auto lender may report that it has charged off a car loan on a car that has been totaled without reporting that the consumer continued to pay the note on time. A lease company might report that a lessee had gone through bankruptcy without noting that the lessee continued to be current on the car lease despite the bankruptcy. A Federal Reserve Board study has noted the problem with incomplete or out-of-date information. In particular, the study found that furnishers sometimes do not report or update information on consumers who consistently make their required payments or on consumers who have been seriously delinquent, particularly accounts with no change in status.[33] Incomplete files can be highly misleading.

Another sort of incomplete file develops when furnishers selectively withhold good payment histories from the CRAs. As both the Regulatory Agencies and the CRAs are aware, certain furnishers who wanted to keep their most reliable customers have purposefully withheld payment data to shield those customers from competing lenders who might seek to recruit them. This practice, which is common among subprime lenders, will result in credit reports that do not accurately reflect the positive payment histories for borrowers, especially high-interest borrowers in the subprime market. This practice distorts the credit market, trapping borrowers who are now good credit risks in the subprime arena.

Information also differs from CRA to CRA. According to the FRB report, CRAs all have their own rules for determining whether identifying information is sufficient to link information to a single individual, which sometimes results in "fragmentary files" that are multiple and incomplete credit reports for the same individual. CRAs also receive and post information at different times; furnishers may report to one or two CRAs, but not all three; and changes made to disputed information may be reflected in only the CRA that received the dispute and not the others.

The discrepancies that exist in the underlying information held and reported by CRAs have serious negative consequences for many Americans. A study of credit scores for more than half a million consumers by the Consumer Federation of America found that nearly one out of three files (29 percent) had a score discrepancy between the three biggest CRAs of 50 points or more. The study found that these differences put approximately 40 million consumers, or one in five, at risk of misclassification into the subprime mortgage lending market. Roughly eight million consumers, or one in five of those who are at risk – are likely to be misclassified as sub-prime upon applying for a mortgage.[34]

Incomplete information that is not related to any particular item in a file, but that would make the whole file more complete, is itself a troubling type of inaccuracy. The Regulatory

[33] Robert B. Avery, Paul S. Calem, and Glenn B. Canner, *Credit Report Accuracy and Access to Credit*, Federal Reserve Bulletin, Summer 2004, at 301, *available at* www.federalreserve.gov/pubs/bulletin/2004/summer04_credit.pdf.
[34] *Credit Score Accuracy and Implications for Consumers*, Consumer Federation of America, December 17, 2002.

Agencies should encourage entities that are already furnishers to furnish information on all their customers.[35]

The failure of a furnisher to add information to items already in the file to make them accurate is a different kind of incompleteness. This problem should be specifically addressed by the Regulatory Agencies' accuracy and integrity guidelines. There should be no question that furnishers must have an obligation to add information to already preexisting items if the failure to do so would render the item misleading.

Duplication in tradelines

Debts that are sold or transferred to others for collection present another fundamental accuracy problem - duplicate accounts. This problem is especially acute with student loan and collection accounts. Generally speaking, the Metro 2 system relies upon the transferring creditor to delete the accounts from agency files and the new creditor or servicing agent to begin furnishing information about the account. A servicer, one who does not itself hold the note, must also continue to use the identification number of the holder. Mistakes when accounts are transferred can result in false or misleading information in consumer reports. Specifically, because credit grantors expect from the Metro 2 industry standard that tradelines will not be duplicated, errors such as these that falsely appear to multiply the amount of outstanding debt have harmful adverse impacts on consumers as well as on the credit grantors who lose otherwise qualifying loans on the mistaken belief that the consumer is overextended.

Note that the Metro 2 Manual states:

36. Question: What causes duplicate tradelines?
Answer: Any change in Account Number, Identification Number, Portfolio Type, and/or Date Opened may cause duplication if the consumer reporting agencies are not notified prior to the change.[36]

As one can imagine, these pieces of information often change when an account is transferred. For example, the plaintiff in Jordan v. Equifax had successfully gotten a student loan tradeline resulting from identity theft deleted from his file. The servicer then transferred the account to its affiliate, Sallie Mae, which assigned it a new account number. The fraudulent loan then began reappearing again due to the simple act of changing the account number.[37]

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[35] Requiring furnishers to report missing positive tradelines or information is not a radical concept. The Agencies themselves have previously disapproved of the practice of withholding good credit information. Fed. Fin. Insts. Examination Council, *Advisory Letter* (Jan. 18, 2001), available at www.ffiec.gov/press/pr011800a.htm. The former Comptroller of Currency has suggested that legislation might be a possibility to ensure that such information is reported and consumers are protected from such incomplete reporting. Office of the Comptroller of the Currency, *Press Release NR99-51*, June 6, 1999, available at www.occ.treas.gov/ftp/release/99-51.wpw. Freddie Mac has reminded its sellers and servicers that its Single-Family Seller/Servicer Guide requires monthly submission to all three credit repositories of a complete file of mortgage information. Freddie Mac, *Industry Letter* (Feb. 22, 2000).

[36] Metro 2 Manual at 6-12.

[37] Jordan v. Equifax Information Services, LLC, 410 F.Supp.2d 1349 (N.D. Ga. 2006).

Another example in the student loan context are status code 88 cases, which have been referred to the Department of Education for payment of the insured balance on the loan. If the claim is denied, the lender or servicer must delete the account and furnish afresh information about the debt, using the original date opened, status, and other attributes. If the lender or servicer does not report this correctly, an error may result in the same student loan debt being reported twice.

In the mortgage context, duplicate tradelines often appear when the servicing for a loan is transferred. According to the FRB study from 2004, closed mortgage accounts comprised a significant portion of the "stale accounts" in credit reports.[38]

Incorrect Status Codes

The Metro 2 format allows the furnisher to provide the current status of the reported account based on a series of standardized codes. There are many codes that can be reported generally to reflect the account status. Many furnishers' data entry employees are not well trained in the variety of entries that can be made and therefore use an inapplicable code that incorrectly describes the consumer's precise circumstances. For instance, a vehicle may have been "account paid in full, was a repossession," "account paid in full, was a voluntary surrender," or "voluntary surrender," to name just a few. There is a significant difference between these statuses, not the least of which is that some indicate the lack of a deficiency after the lender takes possession of the vehicle.

A2. *Please describe, in detail, the patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to consumer reporting agencies. . . .*

Reckless Granting Of Credit

One of the biggest problems with the accuracy of credit reports is very simple - the way in which furnishers have aided and abetted identity theft with their recklessly low security controls in their granting of credit. While identity theft may not numerically comprise the absolute greatest number of inaccurate items, they certainly constitute the most serious item. Identity theft imposes extremely high costs on the victim (both financially and emotionally) as well as the credit system. With an estimated ten million consumers discovering they were the victim of some form of identify theft in a twelve month period – the fastest growing crime in this country[39] - the failure of furnishers to exercise more care in opening new accounts is reprehensible. We could not put it any better than a recent federal District Court judge, who stated:

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[38] Robert B. Avery, Paul S. Calem, and Glenn B. Canner, *Credit Report Accuracy and Access to Credit*, Federal Reserve Bulletin, Summer 2004, at 297-322, available at www.federalreserve.gov/pubs/bulletin/2004/summer04_credit.pdf.

[39] Federal Trade Commission, *Identity Theft Survey Report* (Sept. 2003), *available at* http://www.ftc.gov/os/2003/09/synovatereport.pdf.

> In an age of rampant identity theft, it is irresponsible to allow consumers to open credit cards over the telephone, without ever requiring written verification of that consumer's identity. Citibank did not even bother to save the specific intake information that it collected over the telephone when this account was opened. These sloppy business practices facilitate identity theft. Citibank's lax record keeping permits a thief to easily accumulate thousands of dollars of debt in the name of an innocent consumer once the thief has acquired the consumer's social security number. At no time is the consumer given the opportunity to confirm that he or she ever agreed to be liable for the debt. Although the FDCPA does not punish Defendants for continuing to attempt to collect this debt when their proof of verification was weak, the Court admonishes Defendants and their clients that both good business practices and good citizenship require them to do their part to prevent identity theft.[40]

Debt Buying

The purchase and transfer of old consumer debts creates another huge source of inaccurate information. The re-aging of old debts, as discussed above, is but one of these problems. Other problems include pursuing collection against consumers who are not liable on the account and not providing the name of the original creditor and type of creditor involved. When debt buyers collect a debt that is several decades old,[41] it's not just re-aging that is an issue – the first issue is whether the debt is still even valid, since some states prohibit collection after the passage of the statute of limitations. Furthermore, there may be an issue of whether the consumer really still owes the debt - the FTC alleged that 80% of the consumers from whom one debt buyer collected from never even owed the debt[42] - or whether they paid it or otherwise resolved it.[43] With records long gone due to the passage of time, it's the consumer's word against the presence of her name in an electronic list purchased by the debt buyer.

Indeed, the fundamental problem is that debt buyers and collectors often are given nothing more than a list of debts.[44] There is no account application, original agreement, history of periodic statements, or indication of whether any of the debt was disputed with the creditor. The debt buyer is at fault for collecting debts on this flimsy record, and the original creditor is at fault for not providing more documentation. Both parties should be required to revise their procedures, as discussed in the Response to A.4 below.

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[40] Erickson v. Johnson, 2006 WL 453201 (D. Minn. Feb. 22, 2006).

[41] For an example of a debt buyer attempting to collect on a nearly 30 year old debt, *see* Rosenberg v. Cavalry Investments, LLC, 2005 WL 2490353 (D. Conn. Sept. 30, 2005).

[42] *See* FTC Press Release, *FTC Asks Court to Halt Illegal CAMCO Operation; Company Uses Threats, Lies, and Intimidation to Collect "Debts" Consumers Do Not Owe* (Dec. 8, 2004), *available at* www.ftc.gov/opa/2004/12/CAMCO.htm.

[43] *See, e.g.,* Asset Acceptance Corp. v. Proctor, 804 N.E.2d 975 (Ohio Ct. App. 2004) (consumer claimed that he made payments toward amount claimed to be owed).

[44] *See, e.g.*, Atlantic Credit and Finance, Inc. v. Giuliana, 829 A.2d 340 (Pa. Super. 2003) (striking collection complaint of debt buyer for failure to produce a cardholder agreement and statement of account, as well as evidence of the assignment from creditor to debt buyer); First Selection Corporation v. Grimes, 2003 WL 151940 (Tex Ct. App. Jan. 23, 2003)

"Zombie" debt collection is another practice that impairs the accuracy of the credit reporting system. This is the debt buyer's practice of offering debtors a new credit card account, then slapping the old debts onto the account. Not only does this re-age the debt, but the debt buyers also usually violate the FDCPA in so doing.[45] Zombie debt collection also impugns the integrity of the credit reporting system by disguising old debts as new tradelines.

Debt buyers are inherently unreliable, as are many collectors. As discussed in the Response to A.4 below, they should be held to a higher standard than other furnishers.

Bankruptcy Issues

Any report mentioning a bankruptcy can have a detrimental impact on the consumer. Thus it is important that the report accurately indicate what kind of bankruptcy is involved and the proper status of any bankruptcy proceeding. The Metro 2 format requires that a furnisher specify in some detail the nature of any reference to bankruptcy.

Metro 2 clearly distinguishes between the primary and secondary consumers. Both the base segment and the associated consumer segments have a field for consumer information indicators. In the base segment, the consumer information indicator provides information about the primary consumer only; the furnisher should not report any bankruptcy information concerning an associated debtor here. The associated consumer segment of the Metro 2 format has its own field for the bankruptcy codes appropriate to the secondary consumer(s). The record should therefore be clear which of two joint obligors has filed bankruptcy, and it should be entirely possible to separately track and report independently the accurate status of each consumer.[46]

Despite these specific instructions, consumer reports on one consumer often include information about a bankruptcy filed by the other obligor This inaccuracy was not resolved until a major class action lawsuit forced the CRAs to change their procedures.[47] However, the furnishers share much of the blame for this problem, and should have been held accountable for their systemic failure to maintain accuracy.

Another frequent problem with bankruptcy reporting is the failure to accurately report debts discharged in bankruptcy. Metro 2 instructions 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

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[45] Carbajal v. Capitol One, F.S.B., 2003 WL 22595265 (N.D. Ill. Nov. 10, 2003).

[46] According the Metro 2 Manual, the status of such a bankruptcy account should be reflected as follows:

> For joint accounts where only one borrower files bankruptcy, report one Base Segment for the account with the Consumer Information Indicator (CII) set to the appropriate bankruptcy code for the borrower who filed bankruptcy. The CII for the other consumer should be blank. The Account Status (field 17A) should reflect the status of the ongoing account for the consumer who did not file bankruptcy.

Metro 2 Manual at 6-5.

[47] Clark v. Experian Information Solutions, 2004 WL 256433 (D.S.C. Jan. 14, 2004).

correctly reporting that the debt has been discharged in bankruptcy.[48] 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, and sometimes is used by creditors and debt collectors as an attempt to get the debtor to pay a debt for which he is not legally obligated.

A3. *Please describe, in detail, any business, economic, or other reasons for the patterns, practices, and specific forms of activity described in item A2.*

One reason for the inaccuracies in the credit reporting system is the CRAs' and furnishers' disregard of their obligations when consumers dispute items, a topic discussed below in our Response to A.8. At present, furnishers treat disputes as nuisances and devote correspondingly little effort to them. The underlying problem is that there appears to be little economic incentive to conduct true reinvestigations. A real investigation would cost the furnishers real money.

In fact, furnishers actually have a positive economic incentive for not conducting an investigation and keeping negative information on a consumer's credit record – even if it is inaccurate. Maintaining negative information on a report limits the consumer's options to obtain other, less expensive debt, and is often the impetus to force a consumer to pay the furnisher even on an unjust claim. It has even been alleged that furnishers deliberately reward fraud investigators for finding against a consumer by tying their salaries to their ability to contain losses.[49]

Even more egregious are furnishers who have used credit reporting to collect debts from consumers who they KNEW did not owe the debt, or have used negative information to pressure family members or authorized users not liable on debt. For example, a court found that First USA Bank's reinvestigation of a consumer's claim that his wife fraudulently opened accounts in his name ignored evidence that signatures on credit card applications did not match the consumer's signature on his driver's license.[50] In another case, a furnisher continued to report a fraud account for a 77 year old widow, despite the fact that the furnisher's executives KNEW the widow was the victim of identify theft by her granddaughter - and at one point, the furnisher recommend that the widow's credit rating for revolving accounts be demoted to the worst possible score despite knowing about the identity theft.[51] Numerous other cases of furnishers collecting debts from family members abound.[52] Debt buyers are even more notorious for pursuing non-liable parties, with the FTC alleging that "as much as 80 percent of the money [one

[48] *See, e.g.*, Helmes v. Wachovia Bank, N.A. (*In re* Helmes), 336 B.R. 105 (Bkrtcy. E.D. Va. 2005). The comments of Evan Hendricks contain additional information regarding this issue and we refer the Agencies to those comments.
[49] Carrier v. Citibank (South Dakota), N.A., 383 F. Supp.2d 334 (D. Conn. 2005).
[50] Bruce v. First U.S.A. Bank, N.A., 103 F. Supp. 2d 1135 (E.D. Mo. 2000) (No one from First USA's investigation unit spoke with the consumer or his former wife about the fraudulent accounts).
[51] Bach v. First Union Nat. Bank, 149 Fed.Appx. 354 (6th Cir. August 22, 2005) (resulting $2.6 million jury punitive damage award vacated and remanded).
[52] *See e.g.* Johnson v. MBNA Am. Bank, NA, 357 F.3d 426 (4th Cir. 2004).

debt buyer] collects comes from consumers who never owed the original debt in the first place."[53]

The risk of an occasional lawsuit appears not to have overcome these other economic incentives. The result is persistent inaccuracies in credit reports, which harms both consumers and creditors. Until the failure to conduct a real investigation becomes more expensive than not conducting a real investigation, the current system will remain broken. Furthermore, any protections for identity theft victims cannot be effective in the absence of a real investigation.

A4. *Please describe, in detail, the policies and procedures that a furnisher should implement and maintain to identify, prevent, or mitigate those patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to a consumer reporting agency.*

Original Creditors

Original creditors must be required to retain the operative records for any account for which they are reporting a tradeline. These documents would include the original account applications, original contract or agreements, any billing statements, any contract modifications or forbearance agreements, any records of disputes, and for real estate secured loans, the settlement package (HUD-1, RESPA Good Faith Estimate, appraisal, etc)

Several cases has shown that some creditors fail to keep these key records for an account, most notably in the Johnson v. MBNA case, where MBNA admitted that it fails to retain records such as the original account application for more than 5 years.[54] This failure to keep records resulted in MBNA being unable to demonstrate whether the consumer was a joint account holder or merely an authorized user, despite trying to hold the consumer liable as the former.[55]

In this day and age of computerized storage of information, furnishers cannot be allowed to use the excuse that it is too costly or voluminous to retain such records (which can be electronically stored as PDF or image documents to maintain the consumer's signature). Indeed, credit card slips are now electronically retained by merchants[56] - if the merchants can retain even individual credit card receipts in their systems, the creditors should be able to maintain the more limited documents of application, agreement, and billing statements.

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[53] *See* FTC Press Release, *FTC Asks Court to Halt Illegal CAMCO Operation; Company Uses Threats, Lies, and Intimidation to Collect "Debts" Consumers Do Not Owe* (Dec. 8, 2004), *available at* www.ftc.gov/opa/2004/12/CAMCO.htm ("Many consumers pay the money to get CAMCO to stop threatening and harassing them, their families, their friends, and their co-workers.").

[54] Johnson v. MBNA Am. Bank, NA, 357 F.3d 426 (4th Cir. 2004).

[55] *See also* Deaville v. Capital One Bank, 2006 WL 845750 (Capital One admits that they don't keep original copy of credit card disclosures sent to consumers; credit card account used for zombie debt collection); Citibank (S.D.) Nat'l Assn. v. Whiteley, 149 S.W.3d 599 (Mo. Ct. App. 2004) (collection case; Citibank could not offer up original agreement or any other documentation on account).

[56] *See, e.g.*, Symbol Technologies, *Federated Department Stores Saves Millions of Dollars in Credit Card Dispute Resolution Costs with Electronic Signature Capture*, SymbolSolutions, January 2003.

Thus, original creditors must be required to retain original records to maintain the accuracy and integrity of the credit reporting system. If they do retain original records, an original creditor can rely on their records, so long as they actually review them when there is a dispute. However, if a consumer disputes an account or a charge based upon information that cannot be determined by records alone, the original creditor must be required go beyond its records. For example, in an identity theft case involving a forgery, the creditor must be held to the same standard as CRAs, which are required to compare an exemplar of handwriting submitted by the consumer with the signature on the account application.[57] In a case involving a telephone application, the creditor should be required to review phone records showing that the consumer never placed the phone call opening the account.

Debt Buyers and Collectors

Because of their inherent unreliability due in part to the age of the debts and incomplete records, debt buyers and collectors should be held to an even higher standard than an original creditor, who at least have some stake in the accuracy and integrity of the information they furnish as well as in maintaining good will with actual customers. Original creditors also have a stake in the integrity of the credit reporting system itself, to ensure that potential customers who are good credit risks are not wrongfully excluded. Debt buyers and collectors do not have any interests in preserving good relations or ensuring that the credit reporting system works properly (as long as it works for their benefit). Debt buyers and collectors have only one goal and one interest– to elicit payment out of the consumer (whether or not it is the right consumer).

The concept of holding certain furnishers as less reliable and therefore subject to a higher standard would not be a novel one under FCRA jurisprudence. The converse is certainly true - when a CRA has no reason to believe a furnisher is inaccurate, it is under no obligation to take additional steps initially to verify the accuracy of its information prior to being notified by the consumer of a putative inaccuracy.[58] So when a CRA does have reason to believe that a source is inherently unreliable, that furnisher must be held to a higher standard. The Regulatory Agencies should also hold these furnishers to a higher standard.

Thus, a debt buyer or collector must be required to obtain the original records from the creditor. A reasonable procedure is to require debt buyers and collectors to obtain and review certain records before furnishing information to a CRA. For example, in a credit card case, the debt buyer must be required to obtain and review the consumer's account application, original agreement, history of periodic statements, and any record showing whether any of the debt was disputed with the creditor. At a minimum, if the consumer disputes the debt and the debt buyer does not have adequate original documentation, the tradeline must be deleted from the consumer's file.

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[57] Cushman v. Trans Union Corp., 115 F.3d 220 (3d Cir. 1997).

[58] *See, e.g.,* Henson v.. CSC Credit Services, 29 F.3d 280, 285 (7th Cir.1994); *cf.* Cushman v. Trans Union Corp., 115 F.3d 220, 224-26 (3rd Cir.1997) (holding that where a consumer reporting agency relies on a reliable source, it does not have a duty to go beyond its original source unless a consumer alerts a consumer reporting agency to an alleged error)

In fact, the FTC specifically required a debt buyer to review the files of an original creditor in its enforcement action against Performance Capital Management.[59] This standard should be applied to all debt buyers, assignees, and collection agencies.

A5. *Please describe, in detail, the methods (including technological means) used to furnish consumer information to consumer reporting agencies. Please describe, in detail, how the use of these methods can either enhance or compromise the accuracy and integrity of consumer information that is furnished to consumer reporting agencies.*

The CRAs encourage reporting through the use of an electronic medium through Metro 2, the standard automated data reporting format created by CDIA. The CRAs also use a number of other standard reporting formats, such as the Universal Data Form (UDF) to provided updated information.

One consequence of this reliance upon electronic communication is that even when a consumer successfully disputes inaccurate information, the incorrect information will re-appear or be "reinserted" if the correction is not reflected with precision in the same database used to report current information on a weekly or monthly basis to the CRAs. In other words, the reliance on data furnished using Metro 2 is so complete that the latest Metro 2 "information dump" will often supersede a correction made earlier by a creditor if the creditor failed to also correct the data put into its Metro reports.[60] The problem of reinsertion should be addressed by the guidelines, and the Regulatory Agencies should require furnishers to ensure that their systems do not continue to report erroneous information after it has been deleted or corrected.

Electronic reporting and Metro 2 are certainly not a flawless system. However, the failure to report electronically or use Metro 2 creates even more inaccuracies. For example, manual reporting and its conversion to electronic format are prone to transcription errors. While the CRAs claim that up to 80% of their subscribers or furnishers have converted to the Metro 2 reporting system, we question whether the 80% figure is based on the data being reported and not the percentage of furnishers who submit the data. Furthermore, not all furnishers use Metro 2 properly. Some furnishers fail to report essential information, such as whether the tradeline is disputed.

Furnishers who assign different values to the information in the same field also compromise the accuracy and integrity of the credit reporting system. For example, in Cassara v. DAC Services, a truck driver history database used an overly broad definition of what constituted an "accident," leading employers to use different standards to report accidents. The court held rightfully that these discrepancies raised a genuine issue as to the accuracy of such reports, stating:

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

[60] *See e.g.*, Evantash v. G.E. Capital Mortgage Serv., 2003 WL 22844198 (E.D. Pa. Nov. 25, 2003). The comments of Evan Hendricks contain additional information regarding reinsertion and we refer the Agencies to those comments.

> if (furnishers) in that industry are to communicate meaningfully among themselves within the framework of the FCRA, it proves essential that they speak the same language, and that important data be reported in categories about which there is genuine common understanding and agreement. Likewise, if [the CRA] is to "insure maximum possible accuracy" in the transmittal of that data through its reports, it may be required to make sure that the criteria defining categories are made explicit and are communicated to all who participate.[61]

While the initial reporting of information in electronic format should be encouraged, the opposite is true for handling disputes. We have serious concerns about the ACDV process and its reduction of disputes into electronic format, discussed below in the Response to A.8.

A6. *Please describe, in detail, whether and to what extent furnishers maintain and enforce policies and procedures to ensure the accuracy and integrity of information furnished to consumer reporting agencies, including a description of any policies and procedures that are maintained and enforced, such as policies and procedures relating to data controls, points of failure, account termination, the re-reporting of deleted consumer information, the reporting of the deferral or suspension of payment obligations in unusual circumstances, such as natural disasters, or the frequency, timing, categories, and content of information furnished to consumer reporting agencies. Please assess the effectiveness of these policies and procedures and provide suggestions on how their effectiveness might be improved or enhanced. . . .*

We are not privy to the furnishers' policies and procedures to ensure the accuracy and integrity of information furnished to CRAs. What we do know is that these policies and procedures have not been adequate to meet this goal. The policies and practices that we do know about, such as the failure to retain records in Johnson v. MBNA and the automated dispute system, are actually counterproductive to the goal of accuracy and integrity of information.

A7. Please describe, in detail, any methods (including any technological means) that a furnisher should use to ensure the accuracy and integrity of consumer information furnished to a consumer reporting agency.

Furnishers who use the Metro 2 format must properly follow the instructions for that system, which appear to be written to comply with the FCRA and ensure accuracy. They must also be required to adequately train, supervise, and monitor their employees to properly follow the instructions for Metro 2. Other suggestions are in responses to questions A.4 and A.5.

A8. *Please describe, in detail, the policies, procedures, and processes used by furnishers to conduct reinvestigations and to correct inaccurate consumer information that has been furnished to consumer reporting agencies. Please include a description of the policies and procedures that furnishers use to comply with the requirement that they ''review all relevant information provided by the consumer reporting agency'' as stated in section 623(b)(1)(B) of the FCRA.*

[61] Cassara v. DAC Services, Inc., 276 F.3d 1210 (10th Cir. 2002).

The reinvestigation system in its current form is fundamentally flawed, and we have stated so repeatedly in testimony to Congress and the Federal Reserve Board.[62] Two of the main problems are that (1) CRAs do not provide furnishers with the documentation of errors that consumers send to the CRAs; and (2) furnishers' reinvestigations of disputed information typically involve merely verifying that the information matches their own computer records, without undertaking a meaningful examination of the underlying facts. The continued result of this lackadaisical reinvestigation system is that consumers find it extremely difficult, frustrating, and expensive to dispute errors, which all too often remain uncorrected long beyond the timeframe contemplated by the FCRA.

Automation Creates Flawed Reinvestigations

All too commonly, CRAs, furnishers, and others maintain inadequate procedures to ensure accuracy and fail to take complaints from consumers either seriously or seriously enough. Testimony in cases suggests that CRAs receive tens of thousands of consumer disputes each week (one agency reportedly receives between 35,000 and 50,000 per week). Some CRAs have quotas for the number of consumer disputes agency employees must process. CRA employees have testified that employees are required to process one dispute every four or six minutes in order to meet quotas.[63]

In order to crunch down the time for a consumer's dispute into a mere 4 to 6 minutes, CRAs and furnishers have developed a highly automated, computer-driven system that precludes any meaningful reinvestigation. A consumer's dispute is communicated using a Consumer Dispute Verification form (CDV). An automated version of the form, communicated entirely electronically, is known as Automated Consumer Dispute Verification (ACDV). According to one CRA, 52% of its data furnishers participate in ACDV system.[64] Furthermore, all three CRAs collaborated through CDIA to create an automated on-line reinvestigation processing system "E-OSCAR."

This automated system, like the Metro 2 format, is heavily dependent upon standardized dispute codes used to communicate the nature of the dispute. Difficulties with this level of automation have been noted by consumer counsel. Most critically, it appears that use of this automated system has resulted in the problem that furnishers merely verify the existence of disputed information, not reinvestigate disputes.

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[62] *See* National Consumer Law Center, et al, *Comments to the Federal Reserve Board's Request for Information for the Study on Investigations of Disputed Consumer Information Reported to Consumer Reporting Agencies, Docket No. OP-1209*, September 17, 2004, *available at* www.consumerlaw.org. *See also* Testimony of Anthony Rodriguez before the Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit (2003). These documents are attached as Attachments 1 and 2 to these comments. The comments of Evan Hendricks contain additional information regarding this issue and we refer the Agencies to those comments.

[63] *See* Cushman v. Trans Union Corp., 115 F.3d 220, 224-25 (3d Cir. 1997). *See also* Deposition of Regina Sorenson, Fleischer v. Trans Union, Civ. Action No. 02-71301 (E.D. Mich. Jan 9, 2002).

[64] Statement of Harry Gambill, Chief Executive Officer, Trans Union, L.L.C., before the Subcommittee on Financial Institutions and Consumer Credit, June 4, 2003.

The industry has asserted that approximately 80% of consumer disputes are written.[65] These written disputes, often containing a detailed letter and other documentation, are translated into a two digit code that the credit reporting agency employee believes best describes the dispute. Thus, a consumer's careful detailing of a specific dispute, fashioned to make detection and correction easy, may be relegated to a generalized code.[66]

The code is sent to the furnisher for verification. They are often communicated alone, without supporting documentation provided by the consumer. Typically, underlying and essential documentation of inaccuracies such as account applications, billing statements, letters, and the like, are left out of the reinvestigation process while both the CRA and furnishers rely on the automated dispute process and its coding of information. In fact, the policies and practices of the CRAs are to not forward documents and other information to furnishers that would allow the furnisher to evaluate the truthfulness and completeness of the disputed information.[67]

Thus, the automated dispute system actively violates the FCRA's requirement at § 1681i(2) that all relevant information about the dispute be communicated. And if all relevant communication is not forwarded, how can the furnisher comply with the requirement at § 1681s-2(b)(1)(B) to "review all relevant information" provided by the CRA? The requirement to review all relevant information has become a nullity because such information is never communicated.

Furthermore, this system permits a furnisher to simply check a box indicating that the disputed information has been verified, an exercise which aids and abets the second problem that furnishers fail to properly investigate disputes. In addition, the dispute codes are not uniformly applied among the major CRAs, so the same information disputed in the same manner by a consumer may be categorized differently by different CRAs.

Once the disputed information is purportedly reinvestigated, the CRAs then send generic and uninformative letters stating that an investigation has been made, without including any details as to whom they have contacted and what information was obtained or relied upon for a final determination.[68]

In order to correct this massive flaw in the credit reporting system, CRAs must be required to convey to furnishers the actual documents that support the consumer's dispute, as explicitly required by the FCRA. Failure to do so should be per se unreasonable. The Regulatory Agencies must also set forth guidelines that a furnisher cannot simply blindly rely on the ACDV form, but must ensure that it has the complete dispute documentation from the consumer.

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[65] *See* Deposition of Eileen Little, Evantash v. G.E. Capital Mortgage, Civ. Action No. 02-CV-1188 (E.D. Pa. Jan. 25, 2003).

[66] For a criticism of this system, *see* the Seventh Circuit's decision in Ruffin-Thompkins v. Experian Information Solutions, 422 F.3d 603 (7th Cir. 2005) (noting "the opaque notice of dispute sent by Experian to U.S. Bank").

[67] In just one reported example, an employee of Trans Union actually testified that it is Trans Union's policy to send consumer dispute verification forms without ever including the underlying documents. Crane v. Trans Union, LLC, 282 F. Supp. 2d 311, 316 (E.D. Pa. 2003).

[68] The Seventh Circuit has called an example of these letters a "meaningless communication". Ruffin-Thompkins v. Experian Information Solutions, 422 F.3d 603 (7th Cir. 2005).

Furnishers' Inadequate Investigation

Consumer advocates repeatedly confirm that regardless of where the dispute is made (directly with the furnisher or through a CRA), furnishers are simply *not* conducting meaningful reinvestigations; they do *not* train their employees on effective reinvestigation procedures,[69] and they repeatedly default simply to verifying the existence of an account and the disputed information itself. Rarely do furnishers actually research the underlying dispute, rarely are documents reviewed, and too often there is no analysis of the furnishers' own data for inconsistencies and errors.

Advocates also know from recurring cases that the standard response of furnishers is to ignore documentation even once the consumer is successful in getting it into their hands. In Johnson v. MBNA, the furnisher's employees testified that it is their practice to merely confirm the name and address of consumers in their computers and note from the applicable codes that the account actually belongs to the consumer. These employees testified that they *never* consult underlying documents such as account applications to determine accuracy of disputed information.[70]

In another case, a consumer disputed information in her Equifax credit report, which the furnisher simply confirmed, even though the consumer had already won a court decision that she did not owe the debt. When the consumer again disputed the entry with Equifax, the furnisher again confirmed the debt, plus it increased the amount owed from $488.00 to $829.00. Yet, the furnisher asserted that it could rely on a state department of licensing report and that it had no further duty to investigate the accuracy of the information.[71]

All of these examples show that furnisher reinvestigations have consisted primarily of checking information in their records. Checking information against computer records is not an investigation of whether information is accurate, it is simply verification of files. That is NOT the standard in the FCRA.

Some furnishers rely on third parties to both gather information from public sources and conduct the reinvestigations of the gathered information. Even if their selection of a third party vendor is reasonable, the furnisher should remain liable, as the duty to conduct a reasonable reinvestigation is a non-delegable task.

Thus, in order for the credit reporting system to work correctly, the Regulatory Agencies must significantly increase the duties upon furnishers in a dispute in two respects:

- Furnishers must be required to investigate the dispute rather than merely verifying that the disputed information appears in their own records. At a minimum the furnisher's reinvestigation must involve reviewing the actual documents provided by the consumer.

[69] *See* Deposition of Gino Archer, witness on behalf of Cavalry Investments, LLC, Rosenberg v. Calvary Investments, LLC, U.S. Dist. Ct. D. Conn., Case No. 03-cv1087, at 8.
[70] Johnson v. MBNA, 357 F. 3d 426 (4th Cir. 2004)
[71] Betts v. Equifax Credit Information Services, 245 F. Supp. 2d 1130 (W.D. Wa. 2003).

Depending on the nature of the dispute, the furnisher may also have to review documents in its own possession or in the possession of an earlier holder of the debt, and may have to contact third parties. In short, the reinvestigation must make a substantive determination of the validity of the dispute.

- Furnishers should be required to rebut the consumer's specific disputes by providing to the consumer and the CRA documentation that shows that the information furnished is correct. Furnishers should not be allowed simply to tell the CRA that the consumer is wrong and the original information was correct, and CRAs should not be allowed to accept such a report. Instead, the furnisher should be required to give the consumer and the CRA the underlying information - copies of documents with original signatures to rebut a forgery claim, for example, or copies of the payment record to demonstrate that the claimed balance is correct.

A9. *Please describe, in detail, the policies, processes, and procedures that furnishers SHOULD use to conduct reinvestigations and to correct inaccurate consumer information that has been furnished to consumer reporting agencies.*

Many furnishers are already under an obligation to investigate disputes for their major product categories, which are discussed in detail in the Response to B.1. Some of these regulations set forth detailed requirements for investigation. For example, the Official Staff Interpretations under the Truth in Lending Act suggests that creditors take some of the following steps if the consumer claims unauthorized use:[72]

i. Reviewing the types or amounts of purchases made in relation to the cardholder's previous purchasing pattern.

ii. Reviewing where the purchases were delivered in relation to the cardholder's residence or place of business.

iii. Reviewing where the purchases were made in relation to where the cardholder resides or has normally shopped.

iv. Comparing any signature on credit slips for the purchases to the signature of the cardholder or an authorized user in the card issuer's records, including other credit slips.

v. Requesting documentation to assist in the verification of the claim.

Furnishers should be under the same types of obligations when they conduct reinvestigations they receive from CRAs as when they receive direct disputes from consumers. This should not merely be a similar duty, but an identical duty based on an identical statutory term. Under TILA's Fair Credit Billing Act, Congress requires a credit card issuer to "conduct[] an investigation" of a consumer's dispute. 15 U.S.C. § 1666(a)(3)(B)(ii). Furnishers are required to "conduct an investigation" with respect to disputed information under §§ 1681s-2(a)(8)(E)(i) and (b)(1)(A). The Federal Reserve Board and the courts have repeatedly stated

[72] Federal Reserve Board, Official Staff Interpretations to 12 C.F.R. § 226.12(b) at paragraph 3.

this same phrase creates a duty to conduct a "reasonable" investigation.[73] Furnishers should be under the same reasonable investigation standards under the FCRA

For a reasonable investigation, furnishers should be to undertake the same steps as those required under TILA, FCBA and Regulation Z. They should be required to consult their own record - not just computer records but actual documents in their files - and to review any documents that the consumer has sent to them or to the CRA. Furnishers should also be required to request documentation from third parties, such as merchants or police departments or telephone companies.[74] They should review security measures, such as signatures or PIN entries, when determining whether the consumer actually incurred the debt or not.

Furthermore, furnishers should be required to report their investigation results in no less detail than that required by reporting procedures for the initial furnishing of the information. For most creditors, this obligation means that the information should be at least as specific and detailed as called for in the Metro 2 format. Other outside benchmarks for accuracy may also exist. For example, regulated utilities are subject to general codes of conduct issued by state public utility commissions or the Federal Energy Regulatory Commission. Medical information bureaus will also have standards for conveying accurate and useful information, such as completing Medicare forms, as may other specialized forms of CRAs.

B1. Please identify the circumstances under which a furnisher should (or alternatively, should not) be required to investigate a dispute concerning the accuracy of information furnished to a consumer reporting agency based upon a direct request from the consumer, and explain why.

Many furnishers are already under an obligation to investigate disputes for their major product categories. The addition of FCRA dispute obligations should add only marginal costs, since they should have a pre-existing system set up to handle disputes for these products. For example:

> **Credit cards** – consumers already have the right to dispute credit card transactions under the Truth in Lending Act, 15 U.S.C., §§ 1601-1666j. In fact, they have *three* separate dispute rights with respect to credit cards: (1) protections against unauthorized use under 15 U.S.C. § 1643; (2) the Fair Credit Billing Act at 15 U.S.C. § 1666; and (3) the right to assert claims and defenses under 15 U.S.C. § 1666i.
>
> **Real estate secured loans** – consumers have dispute rights available under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(e)(1)(B), namely the right to require mortgage servicers to investigate disputes by sending a qualified written request.

[73] Regulation Z, 12 C.F.R. § 226.13(f) and note 31; Burnstein v. Saks Fifth Avenue & Co., 208 F.Supp.2d 765, 772-73 (E.D. Mich. 2002).

[74] Olwell v. Medical Information Bureau, 2003 WL 79035 (D. Minn. Jan. 7, 2003) (a reasonable jury could find that failure to contact outside sources during reinvestigation was unreasonable); Bruce v. First U.S.A. Bank, 103 F. Supp. 2d 1135 (E.D. Mo. 2000).

Home equity lines of credit – these accounts are covered by the Fair Credit Billing Act, which applies to all open-end credit accounts. 15 U.S.C. § 1666.

Deposit accounts – consumers have dispute rights with regard to their ATM, debit card, and other electronic transactions under the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693f and 1693g. Other checking account transactions may be disputable under the Uniform Commercial Code or the Check Clearing for the 21st Century Act.

Thus, there are only a few product lines for which many furnisher/creditors do NOT have a pre-existing dispute obligation, the most notable being automobile-secured credit and high cost fringe credit (payday loans, refund anticipation loans, auto title loans). The addition of these product lines to a furnisher's dispute responsibilities should not impose a great burden. In fact, the product lines for which there are pre-existing dispute rights comprise the great majority of consumer disputes for certain furnishers. According to the Office of Comptroller of Currency, these product lines account for 80% of complaints to national banks.[75]

There is no good reason to leave out the remaining types of products or to leave out non-financial institution furnishers, especially since they involve products or entities that are often abusive. The problems with subprime auto loans, especially "yo-yo" sales, is well documented.[76] There is no conceivable reason to let off fringe creditors, such as payday loan outlets and refund anticipation lenders, from having to handle disputes when mainstream credit card issuers and mortgage companies must deal with them. There is also no reason to let off debt buyers and collection agencies from direct dispute responsibilities since as discussed above, these types of furnishers are inherently unreliable and prone to inaccurate reporting. Of all furnishers, they more than anybody should be subject to a duty to investigate consumer disputes over erroneous reporting.

B2. Please describe any benefits or costs to consumers from having the right to dispute information directly with the furnisher, rather than through a consumer reporting agency, in some or all circumstances. Please address the circumstances under which direct disputes with furnishers would yield more, fewer, or the same benefits or costs for consumers as disputes that are first received and processed through the consumer reporting agencies and then routed to furnishers for investigation. Please quantify any benefits or costs, if possible.

If consumers have the right to directly dispute credit reporting errors with furnishers, it would go a long way toward resolving one of the fundamental problems of the reinvestigation process - the failure of the CRAs to properly forward a consumer's actual written dispute plus supporting documentation to the furnisher, as discussed in our Response to A.8. As discussed in

[75] Office of Comptroller of Currency - Customer Assistance Group, *PowerPoint Presentation for "Ombudsman: Will the Canadian System Be a Model For the United States?"*, Consumer Financial Services Committee of the American Bar Association, Spring 2006 Meeting (April 6, 2006)

[76] A yo-yo sale or spot delivery occurs when the dealer sells a vehicle and gives possession to the consumer on the spot, often taking the consumer's old vehicle as a trade-in. The dealer later tells the consumer that the financing deal has fallen through, and the consumer will have to pay more in financing costs or purchase a different car. *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices, § 5.4.5 (6th ed. 2004 and Supp) (description of yo-yo abuses).

that Response, the entire ACDV process is an impediment to compliance with § 1681i(a)(2), which requires that all relevant information about a dispute be provided to the furnisher. Requiring furnishers to investigate complaints directly from consumers could mitigate some of the enormous flaws of the automated reinvestigation process, which one federal court of appeals has criticized as being "opaque".[77]

Direct disputes might also rein in some of the problems where furnishers ignore documentation from consumers about errors or fraud, as described in the Response to A.3. Because the FCRA requires the furnisher to "review all relevant information provided by the consumer," when there is a direct dispute (§ 1681s-2(a)(8)(E)(ii)), furnishers will be required by the statute itself to pay attention to the documentation submitted by consumers.

B3. Please describe any benefits to furnishers, consumer reporting agencies, or the credit reporting system that may result if furnishers were required to investigate disputes based on direct requests from consumers in some or all circumstances. Please quantify any benefits, if possible.

The primary reason to require all furnishers to investigate direct disputes is simply that it will result in a more accurate credit reporting system. A more accurate system means that consumers who are truly good risks do not mistakenly suffer bad credit reporting, which harms not only the consumer but other creditors who would have found the consumer to be a profitable and reliable customer. The harms from inaccurate reporting are not insubstantial. For example, the erroneous reporting of "included in bankruptcy" affected four million consumers.[78] That's four million consumers shut off from mainstream affordable credit, who may have been good customers but were never given the chance.

Many of the problems discussed in this comment and witnessed by consumer counsel are not isolated incidents affecting a handful of consumers, but systems problems affecting millions. Even identity theft is not just a problem of "sporadic crime," when 10 million consumers may be potentially affected in one year.

Thus, when considering the cost of direct disputes to a furnisher, the costs to the entire community of creditors must be considered. While it might cost a furnisher $25 to process a dispute, it may cost a fellow creditor thousands in lost profits.[79] And of course, the failure to investigate might wrongfully cost a consumer thousands of dollars as well as countless hours of grief and aggravation because the error remains uncorrected.

Another benefit of direct disputes with the furnisher will be the standardization of different types of consumer complaints, something much prized by the industry. With direct dispute capability, a credit card issuer will not have to deal with two different standards for

[77] Ruffin-Thompkins v. Experian Information Solutions, 422 F.3d 603 (7th Cir. 2005).
[78] Clark v. Experian Information Solutions, 2004 WL 256433 (D.S.C. Jan. 14, 2004).
[79] For example, a bank had to place special conditions on a mortgage for a condo purchase by an identity theft victim, which led the victim to abandon the transaction. Bach v. First Union Nat. Bank, 149 Fed.Appx. 354 (6th Cir. August 22, 2005)

investigations for a credit card dispute, depending on whether the dispute involves a dispute over a particular charge or a credit reporting matter.

Finally, we know that many consumers already dispute directly with furnishers, because they do not know that they must go through the CRAs. After all, the intuitive step for most people with a problem is to deal directly with the party that is responsible for the problem, *i.e.*, the furnisher. Furnishers should be required to act responsibly and reasonably when they are directly contacted.

B4. Please describe any costs, including start-up costs, to furnishers and any costs to consumer reporting agencies or the credit reporting system, of requiring a furnisher to investigate a dispute based on a direct request by a consumer in some or all circumstances.

* * * * *

Does the FCRA's section 623(a)(8)(F)(ii) timing requirement for a Notice of Determination that a consumer dispute is frivolous or irrelevant impose additional costs? If so, please provide quantitative data about such costs.

As discussed in the Response to B.1, many furnishers already have direct dispute responsibilities. Thus, start up costs should not be extremely burdensome for them. The marginal cost of each investigation is minimal since the necessary information is typically in the possession of the furnishers; however, we have seen estimates for processing a dispute range from $25[80] to $200. These costs would be greatly exceeded by the harms to consumers who cannot obtain relief from adverse credit reporting errors.

As for the timing requirements for the Notice of Determination that a dispute is frivolous or irrelevant at 15 U.S.C. § 1681s-2(a)(8)(F)(ii), we object to any indication that the Regulatory Agencies are contemplating altering the time frame of this requirement. The 5 day window is specifically written into the statute. The statute does not give the Regulatory Agencies the authority to extend this period. Apparently, requiring furnishers to give notice within 5 days was important enough for Congress to specify the number of days in the FCRA itself, instead of reserving the issue for rulemaking. Congress's reasons for so doing are logical - it is important that the consumer receive the notice quickly, especially if it identifies additional information that the consumer can provide to get the dispute investigated (as provided by § 1681s-2(a)(8)(F)(iii)(I)). The faster the notice, the faster the consumer can gather and send additional information to the furnisher and get the dispute processed.

B5. Please discuss whether it is the current practice of furnishers to investigate disputes about the accuracy of information furnished to a consumer reporting agency based on direct requests by consumers.

See Response to B.1 above.

B6. *Please describe the impact on the overall accuracy and integrity of consumer reports if furnishers were required, under some or all circumstances, to investigate disputes concerning*

[80] *Credit Cards: What's Wrong With This Bill?*, Consumer Reports at 27 (February 2004).

the accuracy of information furnished to consumer reporting agencies based on the direct request of a consumer.

See Responses to B.2 and B.3 above.

B8. *Please describe the potential impact on the credit reporting process if a person that meets the definition of a credit repair organization is able to circumvent section 623(a)(8)(G).*

Since we fully expect that the furnishers will supply information on the costs of credit repair organizations, we will discuss the potential impact on consumers from the reverse situation, *i.e.*, when furnishers reject legitimate disputes from consumers as being from credit repair organizations.

It has been reported that some CRAs are rejecting consumers' dispute letters erroneously believing them to come from credit repair companies. CRAs no doubt have rules or protocols for handling disputes from credit repair companies. However, these rules are inappropriately and illegally excluding legitimate consumer disputes and cause these CRAs to violate the FCRA requirements with respect to reinvestigations.

Some CRAs send consumers letters suggesting that the CRAs do not have to reinvestigate any dispute if the letter comes from any third party, not just credit repair organizations. This would include family members or someone trying to help the consumer from a social services organization. Not only is this exclusion not legally correct, it prevents the most vulnerable of consumers – those with limited literacy skills or limited English speakers, for example – from exercising their rights under the FCRA. About 1 in 20 adults in the U.S. are non-literate in English, or about 11 million people. Overall, 14% of adults have below basic literacy skills and would not be able to compose a dispute letter.[81]

The Regulatory Agencies must protect the rights of these consumers to dispute erroneous credit report information with both the CRAs and furnishers by setting clear guidelines that prohibit the CRAs and furnishers from inappropriately excluding disputes sent by family members or non-CROA agencies, such as social services providers. In fact, a furnisher who is a creditor under the Equal Credit Opportunity Act may well be violating the ECOA by excluding disputes that have been sent by a third party who has translated the letter for a non-English speaking consumer. The Americans with Disabilities Act might similarly require reasonable accommodations that include third party assistance for a blind consumer.

Finally, an argument is being advanced that attorneys cannot help consumers send direct disputes to furnishers because attorneys fall under the definition of a "credit repair organization" under § 1681s-2a(8)(G).[82] This conclusion would be highly dubious and absurd, since an attorney is a duly empowered fiduciary who acts on the consumer's behalf. Furthermore, as you

[81] National Center for Education Statistics, *National Assessment of Adult Literacy: A First Look at the Literacy of America's Adults in the 21st Century*, Dec. 15, 2005. *See also* White and Mansfield, *Literacy and Contract*, 132 Stanford Law & Policy Rev. 233 (2002).

[82] Gregg B. Brelsford, *Why Lawyers Can't Help Challenge Credit Scores: FACTA and the Forfeiture of Consumers' Rights*, 22 GPSolo 51 (American Bar Ass'n April/May 2005).

know from the litigation over Gramm-Leach-Bliley coverage, licensed attorneys are extensively regulated and subject to strict codes of conduct. One would assume that furnishers would benefit from having a knowledgeable and skilled professional to prepare a dispute letter, since it would ensure that the letter is clearly written, adequately documented, and already reviewed to ensure it is not frivolous or irrelevant. As one court opined in a credit reporting dispute "It is inconceivable to the Court that an attorney could not represent a consumer in this regard, . . ."[83]

III. CONCLUSION

The Regulatory Agencies have a critical task ahead of them in establishing the standards for furnisher accuracy as well as the ability of consumers to dispute credit reporting errors directly with furnishers. Ensuring the accuracy of credit reports is ever more critical given the expanding reliance on credit scores in all financial aspects of a consumer's life. Even inaccurate information that is not facially negative (such as a wrong balance on a revolving account) can significantly depress a credit score. For this reason, we urge the Regulatory Agencies to consider the recommendations above and issue guidelines that have meaningful protections for consumers.

[83] Pinner v. Schmidt, 617 F.Supp. 342 (E.D. La. 1985), *reversed in part on other grounds*, 805 F.2d 1258 (5th Cir. 1986).

ATTACHMENT 1

COMMENTS
Of
National Consumer Law Center
On behalf of its low income clients, and

Consumer Federation of America
Consumers Union
Electronic Privacy Information Center
National Association of Consumer Advocates
Privacy Rights Clearinghouse
U.S. Public Interest Research Group

To the

Board of Governors of the Federal Reserve System Regarding the Request for Information for the Study on Investigations of Disputed Consumer Information Reported to Consumer Reporting Agencies
Docket No. OP-1209

September 17, 2004

Introduction

The National Consumer Law Center on behalf of its low income clients,[1] Consumer Federation of America,[2] Consumers Union,[3] Electronic Privacy Information

[1] **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* (5th ed. 2002) and *Credit Discrimination* (3rd ed. 2002) are two of the eighteen practice treatises that NCLC publishes and annually supplements. These comments were written by Anthony Rodriguez and Carolyn Carter, NCLC staff attorneys.

[2] The **Consumer Federation of America** 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 advocacy and education.

[3] **Consumers Union**, the nonprofit publisher of Consumer Reports magazine, is an organization created 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 maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications. And noncommercial contributions, grants and fees. Consumers Union's publications carry no advertising and receive no commercial support.

Center,[4] National Association of Consumer Advocates,[5] Privacy Rights Clearinghouse,[6] and the U.S. Public Interest Research Group,[7] submit these comments regarding the study on investigations of disputed consumer information reported to consumer reporting agencies.

I. Half Measures Will Not Improve the Fundamentally Flawed Reinvestigation System.

The reinvestigation system in its current form is fundamentally flawed. Credit reporting agencies (CRA's) and creditors has developed a highly automated, computer-driven system that precludes any meaningful reinvestigation. Typically, CRA's do not even provide furnishers with the documentation of the error that the consumer sent to them. Nor does the CRA itself review that documentation. Creditors' reinvestigation of disputed information typically involves merely verifying that their own records show that a debt exists. Details and documentation of these problems are provided in these comments.

The continued result of this lackadaisical reinvestigation system is that consumers find it extremely difficult, frustrating, and expensive to correct errors. Moreover, there is no reason to believe that recent changes to the Fair Credit Reporting Act made by the FACT Act[8] are likely to improve this system in the near future.

Furnishers and the CRA's are likely to propose standards for reinvestigations that allow a perfunctory, meaningless reverification to substitute for an actual, bona fide reinvestigation of disputed information. Some may propose half measures that make only minor improvements. We urge the Board and the FTC to resist these suggestions.

The reinvestigation system is broken. Tweaking it with little improvements while allowing its fundamental flaws to persist, would be counterproductive: it would simply provide an official imprimatur to the current, defective system.

If a fundamental restructuring of the reinvestigation system is not possible, it would be better to leave development of the standards for reinvestigation to the courts

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[4] The **Electronic Policy Information Center** (EPIC) is a public interest research center in Washington, D.C. It was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values.

[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 **Privacy Rights Clearinghouse** is a nonprofit consumer information and advocacy organization based in San Diego, CA, and established in 1992. The PRC advises consumers on a variety of informational privacy issues, including financial privacy. It represents consumers' interests in legislative and regulatory proceedings on the state and federal levels. www.privacyrights.org.

7 The **U.S. Public Interest Research Group** is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

8 Pub. L. No. 108-159, 117 Stat. 1952 (2003).

and the agencies on a case-by-case basis. The FCRA imposes a broad standard of reasonableness on the reinvestigation process.[9] This is a familiar standard, and one that courts have often been called upon to apply in other contexts.[10] Courts and the FTC are familiar with persistent flaws in reinvestigations conducted by CRA's and furnishers[11] and have successfully applied this standard in FCRA cases.[12] The Board and the FTC should not interrupt this judicial development of standards by adopting half-measures that merely tweak the system and would only provide cover for its severe problems.

II. Responses to Specific Questions in the Board's Request for comments.

The Board has asked several questions relating to the dispute reinvestigation process. Many of these questions are addressed to industry or request information that is not available from consumers or their advocates. Answers to questions for which consumers and their advocates have information are provided below.

A. Disputes Communicated by Consumers Directly to Furnishers.

No. 4: *What are consumers' experiences in resolving disputes where the furnisher provided an address? What are the experiences locating and using this address to resolve their dispute?*

Answer:

We know that consumers lodge disputes directly with furnishers through billing error departments or, in some cases, through whatever address furnishers provide for such disputes. Generally consumer attorneys recommend that consumers dispute information simultaneously with CRA's and the furnisher.

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[9] Johnson v. MBNA, 357 F. 3d 426 (4th Cir. 2004); Bruce v. First U.S.A. Bank, N.A., 103 F. Supp. 2d 1135 (E.D. Mo. 2000).

[10] For example, many sections of the Uniform Commercial Code use reasonableness as the standard, with the expectation that the courts will give specific meaning to the term on a case-by-case basis.

[11] Cushman v. Trans Union Corp., 115 F.3d 220, 224-25 (3d Cir. 1997) (perfunctory investigation improper once a claimed inaccuracy is pinpointed); Henson v. CSC Credit Services, 29 F.3d 280, 286-87 (7th Cir. 1994) (must verify accuracy of initial information); Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151, 1160 (11th Cir. 1991) (whether error could have been remedied by uncovering additional facts); Dynes v. TRW Credit Data, 652 F.2d 35-36 (9th Cir. 1981)(single effort to investigate inadequate); Bryant v. TRW, Inc., 689 F.2d 72, 79 (6th Cir. 1982) (two phone calls to the creditors insufficient; Swoager v. Credit Bureau, 608 F. Supp. 972, 976 (D.C. Fla. 1985) (merely reporting whatever information a creditor furnished not reasonable; In re MIB, Inc., 101 FTC 415, 423 (1983) (FTC ordered the CRA to include as part of such reinvestigation a reasonable effort to contact original sources); In re Credit Data Northwest, 86 FTC 389, 396 (1975) (FTC ordered a credit reporting agency to "request[] examination by the creditor, where relevant, of any original documentation relating to the dispute in addition to its own records). These cases predate the 1996 amendments to the FCRA.

[12] Johnson v. MBNA, 357 F. 3d 426 (4th Cir. 2004); Bruce v. First U.S.A. Bank, N.A., 103 F. Supp. 2d 1135 (E.D. Mo. 2000). *See also* United States of America v. Performance Capital Management, Inc. (C. D. Cal. Aug. 2000), *reprinted at* http://www.ftc.gov/os/2000/08/performconsent.htm; http.

As is there is no private right of action when the dispute is submitted directly to the furnisher, there is a lack of reported information about the furnishers' dispute process when it is not linked to the CRA. However, consumer advocates repeatedly confirm that regardless of where the dispute is made (directly with the furnisher or through a CRA), furnishers are simply *not* conducting meaningful reinvestigations; they do *not* train their employees on effective reinvestigation procedures,[13] and they repeatedly default simply to verifying the existence of an account. Rarely do furnishers actually research the underlying dispute, rarely are documents reviewed and too often there is no analysis of the furnishers' own data for inconsistencies and errors. While a study on the effectiveness of having a separate address for disputes may be beneficial, the underlying problem with the reinvestigation process is the failure by furnishers to conduct a *bona fide* "investigation," as required by the 1996 amendments to the FCRA.

No. 5: *What are the consumers' experiences in resolving disputes where the furnisher does not provide an address? How are the disputes resolved and what entity or person (e.g., furnisher, consumer reporting agency, credit repair entity, legal representative, etc.,) was instrumental in resolving the dispute?*

Answer:

Consumer advocates typically advise consumers to file disputes of inaccurate or incomplete information simultaneously with CRA's and directly with the furnisher, regardless of whether the furnisher has a specified address for such disputes and requests for reinvestigations. As stated in response to question 4, advocates repeatedly find that disputes are simply not resolved through the reinvestigation process because inadequate reinvestigations are conducted both by CRA's and the furnishers of information.

These problems are illustrated by a recent case from Louisiana. The consumer disputed inaccurate information with Experian, was unable to obtain any relief, and then went to the furnisher, but matters only became worse. After the dispute process with Experian lasted for more than six months, the consumer wrote directly to the furnisher regarding the inaccurate information. The furnisher simply denied the inaccuracies and threatened repeatedly to insure that the credit report would contain the inaccurate information "indefinitely." The furnisher continued to reinsert disputed data into the consumer's credit reports, until consumer sought judicial relief.[14]

B. Other Furnisher Duties

No. 6: *What are consumers' experience with communicating with furnishers, with the timing of the notice of dispute appearing on the credit report, or any other matter relating to having the notice of dispute placed on the credit report when disputed information continues to be reported but with a notice of dispute?*

[13] See Deposition of Gino Archer, witness on behalf of Calvalry Investments, LLC, Rosenberg v. Calvary Investments, LLC, U.S. Dist. Ct. D. Conn., Case No. 03-cv1087, p. 8.
[14] Carriere, II v. Proponent Federal Credit Union, 2004 WL 1638250 (W.D. La. July 12, 2004).

Answer:

The problem is not so much with the timing of the dispute and reinvestigation. The problem is with whether the substance of the dispute is adequately conveyed and communicated to the furnisher by the CRA, and the quality of the reinvestigation conducted by both the CRA and the furnisher. Consumers and their advocates are less concerned with problems relating to the timing of the reinvestigations since they are usually done very quickly through the automated dispute verification process. As described repeatedly in these comments, the concerns rest with the failure by both the CRA's and furnishers to conduct any meaningful reinvestigation.

C. Disputes Communicated by Consumers to Consumer Reporting Agencies

No. 4*: Is sufficient relevant information provided to the furnisher by the consumer through the consumer reporting agency? Is all relevant information from a consumer provided to the furnisher through the consumer reporting agency? If not, what relevant information is often missing, and why? If relevant information is lacking, how does the furnisher resolve the dispute?*

Answer:

Consumers often provide whatever information is requested of them by CRA's and furnishers. Regardless of the fact that sufficient information and documentation of the disputed inaccuracy has been provided, the documentation is routinely not passed on to the furnisher. Typically underlying – essential – documentation of inaccuracies such as account applications, billing statements, letters, and the like, are left out of the reinvestigation process while both the CRA and furnishers rely on the automated dispute process and its coding of information. As reflected in the examples below, the policies and practices of CRA's is to *not* forward documents and other information to furnishers that would allow the furnisher to evaluate the truthfulness and completeness of the disputed information. This practice raises the obvious question: How can a furnisher or CRA reinvestigate the accuracy of information if they fail to review and consider documents pertaining to the disputed debt or tradeline?

III. Documented Fundamental Deficiencies in the Reinvestigation System.

The flaws in the reinvestigation system are well documented and can be found in testimony before Congress,[15] reported cases in federal and state courts, deposition testimony by employees of CRA's and furnishers regarding the policies and practices purportedly used for reinvestigations, the voluminous disputes lodged with CRA's and

[15] *See* Testimony of Anthony Rodriguez before the Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit (2003); Testimony of Len Bennett before the Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit (June 3 2003).

furnishers,[16] and the FTC's own database of complaints. All of these sources point to these ongoing flaws in the current reinvestigation system:

- **CRA's refuse to forward documentation of disputes to furnishers**.

  This problem is repeatedly evidenced to consumer advocates. In just one reported example, an employee of Trans Union actually testified that it is Trans Union's policy to send consumer dispute verification forms *without* ever including the underlying documents.[17]

- **Furnishers ignore documentation of inaccuracies**.

  Advocates also know from recurring cases that the standard response of furnishers is to ignore documentation even once the consumer is successful in getting it into their hands. In a recent case in a federal appellate court, MBNA employees testified that it is their practice to merely confirm the name and address of consumers in their computers, and note from the applicable codes that the account actually belongs to the consumer. These employees testified that they *never* consult underlying documents such as account applications to determine accuracy of disputed information.[18] Consumer advocates know that this is a chronic problem with reinvestigations.

- **CRA's' reinvestigations consist of merely "parroting" information received from other sources without independently investigating the accuracy and completeness such information, as required by the FCRA**.

  Again, these problems are repeatedly seen by consumer advocates across the country. Just one illustration of the problem is a case in which a Trans Union employee testified that – as a matter of policy – Trans Union reports whatever information creditors "verify" without independently investigating whether the information was accurate. [19]

  In another case, a consumer disputed information in her Equifax credit report and the furnisher was sent a Consumer Dispute Verification (CDV) form from Equifax. The creditor simply confirmed the debt, even though the consumer had already won a court decision that she did not owe the debt. When the consumer again disputed the entry with Equifax, the creditor again confirmed the debt, plus it increased the amount owed from $488.00 to $829.00. Yet, the creditor asserted that it could rely on a state

[16] Representatives of CRA's testified in depositions that CRA's can receive a range of 5,000 to 25,000 consumer disputes per day, with 7,000-10,000 being typical. *See* "Credit Scores & Credit Reports," p. 141, Evan Hendricks (2004).
[17] Crane v. Trans Union, LLC, 282 F. Supp. 2d 311, 316 (E.D. Pa. 2003).
[18] Johnson v. MBNA, 357 F. 3d 426 (4th Cir. 2004)
[19] Crane v. Trans Union, LLC, 282 F. Supp. 2d 311, 316 (E.D. Pa. 2003).

department of licensing report and that it had no further duty to investigate the accuracy of the information.[20]

- **CRA's ignore proof of inaccuracies provided by consumers**.

  Advocates confirm that this problem is repeatedly reported by consumers. One example of the problem is a case in which consumers provided Trans Union with proof issued by the IRS of extinguished tax liens, but Trans Union refused to perform a reinvestigation.[21]

- **Automated dispute verification programs only convey generic descriptions of disputes without substantive details of why consumers have disputed the accuracy or completeness of the information.**

  Consumer advocates point to this as a constant problem with the current reinvestigation system. Indeed an employee of Trans Union, Regina Sorenson, testified in one case that Trans Union's investigation is limited to sending the dispute verification forms. An excerpt from her deposition testimony reveals that the agency performs no meaningful investigation:

  Attorney: Now you sent [Capital One] a CDV and response came back verified to the name and the Social Security number, is that true?

  Ms. Sorenson: Verified means the account information was accurately reported and they also verified name and Social Security number.

  Attorney: And as a result, you all completed your investigation by updating it to show it had been verified by Capital One and leaving Capital One on Ms. Fleischer's credit report, is that true?

  Ms. Sorenson: Yes, it is.

  Attorney: Other than sending the CDV to the six furnishers, what else did Trans Union do to investigate Ms. Fleischer's complaints?

  Ms. Sorenson: **Nothing else**.[22]

Employees of furnishers have provided similar testimony regarding their lack of follow up and reinvestigation of the accuracy and completeness of disputed

[20] Betts v. Equifax Credit Information Services, 245 F. Supp. 2d 1130 (W.D. Wa. 2003).
[21] Soghomonian v. U.S.A., 278 F. Supp. 2d 1151 (E.D. Cal. 2003).
[22] Deposition of Regina Sorenson, Fleischer v. Trans Union, U.S. Dist. Court for the Eastern District of Michigan, Southern Div., No. CV-02-71301. *See also,* "Credit Scores & Credit Reports," Evan Hendricks, March 2004.

information.[23] This is a problem that is often discovered by attorneys representing consumers.

- **Furnishers claim that no standards at all apply to their reinvestigations.**

  It may be hard to believe that furnishers actually stand up in court and claim that there are no legal standards applicable to their investigations, and that therefore their meaningless procedure is legally justified. However, this is exactly what they routinely claim. Indeed in a recent case, a federal appellate court found that MBNA's interpretation of the FCRA reinvestigation provision does not contain "any qualitative component that would allow courts or juries to access whether the creditor's investigation was reasonable."[24]

- **Furnishers' reinvestigations ignore evidence of fraud.**

  Unfortunately, advocates find that ignoring evidence of fraud is typical of furnishers. Indeed in a First USA Bank's reinvestigation of a consumer's claim that his wife fraudulently opened accounts in the consumer's name, the court found that the bank ignored evidence that signatures on credit card applications did not match the consumer's signature on his driver's license.[25]

- **Consumers have the impossible burden of proving negative information to both furnishers and CRA's.**

  The current system requires that consumers prove a negative – an impossible task which is rarely accomplished without intervention by the courts.

  One recent example of this problem is in a case from Texas. The consumer complained to Verizon of erroneous Verizon tradelines in the credit report. Verizon employees stated that Verizon had no account with the consumer's name or social security number and advised the consumer to go to Trans Union. The consumer disputed the tradelines with Trans Union but received a post-reinvestigation report still containing the erroneous information. The consumer completed a fraud affidavit, but still

[23] *See* Testimony of Pamela Tuskey, Fleischer v. Trans Union, U.S. Dist. Ct. E.D. Mi, Civ. No. CV 02-71301; Testimony of Tricia Furr, MBNA credit reporting specialist, Johnson v. MBNA, Slip. Op. No. 3:02 cv 523, U.S. Dist. Ct. E.D. Va. (2003).
[24] Johnson v. MBNA, 357 F. 3d 426 (4th Cir. 2004)
[25] Bruce v. First U.S.A. Bank, N.A., 103 F. Supp. 2d 1135 (E.D. Mo. 2000) (No one from First USA's investigation unit spoke with the consumer or his former wife about the fraudulent accounts).

got no relief. He subsequently received debt collection demands and was routinely denied credit despite his efforts to have his report corrected over several months.[26]

These examples are only representative illustrations of chronic flaws in the reinvestigation system that prevents consumers from clearing their inaccurate and incomplete credit reports.

IV. Recommendations to Ensure Meaningful Reinvestigations and Accuracy in the Credit Reporting System

The current reinvestigation system is fundamentally flawed and needs to be overhauled from the ground up. At present, CRAs and furnishers treat requests for reinvestigations as nuisances. They go through motions of an activity that pantomimes what they believe the law requires of a reinvestigation without actually reexamining the substance of the information.

The underlying problem is that there appears to be little economic incentive to conduct true reinvestigations. *As there is almost always no economic cost to failing to conduct a real investigation, it is more financially rewarding to do little or nothing. Until the failure to conduct a real investigation becomes more expensive than not conducting a real investigation, the current system will remain broken.*

Furnishers have the same economic incentive against conducting meaningful reinvestigations – because real effort costs money, and there is no cost to *not* expending that effort. In addition, the furnishers actually do have an economic incentive for keeping negative information on a consumer's credit record – even if it is inaccurate. This is because the negative information limits the consumer's options to obtain other, less expensive debt, and is often the impetus to force a consumer to pay the furnisher even on an unjust claim. The risk of an occasional FCRA lawsuit appears not to have overcome these other economic disincentives. The result is persistent inaccuracies in credit reports, which harm both consumers and creditors.

In the upcoming study, the Board and the FTC should not focus on adjustments to the existing reinvestigation system but should instead focus on the underlying dynamics and the reasons that the system is so deeply flawed. The Board and the FTC should study what can be done to shift or counter these economic incentives. Perhaps insertion of an independent third-party review into the process would be helpful. Perhaps a role for lay advocates could be crafted that would reform the reinvestigation system. Perhaps if statutory damages were more readily available for sham reinvestigations the CRAs and furnishers would take these duties seriously. We urge the Board and the FTC to evaluate these central issues as part of the study.

Another approach to the underlying problems is to increase – to a significant degree – the duties upon furnishers. Furnishers should be required to rebut the

[26] Carlson v. Trans Union, LLC, 259 F. Supp. 2d 517 (N.D. Tx. 2003).

consumer's specific disputes by providing documentation to the CRA that shows that the information furnished is correct. Furnishers should not be allowed simply to tell the CRA that the consumer is wrong and the original information was correct, and CRAs should not be allowed to accept such a report. Instead, the furnisher should be required to give the CRA the underlying information - copies of documents with original signatures to rebut a forgery claim, for example, or copies of the payment record to demonstrate that the claimed balance is correct. Then the CRA should be required to evaluate this data and reach its own conclusion.

If, despite the fundamental flaws in the reinvestigation system, the Board and the FTC decide that merely setting standards for reinvestigations is sufficient, the standards should involve at least the following features:

- The standards must explicitly state that the scope of a reasonable reinvestigation varies from case to case and depends on the nature of the dispute. Setting blanket standards will only invite perfunctory reinvestigations.
- The standards should identify some reinvestigation practices that are *per se* unreasonable.
- CRAs must be required to convey to furnishers the actual documents that support the consumer's dispute, and failure to do so should be *per se* unreasonable.
- Furnishers must be required to investigate the dispute rather than merely verifying that the information appears in their own records. At a minimum the furnisher's reinvestigation must involve reviewing the actual documents provided by the consumer. Depending on the nature of the dispute, the furnisher may also have to review documents in its own possession or in the possession of an earlier holder of the debt, and may have to contact third parties.
- The furnisher must be required to respond specifically and in detail to the consumer's dispute, and must be required to include enough material so that the CRA can evaluate the response and reach an independent conclusion.
- The CRA must be required to review and evaluate the response from the furnisher, rather than merely parroting it.
- The CRAs should be required to set up an appeal procedure that the consumer can invoke, that involves a telephone conference with a CRA employee who has the consumer's dispute and all the documentation provided by the furnisher and the consumer.

ATTACHMENT 2

Testimony before the Committee on Financial Services Subcommittee on Finanacial Institutions and Consumer Credit regarding

Fair Credit Reporting Act: How it Functions for Consumers and the Economy

Introduction

Mr. Chairman, Congressman Frank, and Members of the Subcommittee, the National Consumer Law Center1 thanks you for inviting us to testify today regarding the Fair Credit Reporting Act. We offer our testimony on behalf of our low-income consumersclients.

The Fair Credit Reporting Act (FCRA) contains important consumer protections, yet there is a compelling need for improvements to this law to address the harm caused by inaccuracies and substandard reinvestigations of disputed information. Without improvements to the FCRA that include enhanced consumer remedies and protections, economic and emotional harm to our nation's consumers will continue unabated. Such harm includes denial of credit, overcharges for credit, denial of insurance or payment of higher insurance premiums, and the denial of employment. For these reasons we recommend that Congress amend the FCRA to ensure that all entities within the credit reporting system, including furnishers, are held to high standards of accuracy and are held accountable when they fail.

The Fair Credit Reporting Act is an essential part of the federal umbrella protecting one of only two significant federal laws that protect the privacy of American consumers and the and ensures accuracy of in the information , which is gathered by corporations about us all. Unfortunately, because of there are numerous loopholes, in this the FCRA law that must be closed to protect fails to protect American consumers fully. The flaws in the FCRA must be addressed. The credit reporting system is broken and consumers are constantly harmed by againsts misinformation that is provided by creditors and other furnishers of information which is and then disseminated by credit reporting agencies. One Congressman legislator has described the adverse impact of bad credit histories this way:, "A poor credit history is the 'Scarlet Letter' of 20th century America."2 While the Fair Credit Reporting Act (FCRA) contains important consumer protections, there is a compelling need for improvements to address the harm caused by inaccuracies and substandard reinvestigations of disputed information. Without improvements to the FCRA that include, but are not limited to, enhanced consumer remedies and protections, economic and emotional harm to our nation's consumers will continue unabated. Such harm includes denial of credit, overcharges for credit, denial of insurance or payment of higher insurance premiums, and the denial of employment. For these reasons we recommend that Congress amend the FCRA to ensure that all entities within the credit reporting system, including furnishers, are held to high standards of accuracy and are held accountable when they fail.

The Credit Reporting System Is Plagued With Inaccuracies

The credit reporting system has an historic and ongoingenduring problem with inaccuracies. Indeed and concern with the high level of inaccuraciesy in credit reports was the primary theme throughout all of the legislative debates leading up to passage of the FCRA.3

Several studies over many years have repeatedly documented the chronic problem of

inaccuracies found in credit reports. U.S. PIRG has conducted at least six studies between 1991 and 1998 and each time it has found an alarmingshocking number of serious errors in consumer credit reports. US PIRG's most recent study in 1998 revealed the following:

- Twenty-nine percent (29%) of the credit reports contained serious errors -- false delinquencies or accounts that had never did not belonged to the consumer -- that could result in the denial of credit;
- Forty-one percent (41%) of the credit reports contained personal demographic identifying information that was misspelled, long-outdated, belonged to a stranger, or was otherwise incorrect;
- Twenty percent (20%) of the credit reports were missing major credit, loan, mortgage, or other consumer accounts that would demonstrate the positive creditworthiness of the consumer;
- Twenty-six percent (26%) of the credit reports contained credit accounts that had been closed by the consumer but incorrectly remained listed as open;
- Altogether, 70% of the credit reports contained either serious errors or other mistakes of some kind.
  Another analysisstudy found that almost half of the reports reviewed contained at least one error, and many contained multiple errors.4 Yet another surveystudy found errors in 43% of the reports furnished by the three major credit reporting agencies.5 In 2000, a Consumers Union review of credit reports of twenty-five staffers found that more than half of the reports contained inaccuracies.6 In a more recent study by the Consumer Federation of America and the National Credit Reporting Association, the problems of inaccuracies and inconsistencies continued to plague consumer credit reports upon which credit scores were based.7

Information reported by furnishers is not always complete8 and many small retail and , mortgage companies, and some government agencies simply never do not even report to credit reporting agencies.9 Failure to report positive information means that consumers of these furnishers never have the opportunity to prove their creditworthiness. Other creditorsMoreover, sometimes creditors do not report or update information on the accounts of borrowers who consistently make payments as scheduled, yet report negative information. Often and credit limits established on revolving accounts are sometimes not reported, which in some cases has the effect of making consumers appear to be less credit worthy than they really are... In other instancescases, creditors may not notify the credit reporting agency when an account is closed or has undergoes other material changes.10

Evidence of high error rates in the credit reporting system is also found in the complaints received by the Federal Trade Commission regarding credit reports. For many years consumer complaints about credit reports have ranked at the top of all for complaints submitted to the FTC for any reason. Identity theft, which also can involves creditors or furnishers of credit information and credit reporting agencies, is now at the top of all fraud complaints received by the FTC. The FTC reported to Congress that as of March, 2002, the FTC received approximately 3000 calls per week to their toll- free identity theft hotline.11 Identity theft is the number one complaint to the FTC. Approximately 43% of all complaints received by the FTC in all subjects are identity theft related.12

These statistics and studies and reports clearly demonstrate that the credit reporting

system is broken and in need of a fix that includes heightened standards for accuracy and accountability within the nation's credit reporting system. Most importantly furnishers must be provided with economic incentives to provide accurate information about consumers. Without such improvements, American consumers like those described below will continue to be harmed and suffer serious adverse financial and emotional consequences that flowing fromflowing from the modern our financial version of the "Scarlet Lletter."

Consumers Are Harmed By Inaccuracies And Errors In Our Broken Credit Reporting System

Statistics of inaccuracies tell only a part of the story. The harm caused to consumers is real and devastating to those who, through no fault of their own, are victims of credit reporting falsehoods. Just this month, the Hartford Courant documented the harm and difficulties six consumers faced when inaccurate information wais contained placed in their credit reports.13 Consumers, who are victims of credit reporting errors, can be cut off from student loans and lose educational opportunities,14 pay higher finance charges,15 and face difficulties obtaining home financing.16

Anecdotal stories of errors illustrate the human costs of credit errors, but because they are stories of individuals they should not be considered to be isolated instances of a minor problem. These stories are typical of the thousands of daily errors in credit reports can including inaccurate reports of bankruptcies,17 reports of overpayments and non-payments, and, and reports of theft or other crimes. In one case, a check cashing services agency that provides businesses with check security services erroneously reported that a consumer was part of "fraud ring." This report led to the arrest of the consumer and his friend who was waiting in a car while the consumer tried to cash a check. Although a day later, the check cashing services firm learned that its information was inaccurate, however the person arrested while waiting in the car spent ninety days behind bars before the charges were dismissed.18 In another case, a consumer had a bankruptcy listed on his credit report, even though he had never filed for bankruptcy. The bankruptcy was instead filed by his business associate, but listed on the consumer's report even though the consumer continued to pay the underlying debt.19 In another example, a consumer received a nonrenewal notice from her insurer and learned that her insurer erroneously reported that she had made four fire claims and an "extended loss" claim over a short period of time. The consumer actually had only made prior claims relating to hail damage to her home, as well as a claim relating to her leaky washing machine. The false claims information remained on the consumer's report for over a year, even after the consumer filed suit, resulting in emotional harm and forcing her to pay higher insurance rates.20 These are just a few examples of the harm and problems associated with flaws in the current credit reporting system.

Furnishers (Creditors) Have No Incentives To Provide Truthful Information

Credit bureau subscribers, for examplee.g., department stores, banks, insurance companies and utilities, make reports to the credit reporting agencies bureaus of which they are members and include information about whether consumers are current or late with their accounts or, if not, whether a consumer is late with on a payments (30, 60, 90 days or more). The subscribers y also state what the balance is on a consumer's account and what the amount of minimum monthly payment is. However, Wwhen they incorrect information is reported information to credit reporting agencies incorrectly, that inaccurate information it

will be entered into a consumer's credit report incorrectly as well. Although credit reporting agencies have a duty to ensure "maximum possible accuracy" under the Actgreater accuracy, they rely heavily upon creditors and other furnishers of information.

Under the FCRA, consumers have very only limited remedies to pursue against furnishers of inaccurate information. The FCRA does establishes minimum standards of accuracy for furnishers. The problem is that , however consumers have no private method of cannot enforcinge violations of such standards. privately.21 The only privately enforceable rights against furnishers of information are those relating to the reinvestigation which the creditor or furnisher is required must to perform after a consumer requests that a credit reporting agency reinvestigate.22 The reinvestigation process, intended by Congress to protect consumers from inaccurate information, exists in name only. Instead it has become simply verification process, not a reinvestigation process. I and it is highly doubtful thatwhether the the process used by credit bureaus and furnishers is the reinvestigation process which was envisioned by Congress when the 1996 Amendments were enacted. Instead it has become a verification process, not a reinvestigation process.

The evidence, in reported cases and in case testimony by employees of the credit industry, shows that routine violations of the reinvestigation requirements are routine.23 Credit reporting agencies (CRA) and furnishers bypass the requirements of checking original documents to determine the accuracy of disputed accounts. This is despite the FTC opinion so, even though the FTC has opined in a consent decree that furnishers they are required to check the original documents when reinvestigating a debt must do so.24 Instead, credit bureaus simply punch in codes or numbers that verify inaccurate information, without any real investigation or checking of documents.

Moreover, case testimony indicates suggests that the CRA employees who are responsible for conducting investigations have time restrictions to investigate and send the dispute onto the creditor or furnisher. One credit reporting agency employee has testified that her agency TU receives between five to eight thousand consumer credit disputes per day and employees must handle one dispute every four minutes in order to meet quotas.25 This demonstrates that the credit reporting agencies have no economic incentives to ensure accuracy – instead the incentive is simply to go through the motions of an investigation process. The current structure of the FCRA protects the agency and the furnisher who engage in a process, regardless of whether the process yields real results in ensuring accuracy.

Furnishers are not subject to litigation for providing incorrect information and there is no federal liability for failing to provide truthful information, or even for providing blatantly false information. Furthermore, so long as the mistakes about consumers generally make the consumers appear to be a worse credit risk than they really are, rather than better, the credit industry has no incentive to improve the system, especially where the current system covers additional risk by charging more for riskier borrowers wrongly identified as being a greater risk by the credit reporting system.

Preemption Has Removed Important State Common Law Claims For Consumers And Hurts Creditors Who Maintain High Rates of Credit Reporting Accuracy

Furnishers are also protected from state common law and other claims because of preemption. Except in the context of a dispute and reinvestigation initiated with and by the

credit onsumer reporting agency, consumers have to turn to legal theories outside the FCRA to establish liability of a creditor or other party furnishing inaccurate information to a reporting agency. However, claims for negligence, invasion of privacy and defamation are preempted unless done with malice can be proven.26 Without preemption of state claims consumers could pursue claims against furnishers for (a) unfair practices (Conduct is unfair when it offends public policy, is immoral, unethical, oppressive or unscrupulous, or it causes substantial injury to consumers,27. (FN – See UDAP manual), where it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by the consumers themselves and not outweighed by countervailing benefits to consumers or to competition.")28, (b) deceptive practices (actual deception is not necessary; deceptive practices include affirmative misrepresentations and failure to disclose material information),29, (c) defamation and (d) infliction of emotional distress. What about defamation??

In light of the preemption of state common law claims, except where there is malice, and the limitation to claims for reinvestigations under federal law, there is no incentive – litigation risk or credit risk –- for furnishers to provide truthful information to credit reporting agencies. For furnishers it is cheaper and easier to be sloppy. This creates a dynamic in the credit marketplace that favors, which favors the creditor/furnisher operating the sloppiest credit reporting system, as there is no economic incentive for the furnisher to spend money to make the reporting accurate. Indeed the consumer is wrongly charged a higher rate to access credit. This not only hurts consumers economically and emotionally, as previously described, it unfairly and adversely affects those creditors and furnishers who strive for accuracy. For those who seek strive for greater accuracy, as envisioned by Congress when enacting the FCRA, the extra money spent they are spending to maintain high accuracy standards is not rewarded by the marketplace.

Changes to the The Credit Reporting System Are Needed To Protect Consumers And The Marketplace

Now is the time to correct the deficiencies in the credit reporting system. State laws should be allowed to apply so that the risk of litigation, including state claims, provides the appropriate incentive to maintain high accuracy standards and provide truthful credit information. Higher accuracy standards and clear accountability for violating such standards ensure that consumers are protected and that the marketplace, including those who use such credit information for whenuse in making decisions on credit, insurance, and employment, can rely upon the information. and that risks associated with such decisions will be reduced.

Consumers Should Have The Right To Obtain Equitable And Declaratory Relief to Correct False Information.

Businesses who furnish information to the credit reporting agencies should be liable to consumers for providing false or inaccurate information, especially when done done after notification that the information is inaccurate.willfully. Reporting agencies rely unquestioningly on the information furnished by creditors and others. Yet, the Act currently protects creditors from all liability for furnishing inaccurate information -- even if the consumer has repeatedly informed the creditor of errors, or the information is blatantly wrong, or even if or the information is furnished spitefully.30 With one minor exception, 31 the FCRA does not even explicitly provide for injunctive relief in actions by private parties.

One circuit court and several district courts have held that courts do not have the power to issue an injunction under the FCRA32, despite the Supreme Court decision in *Califano v. Yamasaki*33, which provides that "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." Providing courts with explicit authority to issue injunctive relief would further the purpose of the FCRA to "assure maximum possible accuracy." Courts should be granted the explicit authority to order credit reporting agencies and furnishers to delete inaccurate information and cease issuing reports that contain such inaccuracies. This could easily be accomplished by granting consumers the ability to seek injunctive and declaratory relief for initial reporting errors by furnishers of credit information. Judicial efficiency would also be served since consumers would not be compelled to file multiple suits when credit reporting agencies repeatedly include inaccuracies or fail to comply with the FCRA's requirements. Injunctive relief would further limit the need for class actions. Finally, it would provide relief to consumers who have not yet been harmed by the inaccurate information due to a denial of credit or other actual damages, but who still had inaccurate wrong credit information associated with their names.

We propose that consumers be granted the right to correct inaccuracies by obtaining injunctive and declaratory relief against furnishers for the errors that furnishers transmit to credit reporting agencies. In this initial process consumers seeking injunctive and declaratory relief would not be entitled to monetary damages, only attorney's fees should they be successful in obtaining injunctive or declaratory relief.

The ability to obtain injunctive and declaratory relief to correct inaccurate information provided by furnishers can be accomplished by removing the prohibition against private actions to enforce §1681s-2(a) of the FCRA. That limitation is now found in §1681s-2(b)(4)(c) of the FCRA. The FCRA only allows state and federal officials to enforce accuracy requirements against furnishers. An appropriate amendment would remove these limitations and enable consumers to seek only declaratory and equitable relief against those who furnish inaccurate information.

Statutory Damages for Furnishers' Failure To Correct Inaccurate Information After Notice

For instances when a furnisher continues to report inaccurate information, after being placed on notice of the inaccurate information and the consumer's dispute of such information, we propose that a consumer be afforded the opportunity to seek statutory damages, in addition to declaratory and injunctive relief. This proposal would serve the dual purpose of providing incentives to maintain high accuracy standards for consumers and, at the same time, empower consumers with the ability to obtain immediate and effective relief from harm caused by inaccurate reports.

The ability to obtain injunctive and declaratory relief to correct inaccurate information provided by furnishers can be accomplished by removing the prohibition against private actions to enforce §1681(a). That limitation is now found in §1681s-2(b)(4)(c) of the FCRA. The FCRA also limits enforcement of accuracy requirements under subsection (a) of § 1681s-2 to state and federal officials. 34 An appropriate amendment would remove these limitations and enable consumers to seek declaratory and equitable relief, for negligently furnishing inaccurate information.

Other Recommendations to Ensure Accuracy And Increase Accountability

Clearly the most important economic incentive for furnishers and credit reporting agencies to maintain high accuracy standards is private litigation. However, we also believe that other improvements to the FCRA are necessary to ensure accuracy and accountability in our credit reporting system. Such improvements would include the following: for furnishers include:

1. Requiring furnishers to conduct a "reasonable" investigation and not simply verify information;
2. Requiring furnishers to comply with the same modification and deletion requirements as those applicable to credit reporting agencies after there has been an investigation of disputed information;
3. Requiring credit reporting agencies to notify furnishers anytime information is deleted from a consumer's file; and.
4. Requiring credit reporting agencies and furnishers to maintain data for a period of five years, including anything sent to creditors or others who use credit reports.

Conclusion

NCLC has over 30 years of experience working on behalf of consumers in several areas of financial and credit services. We have seen the exponential growth of the availability of credit and personal information about consumers and we are familiar with the shortcomings of our current credit reporting system to ensure high rates of accuracy in credit reports. Our current law has not kept pace with the growth of the marketing of consumer credit information. As a result, consumers bear the burden, financially and emotionally, of responding to and attempting to correct the misinformation that furnishers and others in the credit reporting system disseminate. We offer to the subcommittee our expertise and access to attorneys in legal services, private practice and governmental agencies to improve the FCRA and correct this injustice within our credit reporting system.

Thank you for this opportunity to testify today.

June 4, 2003

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1 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 this testimony today. Fair Credit Reporting (5th ed. 2002) is one of twelve practice treatises, which NCLC publishes and annually supplements. These books, as well as our newsletter, NCLC Reports: Consumer Credit & Usury Ed., describes the federal and state law currently protecting all types of consumer loan transactions.

2 136 Cong. Rec. H5325-02 (daily ed. July 23, 1990) (statement of Rep. Annunzio), cited in FTC v. Gill, 265 F. 3d 944, 947 (9th Cir. 2001).

3 "[T}he increasing volume of complaints makes it clear that some regulations are vitally necessary to insure that higher standards are observed with respect to the information in the files of commercial credit bureaus. I cite what I consider to be the three most important criteria for judging the quality of these standards. They are first, confidentiality; second, accuracy; and third, currency of information." Statement of Sen. Proxmire, 114 Cong. Rec. 24903 (1968).

4 Consumers Union, What Are They Saying About Me? The Results of a Review of 161 Credit Reports from the Three Major Credit Bureaus, April 29, 1991.

5 Jan Lewis, Credit Reporting: Paying for Others' Mistakes, Trial 90 (Jan. 1992) (describing a 1998 study done by Consolidated Information Services that reviewed 1500 reports from Equifax, Trans Union and TRW).

6 Credit Reports: How Do Potential Lenders See You?, Consumer Rep. July, 2000.

7 See Credit Score Accuracy and Implications for Consumers," Consumer Federation of America and the National Credit Reporting Association, December 17, 2002.

8 Id.

9 See An Overview of Consumer Data and Credit Reporting, U.S. Treasury (2003)

10 Id.

11 Identify Theft: theTheft: The FTC's Response: Before the Subcommittee on Technology, Terrorism and Govt. Info. of the Senate Judiciary Comm. (March 20, 2002)

12 A PA positive Agenda For Consumers: The FTC Year In Review (April, 2003)

13 See Kenneth R. Gosselin and Matthew Kauffman, , A Credit Trap for Consumers, Hartford Courant (May 11, 2003).

14 Id.

15 See Credit Score Accuracy and Implications for Consumers," Consumer Federation of America and the National Credit Reporting Association, December 17, 2002.

16 Id.

17 See Nelson v. Chase Manhattan Mortgage Corp., 282 F. 3d 1057 (9th Cir. 2002).

18 Haque v. Comp U.S.A., Inc. 2003 WL 117986 (D. Mass. Jan. 13, 2003).

19 Nelson v. Chase Manhattan Mortgage, Corp., 282 F. 3d 1057 (9th Cir. 2002).

20 Boris v. Choicepoint Services, Inc., 249 F. Supp. 2d 851 (W.D. Ky 2003).

21 15 U.S.C. § 1681s-2 (c) & (d) (enforcement limited to the FTC and state attorneys general).

22 15 U.S.C. § 1681-2(b); See Bruce v. First U.S.A Bank, National Association, 103 F. Supp. 2d 1135 (E.D. Mich.).

23 Deposition of Regina Sorenson, Fleischer v. Trans Union, Civ. Action No. 02-71301 (E.D. Mich. Jan. 9, 2003). (Cite)

24 U.S. v. Capital Management, (Bankr. C.D. Cal. Aug. 24, 2000) (consent decree).(Cite to FTC Letter)

25 Deposition of Regina Sorenson, Fleischer v. Trans Union, Civ. Action No. 02-71301 (E.D. Mich. Jan. 9, 2003).

26 See 15 U.S.C. § 1681h(e) _____.
27 FTC v. Sperry & Hutchinson Co., 405 U.S. 322 (1972); See National Consumer Law Center: Unfair and Deceptive Acts and Practices (5th ed. 2001 and Supp.).
28 15 U.S.C. § 45(n).
29 See FTC V. Colgate-Palmolive Co., 380 U.S. 374 (1965); FTC v. Gill, 71 F. Supp. 2d 1030 (C.D. Cal. 1999); See National Consumer Law Center: Unfair and Deceptive Acts and Practices (5th ed. 2001 and Supp.).
30 See generally, 15 U.S. § 1681s-2, FCRA §623.
31 15 U.S.C. § 1681u(m), relating to FBI counter-intelligence purposes.
32 See Washington v. CSC Credit Services, 199 F. 3d 263 (5th Cir.), cert. denied, 530 U.S. 1261 (2000); Ditty v. Checkrite, Ltd., Inc. 973 F. Supp. 1320 (D. Utah 1999); Mangio v. Equifax, Inc. 887 F. Supp. 283 (S.D. Fla. 1995); Kekich v. Travelers Indemnity Co., 64 F.R.D. 600 (W.D. Pa. 1974). Compare Califano v. Yamasaki, 442 U.S. 682 (1979) which provides that "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."
33 442 U.S. 682 (1979)
34 § 1681s-2(b)(4)(d) limits enforcement of § 1681s-2 (a) to FTC and state enforcement agencies.