Testimony before the

U.S. HOUSE COMMITTEE ON FINANCIAL SERVICES

regarding

"Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information"
June 19, 2007

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Mr. Chairman, Representative Bachus, and Members of the Subcommittee, the National Consumer Law Center thanks you for inviting us to testify today regarding accuracy in credit reporting and the Fair Credit Reporting Act (FCRA) dispute process. We offer our testimony here on behalf of our low income clients.[1]

Mr. Chairman, we thank you for holding this hearing to examine the issue of how errors in credit reporting affect consumers, and whether they are able to correct errors using the FCRA dispute process. The short answer is that the American credit reporting system is rife with errors that are predictable and preventable, and the dispute process - the safety net designed to correct those errors - is full of gaping holes. This failure has created economic harm, hardship, and distress for untold numbers of consumers. Specifically, we discuss how:

- Credit reports are plagued by inaccuracies, such as files mixing the identities of consumers, errors caused by furnishers of credit information, the fallout caused by identity theft, stale information "re-aged" by debt collectors, and missing credit limits.
- The consumer reporting agencies (CRAs) conduct the dispute reinvestigations required by the FCRA in an automated and perfunctory manner. The CRAs translate detailed written disputes submitted by consumers into two or three digit codes, and fail to send supporting documentation to furnishers.
- Some furnishers themselves conduct non-substantive investigations that consist of nothing more than verifying the challenged data by comparing the notice of dispute with the recorded information that is itself the very subject of the dispute. The CRAs then "parrot" the furnisher's self-fulfilling results also without conducting any independent review, with the ultimate effect that no one ever investigates the substance or merits of the consumer's complaint.
- CRAs have little incentive to conduct proper disputes or improve their investigations. They treat disputes as a nuisance, and the investigation of errors as a money drain, devoting as little resources as possible by using automation that produces formalistic results.
- Consumers need help from Congress and vigorous enforcement by regulators to fix these problems. Consumers should have the ability to ask a court to order the CRAs and

[1] The National Consumer Law Center is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. As a result of our daily contact with these advocates, we have seen many examples of the damage wrought by inaccurate credit reporting from every part of the nation. It is from this vantage point – many years of observing the problems created by incorrect credit reporting in our communities – that we supply these comments. *Fair Credit Reporting* (6th ed. 2006) is one of the eighteen practice treatises that NCLC publishes and annually supplements. This testimony was written by Chi Chi Wu, with assistance from Lauren Saunders of NCLC and Richard Rubin.

furnishers to correct errors on their credit reports. Regulators also need to be aggressive in setting firm standards and requiring the CRAs and furnishers to obey current laws.

I . The Important Role of Accuracy in Credit Reports and the Unique Market Forces in that Industry

Congress enacted the FCRA in the explicit recognition that the health of the consumer banking and credit system "depend[s] upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of the banking system." 15 U.S.C. §1681(a)(1), (a)(4), and (b). Congress realized that credit decisions made on the basis of faulty information undermine the vitality of the consumer credit system and the ability of Americans to enjoy the fruits of this country's material prosperity. Failure within this system is not only expensive but also severely disruptive, while accuracy keeps the system running well. Congress designed the FCRA to increase that accuracy.

While critically important to consumers and the national economy, the credit reporting industry is unlike most other industries in some fundamental respects. It is essential to keep in mind that the paying clients of the credit reporting industry are not consumers, but the creditors who furnish or use the information contained in the CRAs' databases. Moreover, consumers have no say in whether their information is included in the CRAs' databases. Most Americans cannot avoid having a credit history. Unless they are very wealthy, consumers will need to borrow money if they want to buy a house or attend college.

Thus, unlike almost all other business relationships, consumers who are unhappy with the actions of a CRA cannot vote with their feet – they cannot remove the information or take their business elsewhere. Creditors, in contrast, do have the ability to switch between CRAs if they wish. And vigorous investigation of consumer disputes is likely to drive creditors away. Traditional competitive market forces therefore provide little incentive for CRAs to incur the costs to institute new procedures that ensure information is accurate or to undertake investigations to correct errors, since these activities primarily benefit consumers. Only the FCRA itself compels such behavior.

II. Inaccuracies Abound in the Credit Reporting System

Unfortunately, despite Congress's explicit purpose in enacting the FCRA, the consumer reporting system does not provide accurate information to its users. In the hearings that led to the Fair and Accurate Credit Transactions Act of 2003 (FACTA), Congress was presented study after study documenting errors in credit reports. For example, a study by the Consumer Federation of America and National Credit Reporting Association documented numerous serious errors and inconsistencies, such as the fact that 29% of credit files had a difference of 50 points or more between the highest and lowest scores from the three nationwide CRAs (i.e., Equifax, Experian and Transunion).[2] Members of Congress cited studies from U.S PIRG showing errors

[2] *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs*, 108th Cong. 381 (2003)(statement of Stephen Brobeck, Executive Director, Consumer Federation of America).

in 25% of credit reports serious enough to cause a denial of credit.[3] This level of inaccuracy continues after FACTA, with the most recent study by U.S. PIRG showing no improvement and finding that 25% of credit reports studied still contain serious errors.[4] Even the Consumer Data Industry Association (CDIA) has admitted that, out of 57.4 million consumers who ordered their own credit reports in 2003, 12.5 million (or 21.8%) filed a dispute that resulted in a reinvestigation.[5]

There are many types of errors in credit reports; we focus on a few of the most egregious.

Mixed files

Mixed or mismerged files occur when credit information relating to one consumer is placed in the file of another, thus creating a false description of both consumers' credit histories. Mismerging occurs most often when two or more consumers have similar names, Social Security Numbers (SSNs), or other identifiers (for example, when information relating to John J. Jones is put in John G. Jones' file).

Mixed files occur largely because the CRAs' computers do not use sufficiently rigorous criteria to match consumer data precisely, even when such unique identifiers as SSNs are present. For example, CRAs will include information in a consumer's file even when the SSNs do not match, but other information appears to match.[6] Thus, they have been known to mismerge files when the consumer's name is similar and they share seven of nine same digits in their SSN.[7]

The case of Eric Carroll documented by the Boston Globe is, at a minimum, a mixed file case.[8] It may be an identity theft case, but as discussed below, that crime is often facilitated by the CRAs' loose matching criteria. Other recent mixed file cases include the case of Victoria Apodaca, whose file was mixed with the file of Victoria Lopez Apodaca because they had the same last and first name, seven of the nine digits in their SSN matched, and they both resided in the state of New Mexico.[9] Despite filing dispute after dispute with the CRAs, Ms. Apodaca was unable to get her credit report fixed until she took legal action.

Mixed files could be prevented by requiring the CRAs to use strict matching criteria, for example requiring an exact match on SSNs, or could be reduced by merely requiring an eight of nine SSN match. However, the CRAs have chosen to be excessively and unreasonably over-inclusive because, as the Federal Trade Commission (FTC) noted "lenders may prefer to see all potentially derogatory information about a potential borrower, even if it cannot all be matched to the borrower with certainty. This preference could give the CRAs an incentive to design

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[3] *Id.* at 351 (statement of Senator Paul S. Sarbanes).
[4] Nat'l Ass'n of State PIRGs, Mistakes Do Happen: A Look at Errors in Consumer Credit Reports 11 (2004) .
[5] FTC/FRB August 2006 Report at 12.
[6] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, at 40 (Dec. 2004) (hereinafter "FTC 2004 Report").
[7] Apodaca v. Discover Fin. Servs. 417 F.Supp.2d 1220 (D.N.M. 2006). Practitioners report that one nationwide CRA relies on a match of as few as five of the nine digits in an SSN.
[8] Beth Healey, *Credit Agencies Lag on Errors, Fraud*, Boston Globe, Dec. 28, 2006.
[9] Apodaca v. Discover Fin. Servs. 417 F.Supp.2d 1220 (D.N.M. 2006).

algorithms that are tolerant of mixed files."[10] Despite this, the FTC has supported the CRAs' position in opposing stricter matching criteria, arguing that the costs outweigh the harm to people like Eric Carroll.[11]

Identity Theft

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 - identity theft itself presents a serious source of inaccuracies in the credit reporting system. The identity thief, however, is not the only culprit. CRAs and furnishers bear a share of the blame as well.

Most identity theft problems are actually caused by the CRAs' loose matching procedures, discussed above. For example, if an impostor has only adopted the victim's first name and SSN but not his or her last name or address, the algorithm used by CRAs to "merge" information often will incorporate the impostor's information into the victim's file at the time the CRA compiles the report. Once the fraudulent debt is reported, often after default and non-payment, and especially when collectors begin attempting skip trace searches, the account ends up merged into the victim's file even though many of the identifiers do not match. Accordingly, the "identity theft" is really characterized as a hybrid of a mixed file problem.

Another factor contributing to identity theft is the way in which furnishers have aided and abetted identity theft with their recklessly low security controls in their granting of credit. We could not describe it better than one federal District Court judge, who stated:[12]

> 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.

Many of the protections added by FACTA focused on assisting victims of identity theft. However, the most important new FACTA duties - the fraud alerts - are not proactive and instead are triggered only when consumers notify a CRA of suspected fraud. 15 U.S.C. §§ 1681c-1 and c-2. FACTA also contained several measures to prevent identity theft. Two important protections are the "red flag" guidelines and address discrepancy notice, both of which involve detecting possible signs of identity theft. The FTC and banking regulators are to issue regulations requiring creditors to establish programs to respond to these signs of identity theft.

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[10] FTC 2004 Report at 47.

[11] In the early to mid-1990s, the FTC reached consent orders with the CRAs requiring them to improve their procedures to prevent mixed files. FTC v. TRW, Inc., 784 F. Supp. 361 (N.D. Tex. 1991), *amended by* (N.D. Tex. Jan. 14, 1993); In the Matter of Equifax Credit Information Services, Inc., 61 Fed. Reg. 15484 (Apr. 8, 1996) (consent order). However, over a decade later, mixed files remain a significant problem.

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

However, the regulators' proposed regulations incorporate far too much discretion, allowing users to reject even the most obvious signs of identity theft.[13]

Furnisher errors

A significant source of errors in credit reports is inaccurate information provided to the CRAs by furnishers. Furnisher inaccuracies primarily fall into two categories types. First, the furnisher might report the consumer's account with an incorrect payment history, current payment status, or balance. Alternately, a creditor may have attributed the account to a consumer who does not owe the debt, often called an "ownership dispute."

The first type of error sometimes occurs because the creditor has not complied with industry reporting standards, such as the Metro 2 format. The second type, ownership disputes, often involves a spouse or other authorized user who is not contractually liable on the account. Other times, the consumer may have been the victim of identity theft.

Any error sent by the furnisher in its computer file automatically appears in the consumer's credit report, even if the information patently contradicts information appearing in other parts of the credit report. Thus, one defect of the credit reporting system is the failure of the nationwide CRAs to exercise virtually any quality control over the information initially provided to them by furnishers. The CRAs blindly rely on furnishers and provide no oversight of the quality of the information being reported. This unquestioning acceptance and re-publication of furnisher information invites abuse. This is especially true when it comes to debt collectors and debt buyers, who present their own special types of errors discussed below.

Re-aging of obsolete debts

A recurring abuse that results in inaccurate reporting is the "re-aging" of obsolete debts. This problem has grown particularly prevalent and profitable in recent years with the emergence of a multi-billion dollar distressed debt industry that buys, sells, and re-buys large portfolios of defaulted and time-barred debt for pennies on the dollar and then duns vulnerable consumers for inflated sums. The FCRA requires most consumer debts to be deleted from a credit report after seven years from the date of charge-off or 180 days after the delinquency. 15 U.S.C. §1681c(a)(4) and (c).

"Re-aging" occurs when these "scavenger" debt buyers purposefully misrepresent the date of delinquency to fall within the seven-year period. The debt buyers thereby resurrect long dormant and nearly worthless debts with the simple act of false credit reporting. FACTA attempted to address re-aging by requiring debt collectors to use the date of delinquency used by the creditor. 15 U.S.C. § 1681s-2(a)(5)(B). Despite this change, re-aging abuse continues.[14]

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[13] 71 Fed. Reg. 40,786 (July 18, 2006). See Comments to the FTC re: Identity Theft Red Flags and Address Discrepancies under FATCA, Privacy Rights Clearinghouse, September 18, 2006.

[14] *See, e.g.*, Gillespie v. Equifax Information Services, 484 F.3d 938 (7th Cir. 2007); Maloney v. LVNV Funding LL, 2006 WL 3006484 (N.D. Tex. Oct. 20, 2006); Allen v. Experian Information Solutions, Inc., 2006 WL 1388757 (S.D. Ill. May 12, 2006).

Perhaps one reason for its continuation is that the changes added by FACTA were codified in a section of the FCRA that consumers cannot privately enforce.

The CRAs play a role in re-aging abuse as well, failing to control properly for debt buyers who are effectively gaming their systems. For example, Experian has been aware of re-aging or "date flipping" for several years. In one deposition, an Experian employee testified that the CRA had stopped taking the data of a one debt buyer - Asset Acceptance - and had removed Asset's data from its systems.[15] However, this employee revealed in a later deposition that Experian had allowed Asset back into its system,[16] despite Asset's proven record of abuse.

In addition, the Seventh Circuit recently expressed its concern over Equifax's procedures concerning the "Date of Last Activity" field, which is the date used by that CRA to calculate the seven year expiration period. The Seventh Circuit believed that Equifax's procedures for that field could "effectively allow Equifax the opportunity to keep delinquent accounts in the credit file past the seven and one-half year limitation of" the FCRA.[17]

Debt Buying

The purchase and transfer of old consumer debts creates other problems in addition to re-aging. These 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.[18] When debt buyers collect a debt that is a decade or more old,[19] the first issue is whether the debt is still even valid, since some states prohibit any collection after the passage of the statute of limitations. Furthermore, there may be an issue as to whether the consumer really still owes the debt - the FTC alleged that 80% of the consumers from whom one debt buyer collected never even owed the debt[20] - or whether they paid it or otherwise resolved it.[21] With records long gone due to the passage of time, there is often nothing more than the victimized and hapless consumer's word against the presence of her name in an unverifiable 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. There is no account application, original agreement, history of periodic statements, or indication of whether any of the debt was disputed with the creditor or settled with a previous collector. 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.

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[15] Deposition of Kathy Centanni, Allen v. Experian Information Solutions, Civ. No. 04-817 (S.D. Ill. Dec. 6, 2005).
[16] Deposition of Kathy Centanni, Murphy v. Midland Credit Management, Civ. No. 05:CV-1545 (E.D. Mo. June 21, 2006).
[17] Gillespie v. Equifax Information Services, 484 F.3d 938 (7th Cir. 2007).
[18] *Collecting Consumer Debts: The Challenges of Change, Comments to the Federal Trade Commission regarding the Fair Debt Collection Practices Act*, National Consumer Law Center, June 6, 2007.
[19] 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).
[20] *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.
[21] *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).

The lack of this original documentation cannot help but create inaccuracies in credit reporting. For example in a recent case, an identity theft victim disputed a delinquent credit card account opened by his ex-girlfriend.[22] The account had been sold to a debt buyer, which did not have any of the original account documents. When the victim disputed the delinquent account to a CRA, the debt buyer merely compared the data in its files that had produced the disputed information with the identical information that the CRA was naturally then reporting. The debt buyer did not request documents from the original creditor. The most that this debt buyer would do in an identity theft investigation is to ask the consumer for a fraud affidavit. How is a proper investigation for identity theft conducted without looking at the signature on the original credit card application to see if it was forged or not?

Missing credit limits

The deliberate withholding of credit limit information by credit card furnishers is a well-documented and extremely serious problem. The withholding of credit limit information has a considerable impact on the consumer's credit score, because the ratio of credit used to credit available often constitutes 30% of the score.[23] A Federal Reserve Board study indicates about that 46% of consumers have at least one revolving account in their credit files that does not contain information about the credit limit.[24]

One researcher has theorized that requiring the reporting of credit limits might even help in part to address 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. The Brookings Institution has suggested 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.[25]

No Interest in Helping

Finally, there is one more example that shows how uninterested the CRAs are in ensuring accuracy or responding to consumers. In 2005, several consumer groups attempted to assist survivors who were undergoing major economic disruption caused by Hurricane Katrina from suffering adverse consequences of credit scores that would be artificially depressed as a result of that disaster. Fair Isaac, the developer of scoring models, was willing to work with the consumer groups. However, because developing a scoring model adjustment for disasters would take some time, we approached each of the three nationwide CRAs with a simple request to retain on file a "pre-disaster information" credit score based on current information on consumers in the counties affected by Hurricane Katrina. Each of the nationwide CRAs flatly turned us down.[26]

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[22] King v. Asset Acceptance, 452 F.Supp.2d 1272 (N.D. Ga. 2006).
[23] Fair, Isaac, *What's In Your Score,* available at www.myfico.com/CreditEducation/WhatsInYourScore.aspx.
[24] Robert B. Avery, Paul S. Calem, and Glenn B. Canner, *Credit Report Accuracy and Access to Credit*, Federal Reserve Bulletin, Summer 2004, at 306.
[25] *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).
[26] Press Release, *Credit Reporting Agencies Reject an Important Step to Help Hurricane Survivors:*

III. The Safety Net Is Broken: The Failure Of The Reinvestigation Process

The credit reporting industry has attempted to rebut charges of systemic inaccuracies in credit reports with their own studies, claiming that fewer than 3% of credit reports are inaccurate.[27] Even if the industry were correct, 3% of 200 million files[28] means that inaccurate credit reports are sabotaging the lives of 6 million Americans. These include Americans who work hard their entire lives, pay their bills on time, are responsible credit users, and otherwise play by the rules. Yet the credit reporting industry has the audacity to minimize the damage and disruption that inaccurate reporting wreaks on 6 million lives (or 50 million lives if one uses the 25% figure).

The FCRA does not impose strict liability for these inaccuracies - it requires CRAs to "follow reasonable procedures to assure maximum possible accuracy." 15 U.S.C. § 1681e(b). That is the first level of protection for accuracy in credit reporting. However, for those consumers who this first level of protection fails- whether it be 3% or 25% of the U.S. adult population- Congress enacted a second level of protection: the dispute process. The dispute process is the safety net when something goes wrong in the processing of billions of pieces of data for hundreds of millions of files. Unfortunately, the credit reporting industry has created gaping holes in that safety net.

The reinvestigation system in its current form is fundamentally flawed, and consumer advocates have stated so repeatedly in testimony to Congress and the regulatory agencies. As we discuss and the testimony of my fellow consumer advocates show, these flaws have not been addressed since the passage of FACTA. In fact, the FTC's August 2006 report on the dispute process similarly documents a lack of change in the reinvestigation process, but unfortunately treats the absence of reform as acceptable.

Two of the main problems with the credit reporting system's investigation process are: (1) the automated dispute system, in which CRAs convert detailed consumer disputes into cryptic two or three digit codes and do not forward to furnishers the documentation of errors that consumers send to the CRAs; and (2) furnishers' investigations of disputes involve merely verifying that the information matches their own computer records, without undertaking a meaningful examination of the underlying facts, with the CRAs accepting whatever the furnishers tell them without conducting an independent review. The continued result of this lackadaisical reinvestigation system is that consumers find it extremely difficult, frustrating, and expensive to dispute errors.

Automation Creates Flawed Reinvestigations

All too commonly, CRAs and furnishers fail to take complaints from consumers either seriously or seriously enough. Testimony and other evidence from cases suggest that CRAs

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Many Katrina Victims Will Face Additional Economic Difficulties as Credit Scores Drop Due to Disaster, Consumers Union et al., October 6, 2005.

[27] FTC 2004 Report at 25.

[28] FTC/FRB 2006 Report at 3.

receive tens of thousands of consumer disputes each week while imposing quotas for the number of consumer disputes that 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.[29]

In order to crunch down the time for a consumer's dispute into a mere matter of minutes, CRAs 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). Furthermore, all three CRAs collaborated through CDIA to create an automated on-line reinvestigation processing system called "e-OSCAR." According to the CDIA, 83% of disputes are processed using e-OSCAR, and each of the three nationwide CRAs has announced plans to stop accepting paper-based disputes.[30]

This automated system is heavily dependent upon standardized dispute codes used to communicate the nature of the dispute. Approximately 80% of consumer disputes are written.[31] These written disputes often consist of a detailed letter with supporting documentation, painstakingly written by concerned and even desperate consumers. All of these documents, including a consumer's careful description of a specific dispute, fashioned to make detection and correction easy, are reduced to a two or three digit code that the CRA employee who glances at the material believes best describes the dispute.

The code is sent to the furnisher and is often communicated alone, without supporting documentation provided by the consumer - documents such as account applications, billing statements, letters, and payoff statements that can show overwhelming and even conclusive proof. These critical documents are left out of the reinvestigation process while both the CRA and furnishers rely instead on the automated dispute process and its coding of information. Disturbingly, the actual policies and practices of the CRAs are to *not* forward documents and other information to furnishers that would allow the furnisher to evaluate the accuracy and completeness of the disputed information.[32] The CRAs claim forwarding documents through e-OSCAR is "questionable," a difficult claim to believe given how easily documents can now be transmitted electronically via PDF files.

Thus, the automated dispute system deliberately violates the FCRA's requirement that the CRA include "all relevant information" about the dispute that the CRA received from the consumer. 15 U.S.C. § 1681i(2). And if all relevant communication is not forwarded, the furnisher cannot comply with the FCRA's requirement to "review all relevant information" provided by the CRA. 15 U.S.C. § 1681s-2(b)(1)(B). This essential requirement to review all relevant information has become a nullity because such information is never communicated.

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[29] *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).
[30] FTC/FRB August 2006 report at 16.
[31] *See* Deposition of Eileen Little, Evantash v. G.E. Capital Mortgage, Civ. Action No. 02-CV-1188 (E.D. Pa. Jan. 25, 2003).
[32] FTC/FRB August 2006 Report at 18.

The use of this automated system also has contributed to the problem that some furnishers merely verify the existence of disputed information, and do not actually investigate disputes. In addition to failing to provide a meaningful description of the dispute and underlying documentation, this system permits a furnisher to simply check a box indicating that the disputed information has been verified, an exercise which aids and abets inadequate furnisher investigation. 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.

As you can imagine, numerous difficulties with this level of automation have been noted by consumer counsel. Even furnishers have complained that the dispute codes are "vague and overbroad."[33] As the Seventh Circuit noted about the ACDV processes:

> It seems that Experian has a systemic problem in its limited categorization of the inquiries it receives and its cryptic notices and responses. For example, there is the meaningless communication [plaintiff] received from Experian in response to her notice of dispute: "Using the information provided the following item was not found: Grossinger City Toyota." Another example is the opaque notice of dispute sent by Experian to U.S. Bank: "Claims Company Will Change or Delete." Moreover, in what appears to be an unresponsive form letter rather than the report of an adequate investigation into her claim, [plaintiff] was notified that the "Paid/Was a repossession" notation would remain in her report and the only change would be the addition of: "Account closed at consumer's request."[34]

Inadequate Investigation

Consumer advocates repeatedly confirm that CRAs and furnishers are simply not conducting meaningful reinvestigations. Instead, some furnishers default to verifying the existence of an account and the disputed information itself. They do not actually research the underlying dispute, review documents, or speak to consumers about the dispute. These furnishers simply verify information to the CRAs, who in turn "parrot" this verification without conducting an independent review.

For what should be done in an investigation, consider the testimony of Elizabeth Aadland, who once worked as a fraud investigator for the bank for Zales Jewelers. Ms. Aadland described how she conducted a fraud investigation for Zales, which included: [35]

- gathering original documents, including the credit application, the sales tickets, and any statements from the store personnel that were in written form;
- gathering copies of identification and police reports;

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[33] *Id.* at 17
[34] Ruffin-Thompkins v. Experian Info. Solutions, Inc., 422 F.3d 603, 610-611 (7th Cir. 2005).
[35] Deposition of Elizabeth Aadland, Smith v. Citifinancial Retail Services, No. 3:06-cv-02966 (N.D. Cal. March 23, 2007).

- examining the signature of the purchaser on the sales ticket and account application;
- interviewing store personnel, including the store manager, where possible, and the sales associate who had handled the actual transaction;
- preparing statements to be signed by store personnel or taking notes of interviews;
- interviewing the fraud victim because "often they would have additional information that would help us in locating a suspect or determining how the fraud or forgery had occurred."

Now contrast that with testimony by furnishers showing that they conduct FCRA investigations by merely comparing the information in the ACDV with their internal computer records. These include:

> **Capital One** - Capitol One employee Pamela Tuskey described how all three of the nationwide CRAs instructed Capital One personnel to simply verify information and to "make our system look like your system." The CRAs even discouraged the Capital One personnel from actively researching by pulling statements or similar activities.[36]
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> **MBNA** - In *Johnson v. MBNA*, the furnisher's employees testified that it was 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, and that they *never* consult underlying documents such as account applications to determine accuracy of disputed information.[37]
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> **Asset Acceptance** - *King v. Asset Acceptance* describes how that debt buyer responds to an FCRA dispute by merely reviewing the account information provided in ACDV and comparing it to the information in Asset's files. Asset does not typically request account documents from the original creditor in its review of an ACDV. If the ACDV or the consumer indicates identity theft or fraud, Asset's sole additional response is to send the consumer a letter requesting that the consumer provide an identity theft report.[38]

As for CRAs, their main response to FCRA disputes is to "parrot" what the furnishers respond to them, even when a simple check would reveal inconsistent information. For example, *Allen v. Experian Information Systems* involved a Sears account that was being reported on the consumer's credit report as "included in bankruptcy" past the limitations period for that information. The consumer's bankruptcy had occurred in 1993, yet the Sears account was reported as included in bankruptcy in 1997. When asked why Experian investigators didn't address the consumer's dispute by cross-checking their own records or check the records of the United States Bankruptcy Court as to the correct date of the bankruptcy, Experian employee Kathy Centanni answered:[39]

> …the consumer is not disputing the bankruptcy. If they were disputing the bankruptcy as such, we would dispute the public record.

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[36] Deposition of Pamela Tuskey, Carol Fleischer v. Trans Union, Case No. CV 02-71301 (E.D. Mich.).
[37] Johnson v. MBNA, 357 F. 3d 426 (4th Cir. 2004).
[38] King v. Asset Acceptance, 452 F.Supp.2d 1272 (N.D. Ga. 2006).
[39] Deposition of Kathy Centanni, Allen v. Experian Information Solutions, Civ. No. 04-817 (S.D. Ill. Dec. 6, 2005).

> The consumer is disputing the information being reported by a creditor, and it's our responsibility to go back to that creditor for them to research it.

In other words, the CRA's policy is that what the furnisher says is gospel and even court records cannot contradict that. Another recent example of this practice of refusing to conduct an actual investigation and instead to parrot the furnisher is *Cairns v. GMAC Mortg. Corp.*,[40] in which Equifax argued that "by contacting GMAC regarding Mr. Cairns' dispute, it had complied with the statutory obligations regarding reinvestigation." Fortunately, the court disagreed that Equifax's sole responsibility in an investigation was to contact the furnisher.

Even when the consumer is successful in getting documents into the hands of CRAs or furnishers, advocates know from recurring cases that the standard response of CRAs and furnishers is to ignore the documentation. For example, CSC Credit Services, which is an Equifax affiliate, has explicitly stated its policy of not considering any payoff letter from a creditor over 90 days old.[41] 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.[42]

All of these examples show that furnisher reinvestigations consist primarily of checking information in their computer data, while CRAs do even less by simply parroting the results supplied by the furnisher. 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.

IV. Why the CRAs and Furnishers Ignore Their Duties Under the FCRA

Disagreement Over "Accuracy"

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. For years, CRAs and 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 reality of what is correct.

This definitional controversy over "accuracy" is part of the reason why CRAs and furnishers have not conducted real investigations, but simply considered information accurate if they could verify it against their computer records.

Money Talks, Everything Else Walks

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[40] 2007 WL 735564 (D. Ariz. March 5, 2007).
[41] McKinley v. CSC Credit Serv., 2007 WL 1412555 (D. Minn. May 10, 2007).
[42] Betts v. Equifax Credit Information Services, 245 F. Supp. 2d 1130 (W.D. Wa. 2003).

The primary reason that the CRAs and furnishers fail to conduct proper reinvestigations under the FCRA is simple: money. The CRAs and furnishers treat disputes as nuisances and devote correspondingly little effort to them, because there is little economic incentive to conduct true reinvestigations. A real investigation would cost the CRAs and furnishers real money. For the CRAs, this is money spent on people who are not their real customers, except for the handful that might buy "credit monitoring products" (far outweighed by what the furnishers/subscribers pay).

The risk of an occasional lawsuit appears not to have overcome these 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.

V. Role of the Federal Trade Commission and Banking Regulators

Vigorous enforcement is critical in the credit reporting realm, even more so than in many other areas of consumer protection. There are many sections of the FCRA that are only enforceable by the FTC or by the banking regulators, including:

- Accuracy requirements for furnishers under 15 U.S.C. § 1681s-2(a)(1);
- Consumer's right to dispute debt directly to furnisher under 1681s-2(a)(8);
- Identity theft victim's right to identity theft transaction information under 1681g(e);
- Red flag guidelines under 1681m(e);
- Risk based pricing notices under 1681m(h)(8) (and potentially all FCRA notices);
- Furnisher's response to an identity theft victim under 1681s-2(a)(6);
- Notice of furnishing of negative information under 1681s-2(a)(7); and
- Accuracy and integrity guidelines under 1681s-2(e).

The primary job of enforcement lies with the FTC. The FTC has brought several FCRA enforcement actions in the past decade, many against non-bank furnishers and users of credit information. However, the FTC has only brought a handful of cases during this decade against the nationwide CRAs, and apparently none of which involved the accuracy of information. More critically, the FTC has failed to be assertive in its role as the administrative agency which interprets the FCRA and issues rules.

For example, the FTC has failed to recommend several proposals to improve credit reporting accuracy that FACTA required the agency to study, such as:[43]

- requiring the CRAs to institute stricter matching criteria to prevent mixed files, such as requiring complete SSN matches.
- providing consumers who have experienced adverse actions based on a credit report the right to receive a copy of the same report that the creditor relied upon.

[43] FTC 2004 Report at 53-55, 66-67.

Another example of an inadequate response is the FTC's decision not to address the CRAs' failure to forward consumer's documentation to furnishers during the dispute process. Despite the FCRA's unqualified requirement that the CRAs provide "all relevant information," the FTC and FRB concluded that the CRAs' failure did not necessarily violate the Act.

At least the FTC has taken some enforcement actions under the FCRA. We do not know of any FCRA enforcement actions that federal banking agencies have taken with respect to banks under their supervision. If there have been any such actions, they have not been publicized. The banking regulators are the sole entities capable of enforcing the accuracy requirements of the FCRA against bank furnishers under 15 U.S.C. § 1681s-2(a). They have abdicated this responsibility, leaving consumers unprotected against inaccurate and even deliberate misreporting by bank furnishers.

Finally, all of the regulators are also extremely tardy in issuing guidelines required by Section 312 of FACTA to enhance accuracy by furnishers. The FTC and banking regulators have only issued an Advanced Notice of Proposed Rulemaking, to which we submitted comments in response in May 2006 and are attached as Appendix 1.

VI. What Consumers Need In Order to Protect Their Rights

"Fix That Report"

The number one right that consumers lack under the FCRA is the ability to ask a judge to tell the CRAs and furnishers: "fix that report." With one minor exception, the FCRA does not provide for declaratory or injunctive relief in actions by private parties. The vast majority of courts have held that courts do not have the power to issue an injunction under the FCRA. The FCRA is an anomaly in this respect, as the Supreme Court decision in *Califano v. Yamasaki* provides the basis for injunctive relief for most other laws.[44]

Consider a consumer who has filed dispute after dispute with the CRAs, who has supplied evidence of fraud or mistake, and who has sued to protect her rights under the FCRA. If she can show that the CRAs or furnishers were unreasonable in their investigations, she might be able to get actual damages if she can prove the error caused a denial of credit after the dispute or is in a jurisdiction that permits intangible damages. If she can show the CRAs or furnishers knew they were violating the law or acted with reckless disregard, she can seek statutory or punitive damages. But she cannot seek the one thing she really wants, the remedy that started her down this arduous path in the first place - an order telling the CRAs and furnisher to correct the error.

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 CRAs and furnishers to delete inaccurate information and cease issuing reports that contain such inaccuracies. Judicial efficiency would also be served since

[44] 442 U.S. 682 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.")

consumers would not be compelled to file multiple suits when CRAs repeatedly include inaccuracies or fail to comply with the FCRA's requirements.

The FCRA currently protects creditors and other furnishers 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 the information is furnished spitefully. We propose that consumers be granted the limited right to correct inaccuracies by obtaining injunctive and declaratory relief against furnishers. In this initial process, consumers seeking injunctive and declaratory relief would not be entitled to monetary damages, only the reasonable attorney's fees incurred for successfully obtaining injunctive or declaratory relief.

Correcting a Scrivener's Error

FACTA inadvertently created ambiguity about whether consumers may enforce the FCRA requirement that creditors give notice to consumers when an "adverse action" is taken, *i.e.*, credit or insurance is denied or provided on less favorable terms, on the basis of an unfavorable credit report. 15 U.S.C. § 1681m. FACTA was intended to limit the remedies for the new risk-based pricing notice, but not to change the enforceability of existing FCRA notice requirements. 15 U.S.C. § 1681m(h)(8). However, the phrase "this section" in the limiting provision has been interpreted by several courts to apply to the pre-existing adverse action requirements, making the entirety of 15 U.S.C. § 1681m unenforceable under the FCRA private right of action.[45] This scrivener's error should be fixed by changing "this section" in § 1681m(h)(8) to "this subsection."

Recommendations to the Regulators

In addition to our legislative proposals, we have made a number of recommendations to the FTC and banking regulators as to what these regulators should require. If the regulators refuse to adopt these measures, Congress should do so. Some of our recommendations are set forth below, and the entire text of our comments is attached as Appendix 1.

- 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.
- Debt collectors and debt buyers must be required to obtain the original records needed to verify a debt from the creditor and to review them 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.

[45] Perry v. First Nat. Bank, 459 F.3d 816 (7th Cir. 2006) (collecting cases).

- 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 specific dispute raised by the consumer rather than merely verifying that the disputed information itself 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. In short, the reinvestigation must make a substantive determination of the validity of the specific dispute at issue.
- 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.
- 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.

VII. Conclusion

Three and a half years after FACTA, the American credit reporting system continues to be plagued by errors, and its safety net mechanism to correct those errors is broken. The CRAs have the ability to address these errors by revising their systems, but have chosen not to do so. Instead, they have created an automated and perfunctory dispute processing system, substituting computer codes and automated processing for real, meaningful investigations. Some furnishers participate in this perfunctory system by conducting investigations that consist of nothing more than comparing computer records to the notice of dispute. CRAs have little incentive to improve their procedures or investigations, because improvements cost money and only benefit consumers, who are not their real customers.

The credit reporting industry will only improve if Congress or the regulators take action. They will only improve if forced to do so by a court, yet consumers cannot even ask a court to issue injunctive orders. Without these measures, consumers will continue to be victimized by credit reporting errors and will be unable to use the rights granted to them by Congress to fix those errors.

Thank you for the opportunity to testify today.