Testimony before the

COMMITTEE ON FINANCIAL SERVICES
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

regarding

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

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Introduction

Mr. Chairman and Members of the Subcommittee, the National Consumer Law Center[1] thanks you for inviting us to testify today regarding the Fair Credit Reporting Act. We offer our testimony on behalf of low-income consumers.

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 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 the privacy of American consumers and the accuracy of the information gathered by corporations about us all. Unfortunately, because of numerous loopholes, the FCRA fails to protect American consumers against misinformation provided by creditors and other furnishers of information which is then disseminated by credit reporting agencies. One Congressman described the adverse impact of bad credit histories this way: "A poor credit history is the 'Scarlet Letter' of 20th century America."[2]

The Credit Reporting System Is Plagued With Inaccuracies

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

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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).

Several studies over many years have repeatedly documented the chronic problem of inaccuracies in credit reports. U.S. PIRG has conducted at least six studies between 1991 and 1998 and each time has found a shocking 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 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 analysis found that almost half of the reports reviewed contained at least one error, and many contained multiple errors.[4] Yet another survey 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 complete[8] and many small retail and mortgage companies, and some government agencies simply never 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 creditors do not report or update information on the accounts of borrowers who consistently make payments as scheduled, yet report negative information. Often credit limits established on

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[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)

revolving accounts are not reported, which in some cases has the effect of making consumers appear to be less credit worthy than they really are. In other instances, creditors may not notify the credit reporting agency when an account is closed or has 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 complaints submitted to the FTC for any reason. Identity theft, which also 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] Approximately 43% of all complaints received by the FTC in all subjects are identity theft related.[12]

These statistics 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 suffer serious financial and emotional consequences flowing from the modern version of the "Scarlet Letter."

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 was 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 including inaccurate reports of bankruptcies,[17] reports of overpayments and non-

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[10] *Id*.
[11] *Identify Theft: The FTC's Response*: Before the Subcommittee on Technology, Terrorism and Govt. Info. of the Senate Judiciary Comm. (March 20, 2002)
[12] *A 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).

payments, and reports of theft or other crimes. In one case, a check cashing 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 firm learned that its information was inaccurate, 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]

Furnishers (Creditors) Have No Incentives To Provide Truthful Information

Credit bureau subscribers, for example department stores, banks, insurance companies and utilities, make reports to the credit reporting agencies of which they are members and include information about whether consumers are current or late with payments (30, 60, 90 days or more). The subscribers also state the balance on a consumer's account and the amount of minimum monthly payment. When incorrect information is reported to credit reporting agencies, that inaccurate information 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 Act, they rely heavily upon creditors and other furnishers of information.

Under the FCRA, consumers have very limited remedies to pursue against furnishers of inaccurate information. The FCRA does establish minimum standards of accuracy for furnishers. The problem is that consumers have no private method of enforcing violations of such standards.[21] The only privately enforceable rights against furnishers of information are those relating to the reinvestigation which the creditor or furnisher is required 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. It is highly doubtful that the process used by credit bureaus and furnishers is the reinvestigation process which was envisioned by Congress when the 1996 Amendments were enacted.

[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.).

The evidence in case testimony by employees of the credit industry, shows that 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 in a consent decree that furnishers are required to check the original documents when reinvestigating a debt.[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 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 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 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 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 malice can be proven.[26] Without preemption of state claims

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[23] Deposition of Regina Sorenson, *Fleischer v. Trans Union*, Civ. Action No. 02-71301 (E.D. Mich. Jan. 9, 2003).
[24] *U.S. v. Capital Management*, (Bankr. C.D. Cal. Aug. 24, 2000) (consent decree).
[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).

consumers could pursue claims against furnishers for (a) unfair practices,[27] (b) deceptive practices,[29] (c) defamation and (d) infliction of emotional distress.

In light of the preemption of state common law claims, 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 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 greater accuracy, as envisioned by Congress when enacting the FCRA, the extra money spent to maintain high accuracy standards is not rewarded by the marketplace.

Changes To 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 credit information when making decisions on credit, insurance, and employment, can rely upon the information.

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 after notification that the information is inaccurate. Reporting agencies rely 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, the information is blatantly wrong, or if 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 FCRA.[32]

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[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.).
[29] *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.
[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

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 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.

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

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Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."

accountability in our credit reporting system. Such improvements would include the following:

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.