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Mismatched and Mistaken

HOW THE USE OF AN INACCURATE PRIVATE DATABASE RESULTS IN SSI RECIPIENTS UNJUSTLY LOSING BENEFITS

By Sarah Mancini, Kate Lang, and Chi Chi Wu

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Fighting Together for Economic Justice

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EXECUTIVE SUMMARY

The federal government has a long history of trying to use private databases in its efforts to prevent improper receipt of public benefits. But these efforts can backfire. Recently, this practice was implemented in a way that could potentially be harming thousands of extremely low-income elderly and people with disabilities by cutting off their benefits based on inaccurate information. In fiscal year 2018, the Social Security Administration (SSA) began using a data set from LexisNexis (Lexis) called Accurint for Government on a widespread basis to determine whether recipients of needs-based government assistance had unreported real property that could disqualify them from the receipt of such benefits.

Since the advent of SSA's use of the Accurint for Government (Accurint) product, advocates representing individuals receiving Supplemental Security Income (SSI) benefits have reported significant problems with clients being falsely accused of owning real property. People who rely on SSI to survive have received letters from SSA suspending their benefits or assessing an overpayment based on supposedly owning real property that puts them over the resource limit. Often the suspension letter does not even identify the alleged real property at issue. Too often, the data relied upon is inaccurate. Vulnerable SSI recipients, who are by definition either disabled or elderly and extremely low income, must attempt to prove a negative—prove that they do not own the real property—to the satisfaction of the employees in their local SSA office. And even worse, they may lose their benefits or face an offset for alleged overpayment during that appeal process, depending on the timing of their appeal.

Lexis appears to be attempting to evade the Fair Credit Reporting Act (FCRA), by inserting a disclaimer at the bottom of its promotional website stating, "Accurint for Government is not a consumer report (as defined in the Fair Credit Reporting Act) and may not be used for any purpose permitted by the FCRA." This type of disclaimer is part of a wave of businesses attempting to skirt coverage of the FCRA by disclaiming any intent to provide a "consumer report." By claiming that Accurint for Government is not a consumer report, Lexis is attempting to dodge the FCRA's requirements to adhere to certain standards of accuracy, and SSA is trying to avoid requirements to provide notices to consumers before taking any adverse action based on information contained in the report. If the FCRA applies, consumers would have the right to dispute inaccurate information contained in the report and have it investigated and corrected by LexisNexis.

SSA claims that it does not use the data from LexisNexis to deny or suspend benefits without independent verification, but that the data is used only to establish a lead. SSA employees are supposed to conduct an investigation to determine

whether the SSI recipient owns the real property. Reports from advocates around the country refute this assertion.

The matching standards being used in Accurint are shockingly lax. A first and last name match is sufficient to include a piece of real property in the report. Lexis does not require a middle initial match, Social Security Number, or date of birth. The upshot of this failure to require any reasonable standard of accuracy is that low-income people are being cut off from minimal subsistence-level benefits due to erroneous real property matches. People of color and immigrants are disproportionately impacted, as name-only matching results in even more inaccurate matches among these populations.

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In this report, the National Consumer Law Center and Justice in Aging examine the use of Accurint by SSA offices around the nation to suspend SSI recipients from receiving benefits. We make the following recommendations related to our evaluation of this product and the accuracy standards employed by Lexis.

Recommendations

- Lexis should acknowledge that Accurint for Government is a consumer report and should implement stricter matching standards in its algorithm to ensure maximum possible accuracy.
- SSA should stop using Accurint until stricter matching criteria are put in place. Considering the severity of the harm and the inability of SSI recipients to disprove the allegations, the agency must insist on a higher standard of accuracy.
- SSA should recognize that because the Accurint search is a consumer report, it must issue a notice of adverse action as required by the FCRA, informing consumers of their right to request a copy of the report and to dispute inaccurate information.
- SSA should ensure that local offices conduct an independent investigation, including oral and written communication with the SSI recipient as well as a human review of the real property records in question, before suspending benefits or taking any other adverse action.
- SSA should ensure that local offices properly protect recipients' due process rights.
- SSA should enhance its due process protections to allow for continuing benefits pending the outcome of any appeal of a benefits suspension based on non-home real property that is submitted within 60 days of the benefits suspension notice.
- SSA should translate the relevant notices, and LexisNexis should translate the Accurint report, into the top languages spoken by consumers who have limited proficiency in the English language.

Lexis and SSA are trying to evade coverage of the key consumer protection statute designed to prevent the kind of harm one might expect to see in the market for the sale of data: inaccurate information. By arguing that Accurint for Government is not a consumer report, Lexis is evading its obligation to ensure maximum possible accuracy of the information contained in its reports and provide a pathway for disputes of inaccurate information, and SSA is evading its obligation to provide notices when adverse actions are taken based on the data in these reports.

The population impacted by this data matching program represents some of the most vulnerable in our society—elderly and people with disabilities living on basic subsistence income ($794 per month for an individual and $1,191 per month for an eligible couple). When they are cut off from that income based on an inaccurate real property match, it puts at risk their housing, food security, and physical and mental health. Policymakers should take swift action to ensure that the government and this data broker change their practices to comport with standards of due process and the protections of the FCRA.

I. HOW SSA USES ACCURINT REPORTS TO TERMINATE ELDERLY AND DISABLED SSI RECIPIENTS' SUBSISTENCE-LEVEL BENEFITS

Introduction

Laura (whose name has been changed to protect her privacy) grew up in New York City and lives in senior citizens' housing in Harlem. She is 74 years old and has anxiety and depression. In December 2018, she received a letter from the Social Security Administration stating that she owed the government over $10,000 because of SSI benefits she received when, they claimed, she was not eligible for benefits. The letter had very little information. When she followed up with her local SSA office, they told her she owned real estate in Massachusetts and Washington, DC. Laura knew nothing about any such properties. She feared she may have become a victim of identity theft.

Laura tried to explain to SSA employees that she had no connection to these properties and had never lived in Massachusetts or DC. She reached out to SSA by phone and also went to the office many times, but the representatives kept telling her there was nothing they could do. They did not believe her that these other properties were not hers. She grew distraught. She was barely able to pay her rent with the reduction in her benefits due to the alleged overpayment. Finally, Laura was able to get legal help and convince SSA that she had no connection to these properties and her SSI should be fully reinstated.

Laura's story, and the others recounted in this report, are not unique. These individuals are some of the many who have lost their basic income and come to the brink of homelessness because of the federal government's reliance on a private database that is riddled with errors. Based on the government's own reporting, we estimate that thousands of SSI recipients may have been improperly cut off from their benefits due to an inaccurate match in the Accurint database.

The federal government has a long history of trying to use private databases in its efforts to prevent improper receipt of public benefits. But these efforts can backfire. Recently, this practice was implemented in a way that could potentially be harming thousands of extremely low-income elderly and people with disabilities by cutting off their benefits based on inaccurate information. In fiscal year 2018, the Social Security Administration (SSA) began using a data set from LexisNexis (Lexis) called Accurint for Government on a widespread basis to determine whether recipients of needs-based government assistance had unreported real property that could disqualify them from the receipt of such benefits.

Since the advent of SSA's use of the Accurint for Government (Accurint) product, advocates representing individuals receiving Supplemental Security Income (SSI) benefits have reported significant problems with clients being falsely accused of

owning real property. People who rely on SSI to survive have received letters from SSA suspending their benefits or assessing an overpayment based on supposedly owning real property that puts them over the resource limit. Often the suspension letter does not even identify the alleged real property at issue. Too often, the data relied upon is inaccurate. Vulnerable SSI recipients, who are by definition either disabled or elderly and extremely low income, must attempt to prove a negative—prove that they do not own the real property—to the satisfaction of the employees in their local SSA office. And even worse, they may lose their benefits or face an offset for alleged overpayment during that appeal process, depending on the timing of their appeal.

Supplemental Security Income, or SSI, is a federal cash benefit program administered by the Social Security Administration (SSA), an independent agency of the federal government. SSI provides a very basic income to older adults and people with disabilities who have little-to-no other income or resources to meet their basic needs.

The SSA also administers a larger, better-known program of social insurance benefits for retired, deceased, or disabled workers, called Social Security benefits. Social Security benefits are based on an individual's work history and can also provide auxiliary benefits for a wage earner's spouse and children.[1] These work-history based benefits are funded by a payroll tax for all persons working in a job covered by Social Security.[2] Financial need is not a factor in eligibility determinations, so no eligibility rules limit how much other income or resources an individual can have.

SSI, in contrast, is a means-tested program based on financial need.[3] The SSI program is funded by general tax revenues, not by payroll taxes.[4] SSI has extensive financial eligibility rules. In 2021, the maximum federal benefit rate is $794 per month for an individual and $1,191 per month for an eligible couple, with some states providing a supplement to SSI benefits.[5] SSI is also referred to as "Title XVI" under the Social Security Act. In most states, anyone receiving SSI is automatically eligible for Medicaid.[6]

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SSI provides a below-poverty-level cash benefit to meet the most basic needs–food, clothing, and shelter—for low-income people who are elderly or disabled. Because of racial inequities in American healthcare, education, employment, and justice systems, benefits are particularly important for Black Americans and other oppressed racial groups. Given that the rate of poverty for Black families in the U.S. is two-and-a-half times the rate for white families, and that one in five Black people live below the poverty line, it is not surprising that U.S. Census data shows the importance of SSI benefits for Black households.[7] SSA previously reported data on the race and ethnicity of SSI recipients, but stopped reporting this data in 2002.[8] Since 2016, Justice in Aging and partner organizations have urged SSA to resume its release of data on race and ethnicity for all programs.

Eligibility for SSI

Just under 8 million low-income people, including almost 2.3 million older consumers and over 1.1 million children with significant disabilities,[9] rely on SSI benefits to meet their basic needs, such as food, shelter, and utilities. Because SSI is a means-tested program, all SSI applicants and recipients must meet several eligibility criteria at the time of their application and on an ongoing basis every month they receive benefits. They must be age 65 or older, blind, or disabled, and must meet financial eligibility requirements.

The financial eligibility rules that apply to SSI applicants and recipients are detailed and complex. There is a strict income limit, and income is broadly defined.[10] There are also strict limits and complex rules regarding assets or "resources." Only countable resources affect SSI eligibility. An individual may not have more than $2,000 in countable resources, or $3,000 for a couple, to remain eligible for SSI.

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A "resource" is cash, other liquid assets, or any real or personal property that an individual owns and could convert to cash to be used for food or shelter.[11] Real property is land, including buildings or immovable objects attached permanently to the land. Personal property is any property that is not real property and includes things such as cars, household goods, life insurance policies, jewelry, and tools.[12]

When a question comes up about an individual who might have countable resources over the allowed limit, there are many follow-up areas of inquiry. There are a number of excluded resources that do not count toward the resource limit.[13] For the purposes of this report, the most important resource exclusion is the home in which the SSI recipient resides and all contiguous land, regardless of value.[14] There is also an exclusion for real property the SSI recipient is not able to sell.[15]

Countable resources are valued on the basis of the equity an individual has in the resource, meaning its fair market value minus any encumbrance, such as a lien or loan secured by it.[16] Individuals can also become ineligible for SSI benefits if they give away excess resources for less than fair market value.[17]

When SSA identifies that someone has resources over the allowed limit, that individual may be hit with not only a benefit suspension, but also with an alleged overpayment. An overpayment is the total amount an individual receives from SSA, for any period, that exceeds the amount which should have been paid in that period.[18] Once a final determination on the overpayment is made, the amount is a debt that the individual owes to the federal government.[19] The overpayment letter demands immediate payment, and informs the individual of SSA's right to collect the overpayment from future monthly benefits or through seizure of federal tax refunds.

Non-Home Real Property and Accurint Searches

Any real property that does not serve as the SSI applicant's or recipient's principal place of residence is called "non-home real property" (NHRP) by SSA.[20] Since this real property is counted as a resource, ownership of NHRP may make an applicant or recipient ineligible for SSI, depending on the amount of equity the individual has in the property.

In fiscal year 2018, SSA began widely using data matching through the Accurint product from LexisNexis in its efforts to identify NHRP owned by all new SSI applicants as well as certain current SSI recipients identified as having a "high error profile." SSA uses a computer program to review SSI recipients' records and then assign them a score based on certain characteristics of the recipient and certain reported changes in circumstances. Each SSI recipient's case is ranked by its score and then assigned to a profile code, such as high, medium, or low error profile, and scheduled for a redetermination review according to its ranking.[21] SSA then runs the "high error profile" recipients through the Accurint database in periodic reviews.

When SSA employees run an SSI recipient's information through Accurint, they are not supposed to rely solely on information obtained from Accurint to suspend SSI benefits without getting more information from the individual.[22] The SSA employee is required to review the Accurint information with the SSI recipient prior to making a decision based on that information. If the individual agrees with the Accurint information that makes them ineligible for SSI payments, no further investigation is required and the SSA employee should generate the relevant notices. However, If the individual does not agree with the Accurint information, then the SSA employee is supposed to investigate the real property further, including assisting the SSI applicant or recipient with documenting ownership of the property, its current market value, and any encumbrances on the property.[23]

Despite these procedures being clearly laid out for SSA employees at the time the Accurint data matching began, in the past three years, many individuals have had their SSI benefits suspended or been charged with an overpayment because of a purported real property match *with no independent investigation*. In some cases, due to the lax matching protocols by LexisNexis that are documented in this report, the real property was in fact owned by someone else. In other cases the amount of equity in the home did not in fact put the individual over the resource limit. Yet these low-income people are being cut off of SSI without first having the opportunity to review and dispute the information turned up in an Accurint search.

Administrative Appeal Process

When there is a determination to suspend benefits, the SSI recipient has a right to receive advance notice, called a Notice of Planned Action, before the determination can take effect. This notice triggers certain appeal rights, and the notice must inform the individual of the deadline for filing an appeal. Although the Act provides for

multiple layers of appeal, SSI recipients may only receive continuing benefits during the first stage of appeal (known as reconsideration), and only then if they submit the appeal within 15 days. This is an extremely short window of time, especially considering the barriers faced by elderly or disabled, very low-income, SSI recipients.

SSA has a four-step administrative decision and appeals process: initial determination, reconsideration, administrative law judge hearing, and appeals council.[24] The process applies to decisions involving initial and ongoing eligibility and benefit amounts, and differs somewhat for cases involving disability determinations. At all stages of the appeal process, the individual has 60 days (plus 5 days for mailing) from the date on the notice to file an appeal of an adverse decision,[25] though an individual may be able to show that they have "good cause" for missing a deadline.[26]

Initial Determination

The determination regarding an application or the ongoing receipt of SSI benefits is made in the local SSA office, also known as a field or district office, except disability determinations, which are made by the state disability determination service under contract with the SSA.[27] All initial determination notices must contain:

- what the initial determination is;
- the reasons for the determination; and
- the right to appeal.

Individuals may also receive a notice from SSA saying they were overpaid in the past due to the same issue that will result in their benefits being suspended going forward, such as being over the resource limit because SSA has matched them with non-home real property. These are two separate issues, one looking forward and one looking backward. Separate appeals must be pursued for the overpayment and the benefits suspension.

Reconsideration

This first appeal step, referred to as a Request for Reconsideration, will be handled at the local SSA office for cases involving SSI resource issues. As required by the U.S. Supreme Court, a special procedure for reconsideration applies to a proposed suspension in benefits for SSI recipients.[28] Although the appeal window is 60 days (plus 5 days for mailing), the SSI recipient is entitled to receive continuing benefits pending a decision on reconsideration only if the recipient files the appeal within 10 days (plus 5 days for mailing) of the date on the notice.[29] As shown by the case examples later in this report, meeting this short deadline is a challenge for SSI recipients, all of whom are either elderly or living with serious disabilities. If they miss this deadline, their benefits are terminated pending the decision on reconsideration unless they can show "good cause" for missing the deadline.

In SSI suspension cases, an individual can choose from one of three options:

(1) a case review (a paper-record review not involving a personal appearance or an opportunity to present witnesses),

(2) an in-person informal conference, which involves a face-to-face appearance before a decision-maker where a written summary of the conference becomes part of the case record, or

(3) an in-person formal conference, which is same as the informal conference but includes the opportunity to request that documents and witnesses be subpoenaed.[30]

Additional Levels of Appeal

If the SSA's determination is upheld on reconsideration, the individual can file a further appeal for an evidentiary hearing before an Administrative Law Judge (ALJ) through SSA's Office of Hearings Operations.[31] At the ALJ hearing, the individual can present witnesses and can request the ALJ to subpoena witnesses and documents.

An individual can request Appeals Council review of an adverse ALJ decision. Review by the Appeals Council is discretionary, and in the overwhelming majority of cases, the Council simply denies review.[32] Although it does not happen often, the Appeals Council can also take a case on "own motion" review to review an ALJ decision that was favorable to an individual.[33] The Appeals Council is the last step within the SSA administrative appeal process. If an individual receives an adverse Appeals Council decision, or if the Appeals Council declines to review the case, the individual may appeal in federal court.

Continuation of Benefits Pending an Appeal

The Notice of Planned Action must explain that if an appeal is requested within 10 days (plus 5 days for mailing), SSI payments will continue until a determination is made on the request for reconsideration.

There is no opportunity to receive continuing SSI benefits during an appeal that extends beyond the request for reconsideration stage. When an appeal is not successful on reconsideration, there are often lengthy delays and administrative hurdles in the subsequent layers of appellate review, all of which must be navigated while living without the basic income support of the suspended SSI benefits. This risk of extreme hardship during a lengthy appeal makes it all the more important to minimize improper benefits suspensions.

The individuals who receive SSI benefits are living well below the federal poverty line. They face significant challenges in dealing with the government agency that has the power to revoke their subsistence-level income benefit. As will be described in more detail, eligibility reviews relying on private data with insufficient accuracy standards put these SSI recipients at significant risk.

II. CASE EXAMPLES: HOW SSA'S USE OF ACCURINT REPORTS HARMS ELDERLY AND DISABLED SSI RECIPIENTS

The National Consumer Law Center and Justice in Aging set out to investigate how SSA offices around the country are using Accurint reports. Many advocates came forward with examples of inaccurate matches for non-home real property and SSI recipients whose benefits were suspended improperly.

As previously described, SSA uses the LexisNexis product Accurint for Government to search for potential non-home real property that SSI recipients may have failed to disclose, and which would render them ineligible for benefits. LexisNexis describes its Accurint for Government product as a "powerful tool" for "combating entitlements fraud."[34] It promotes the tool as providing efficient search technology to allow the user to locate people, businesses, and their assets. Accurint uses both public records and non-public information. According to Lexis, it is used by more than 3,000 agencies across the country to "fight fraud, waste and abuse."[35]

The following examples are illustrative of the use of Accurint by SSA offices, and the problems arising from inadequate matching protocols and insufficient procedural protections. In three out of the four examples, the Accurint report was the sole basis for the determination of ineligibility, and in the fourth case, SSA came close to deeming the recipient ineligible solely based on the Accurint report but backed down only after an attorney intervened. These cases also illustrate the impact of this problem on people of color, discussed in detail on page 21.

Minnesota: Teresa Sims

Teresa Sims is an African American woman with disabilities in her thirties who lives in a group home in the Twin Cities. Ms. Sims has been on SSI since she was a child. In March of 2018, the SSA sent her a letter stating that as of April 1, 2018, she would no longer receive her SSI benefits because of alleged assets it claimed she had failed to disclose. Among those alleged assets were three pieces of real estate located in Koochiching County, which is about six hours north of the county where Ms. Sims lived. Because she had been on SSI since she was a child, SSA had Ms. Sims' address history. SSA knew that she had never lived in Koochiching County. In fact, she had never even traveled to the county. These properties did not belong to this Teresa Sims.

It took a few weeks for Ms. Sims to get help with this problem and show the letter to someone at her group home. Fortunately, she found her way to legal services attorney Russell Squire, who represented her in an appeal the termination of her benefits. However, by the time she made it to Southern Minnesota Regional Legal Services, her SSI benefits had been cut off and she was too late to obtain continuing benefits while her request for reconsideration was pending.

On May 1, 2018, Mr. Squire helped Ms. Sims file a request for reconsideration. SSA sent a letter dated June 27, 2018, acknowledging receipt of the request for reconsideration, and requesting "proof that the following properties do not belong to you." The letter listed three pieces of real estate, all located in Koochiching County.

With the help of her attorney, Ms. Sims supplied SSA with an affidavit she signed on July 6, 2018, explaining that she had never owned any real estate in her life, had never been to Koochiching County, and had no family or friends in Koochiching County. Mr. Squire had researched the properties and discovered that they were all owned by Harold and Teresa Sims. He also found the record of a marriage between Harold Sims and Teresa Arnold in 1990. Using this information, he was able to draft a thorough affidavit laying out these facts from public records and explaining, among the other facts mentioned above, that this Teresa Sims had never been married and had never met anyone named Harold Sims.

In a letter dated August 3, 2018, SSA denied Ms. Sims' request for reconsideration, stating in part, "We gave you time to get proofs before scheduling your appointment," and, "You did not provide the proofs we requested in order to make a decision." In another letter to her attorney dated August 15, 2018, SSA claimed that the affidavit Ms. Sims had submitted was "not sufficient" and that, "If these properties are not hers or no longer hers, she must provide proof from Koochiching County."

Fortunately for her, Ms. Sims had an advocate who did not give up easily. Mr. Squire met with the SSA decision-maker in person and followed up with a letter detailing why the reconsideration denial should be reversed. As is recited in that letter, the SSA procedural manual requires SSA to use the LexisNexis report only as an investigatory lead, not to deny a recipient of benefits. Yet, in this case, SSA cut off Ms. Sims's benefits based only on the LexisNexis search result. The SSA employee told Mr. Squire that once the office gets a match through a LexisNexis search, it is the recipient's burden to show they do not own the property.

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Mr. Squire went on to provide further evidence of the fact that Teresa Sims was improperly matched to the three pieces of real property identified in the Lexis search. The property tax records for the three parcels of real estate showed an owner address in International Falls, MN. SSA knew from its address records of Teresa Sims dating back 18 years that she had never lived in International Falls. Finally, Mr. Squire had taken the additional step of obtaining the deeds to the properties, and pointed out that two out of three deeds showed the name "Teresa A. Sims" as owner along with Harold Sims. This confirmed his prior research suggesting that the owner in question was the Teresa Arnold who had married Harold Sims in 1990, when his client Teresa Sims was seven years old. Moreover, as Mr. Squire pointed out in his letter, his client Teresa Sims has no middle initial. Ultimately, after

Ms. Sims had been without income for 6 months, SSA reversed its decision to suspend her benefits.

Ms. Sims's case highlights several problems with SSA's use of Accurint. First, Lexis is matching properties to individuals based solely on a first and last name match. SSA claimed in a letter in this case that the Lexis product uses a combination of name and date of birth, but this is belied by the records. Real estate deeds and property tax records do not contain date of birth information for the property owners.[36] They do sometimes contain middle initials, as they did in this case, yet Lexis failed to require a middle initial match. These public records also contain a mailing address (for example, where the tax bill is being sent), yet Lexis apparently does not reject or flag a property if that mailing address does not match any known or past address of the SSI recipient.

Second, SSA employees are using the results of Accurint searches to make eligibility decisions. In Ms. Sims's case, SSA did not contact her regarding the alleged real property before deciding to cut off her SSI benefits. It simply cut her off. Moreover, when she denied ownership of the properties, it treated the Accurint report as evidence that she did own the properties, and put the burden on a low-income, disabled woman to find evidence that would outweigh the Accurint report. She was never given a copy of the report SSA was looking at. Through the research of her attorney, she was able to obtain the addresses. She was then told to do her own research, to obtain "proof" of a negative, that she did not own these properties.

Ms. Sims was without her SSI benefits for six months. She lost her Medicaid health insurance as a result. There were questions about whether she could see her doctor, get her medications, or buy groceries. She was fortunate not to become homeless during this six-month period because of housing benefits she received from the state, which were able to cover the shortfall for a limited period of time. Nonetheless, she suffered extreme stress. She recounted, "It was so stressful, I'm surprised I didn't have a panic attack. When it was over, I looked in the mirror and I had grey hairs."

As her attorney Russell Squire put it, "Considering the consequences of these searches, it should require a much higher standard of accuracy. How do they expect a seriously disabled individual to prove a negative?" If she had not had the assistance of her attorney, it is unlikely Ms. Sims could have prevailed in convincing SSA to reinstate her benefits. This points to an enormous problem, given that 86% of low-income people do not have access to civil legal representation.[37]

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Pennsylvania: Frances Harmon

Frances Harmon is an African American woman living in South Philadelphia, where she has lived all her life. She applied for SSI when she became disabled around 2008 at age 49. In spring of 2019, she received a notice from her local Social Security Administration office saying that it believed she owned real property and she needed to contact it regarding the issue.

The property at issue was located in Missouri. Ms. Harmon's daughter, trying to help, called the SSA office and explained that Ms. Harmon knew nothing about this property and had never owned property in Missouri or even traveled there. The SSA representative impressed upon her that Ms. Harmon's word on this was not sufficient and she needed to take care of it—to find some way of proving that this was not her property.

In fear that she might get cut off from her basic subsistence income, Ms. Harmon reached out to Community Legal Services of Philadelphia. Attorney Pam Walz quickly contacted SSA about the piece of real estate and explained, just as Ms. Harmon's daughter had done, that this was not her property. At that point, the SSA employee responded that it had removed the property from Ms. Harmon's record, and claimed it had done so based on the earlier call from Ms. Harmon's daughter. Of course, that was entirely different from what it had told her daughter on the phone. Ms. Harmon recalls, "They said 'we took care of it.' No, you didn't take care of it, you told me I had to take care of it. I had to get a lawyer to take care of it." SSA appeared to handle the matter very differently once a legal advocate intervened.

Significantly, this was one of the rare instances in which the local SSA office gave the benefits recipient an opportunity to clarify whether she owned the property before sending a notice of planned action suspending benefits. Pam Walz confirmed she had many clients who came to her upon receiving a suspension or overpayment letter, which they had to appeal promptly or lose access to their SSI benefits. And in nearly every story shared with National Consumer Law Center and Justice in Aging, SSI recipients were cut off without any prior opportunity to challenge the purported non-home real property that was identified in the Accurint report.

Ms. Harmon recounts that being told she might lose her basic income made her fear she would be unable to pay her rent or any of her other bills. "I was really scared," she says. "Before you say someone owns something, you have to really look into it. You've got to be sure."

New York: Laura Marshall

Laura Marshall (name changed to protect her privacy) grew up in Manhattan and lives in senior citizens' housing in Harlem. She is a 74-year-old Hispanic woman and has anxiety and depression. In December 2018, Ms. Marshall received a letter from SSA stating that she owed the government over $10,000 because of SSI benefits she received when, they claimed, she was over the asset limit.

SSA claimed that Ms. Marshall owned properties in New Jersey, Washington, DC, and Massachusetts. The property in New Jersey was her daughter's home. Ms. Marshall was included as a cosigner on the mortgage when the home was purchased in 2000, but was never on title to the home. When Ms. Marshall lived in the home for several years with her daughter, she had paid her rent of $400 per month. Once it became apparent that this house was part of the problem, Ms. Marshall obtained a letter from her daughter clarifying that she had no ownership interest in the home.

The other properties had nothing to do with Ms. Marshall.

She tried to explain to SSA employees that she had no connection to these properties and had never lived in Massachusetts or DC. She reached out to SSA by phone and also went to the office many times, but the representatives kept telling her there was nothing they could do. They did not believe her, or her daughter, that these other properties were not hers. Her daughter attempted to research the properties online. She discovered that a man owned the DC property. The Massachusetts property was harder to locate because they were not provided an address—just a street name. It appeared to be an empty lot. Ms. Marshall says the employees at the local SSA office did not help them. She says, "As a matter of fact, one young man told me to clear this up I would have to go and get a lawyer. I didn't have money for a lawyer, and I didn't think of legal aid."

> ***"If it wasn't for that young lady, to be totally honest, I would have killed myself. There was no way I was going to be able to handle this."***
> *—Laura Marshall speaking about her legal advocate from NYLAG*

Ms. Marshall grew distraught during this process. She was barely able to pay her rent with the reduction in her benefits due to the alleged overpayment. She says, "I suffer from anxiety and depression, and all of this hit me at one time. I didn't know where I was going to get my next meal. My daughter was there for me, but she has her own house to pay; she has her own family." Fortunately, Ms. Marshall's social worker connected her with an advocate at New York Legal Assistance Group, who convinced SSA that these properties were not connected with Ms. Marshall. She believes that getting legal help to straighten this out may have saved her life. She says, "If it wasn't for that young lady, to be totally honest, I would have killed myself. There was no way I was going to be able to handle this."

SSA never contacted Ms. Marshall regarding the alleged real property before sending her an overpayment notice. The overpayment notice stated that she had 60 days to appeal the decision if she disagreed, but the employees at the local SSA office didn't follow the agency's policy that instructs them to assist someone with filing an appeal if they disagree with a decision. Instead they told her that there was nothing they could do and that she should get a lawyer, without providing her with any information about civil legal-aid agencies that could assist her for free.

California: Nam Thi Tran

Nam Thi Tran lives in San Jose, California. In mid-January of 2018 she received a letter from Social Security stating that her SSI payment of $766.07 would be reduced to zero beginning February 2018 because, as the letter asserted, "you and your spouse have countable resources worth more than $3,000." The letter further claimed that Ms. Tran was overpaid from July through December of 2017 due to alleged "countable resources worth more than $3,000." In a section labeled "Your Resources That We Count," the letter mentioned "Real Estate–$333,657.00."[38] This letter terminating her benefits and notifying her that she could initiate an appeal was the first Ms. Tran had heard from Social Security about any alleged real property or excess assets.

Ms. Tran attempted to resolve the situation on her own. She went to the Social Security office and asked for more information. The SSA employees told her the address of the alleged real property, and Ms. Tran explained that she had no connection to this property—that she was not the Nam Thi Tran listed as an owner of this property. She even contacted the county tax assessor's office and learned that the property in question was owned by a Nam Thi Tran and another individual as community property. The SSA employees did not listen to her.

Fortunately, Ms. Tran's doctor recommended she reach out to the Law Foundation of Silicon Valley, where she met attorney Rebecca Moskowitz. Ms. Moskowitz sent correspondence to SSA on January 29, 2018, containing the county tax assessor's office printout showing that the property was jointly owned as "community property" with a person who was not Ms. Tran's spouse. Ms. Moskowitz further explained that "community property" is a type of ownership interest held by married couples under California law. In response to this letter, an SSA employee told Ms. Moskowitz that their office applies federal law, not California law, and stated that the documentation she had provided was not sufficient to disprove Ms. Tran's interest in the real property.

The SSA employee stated that Ms. Tran's benefits could be restored if she could provide a letter on letterhead from the tax assessor's office stating that the owner of the real property in question was a different person than this Nam Thi Tran. Ms. Moskowitz communicated with the tax assessor's office, which was not able to provide a letter to this effect, because they lacked identifying information that would have enabled them to compare the date of birth or Social Security Number of the Ms. Tran shown on the deed and the Ms. Tran who was suddenly cut off of SSI. Incidentally, San Jose has one of the largest Vietnamese populations in the U.S., and the surname Tran is extremely common in the Vietnamese community, on a par with a name like "Smith" or "Jones" in the United States as a whole.

Ms. Moskowitz went back to SSA and continued to fight the wrongful termination of benefits. In a letter dated February 26, 2018, SSA finally informed Ms. Tran, "You have been able to show that the property in question does not belong to you. We

have removed your name from the property in our system and the overpayment that occurred due to the incorrect information. Your benefits have been reinstated."

Ms. Tran had disputed the error immediately, and her attorney sent an appeal letter to SSA by fax within the 15-day window after the date of the suspension notice. She was entitled to ongoing benefits during the period of her appeal. However, the SSA system had already stopped the issuance of her benefits check for the next month, prior to the expiration of the continuing-benefits window. Ms. Tran did not receive her February check until two weeks after her rent was due. She would not have received it then, but for her attorney contacting a manager at SSA to get the check expedited due to the improper suspension.

Ms. Tran receives SSI because she has a disability and is very low income. After her benefits were suddenly cut off, the fear of being unable to pay her rent caused her extreme psychological stress. This financial and emotional hardship was caused by an error that should have been easily detectible to SSA. Moreover, SSA used the false match from Accurint as the sole basis to terminate her benefits, with no apparent independent verification. If SSA had attempted to communicate with Ms. Tran to ask her about the purported real property prior to sending the termination letter, she would have explained that this was not her property. Even when she did try to explain this after SSA sent the notice, SSA refused to accept her explanation without independent verification. Ms. Tran would have had no way to gather this verification without access to her attorney's legal research tools. Without the intervention of Ms. Tran's attorney, SSA likely would have upheld its decision.

Other Elderly or Disabled Individuals Lost Benefits Due to Errors in the Accurint Report

In addition to the four people discussed above, National Consumer Law Center and Justice in Aging reviewed more than a dozen other examples of SSI recipients around the country cut off from benefits based on the results of an Accurint search. These examples brought forward by legal services attorneys are likely the tip of the iceberg. Most low-income people do not have access to civil legal services. Based on the error rate of Accurint real property matches documented by a 2011 report, we estimate that thousands of SSI recipients may have lost their benefits based on an inaccurate Accurint search.

Many of the examples shared with National Consumer Law Center and Justice in Aging involved false real property matches. One limited English proficient client in her late 50's was told by SSA that she had recently purchased real estate. She had submitted her entire credit report during her redetermination review showing that she had no connection to this property or the mortgage loan used to purchase it. Yet her attorney had to go to great lengths to prove to SSA that this was not the same person, including reaching out to the real estate agent and searching the deed records.[39] A Bengali SSI recipient in New York had her benefits suspended and an

$11,000 overpayment assessed against her based on real property in Florida that was in fact owned by her sister, with a similar name.[40]

Other examples involved properties that were connected with the recipient at some point, but should not have disqualified the recipient because they were transferred away many years ago or were worth less than the allowed amount. One SSI applicant in Massachusetts was denied benefits based in part on a property that he previously owned but had conveyed to an ex-spouse in a divorce 20 years ago. The attorney helping him easily discovered this fact in the deed records yet SSA had rejected his application without any apparent investigation and without giving him any opportunity to explain. This man was homeless, unable to get medical care, and living in his car with a failing colostomy bag at the time.[41] Another case involved two children on SSI whose benefits were suspended because their parents still owned a home in Puerto Rico. The family had moved to New York after Hurricane Maria. Ultimately SSA agreed that the value of the property was less than the resource limit but not until the family borrowed money to travel back to Puerto Rico and get the property value reassessed.[42]

SSA offices do not always honor the recipients' due process rights when they suspend benefits based on an Accurint search. An SSI recipient in Washington, DC lost benefits and had to borrow money to pay his bills due to a property that he had inherited that was stuck in probate. SSA eventually conceded that the home was not a countable resource, but it took over a year to resolve.[43] All the more troubling, a supervisor in the local SSA office told the attorney assisting this recipient that he just goes by what's in the system (Accurint), and that because this information came from that system (a data matching program), the recipient had no due process rights.[44]

III. A SYSTEM BUILT ON ERRORS

Several common problems emerge from the examples previously described.

Eligibility (or Ineligibility) Is Determined Solely Based on the Accurint Report

It is clear that local SSA offices are not conducting any independent verification regarding the real property identified by the Accurint reports before the local office sends a notice terminating SSI benefits. If SSA employees were independently investigating this information prior to terminating benefits, they would have communicated with the recipients before sending a notice suspending benefits. The typical experience of SSI recipients, as reflected in three out of the four detailed client stories described above (and numerous others that were reported to us), was that the first communication regarding any alleged real property was in the notice suspending benefits. If SSA had inquired of these benefits recipients, they would have

explained that they had no connection to the real property in question. Similarly, if SSA employees had conducted any reasonable independent investigation, they would have noticed that the property at issue in Teresa Sims and Nam Thi Tran's cases were jointly owned with individuals, and that these individuals were not the recipients' spouses. This information is available in the public records that formed the basis of the data supplied by Accurint, such as deed records and property tax records.

Name-only and Overly Loose Matching Criteria

Another fact illuminated by these examples is that Accurint is returning a "match" based on a first and last name only. In Ms. Sims' example, the Teresa Sims who actually owned real property in upstate Minnesota had a middle initial, whereas SSI recipient Sims had none. The real property records from which Lexis pulls information for the Accurint reports do not contain either dates of birth or social security numbers, but Lexis has access to information that it could use to strengthen the matching protocols.[45]

Name-only matching is extremely unreliable. Mismatching is common among background screening companies that pull from public court records and frequently use name-only matching.[46] Background screeners typically match information in criminal records databases by relying on first name, last name, and date of birth, or just first and last name. Name-only matching is particularly likely to harm consumers with common names. Even where both the name and date of birth match, false positives are common. A search of a website called howmanyofme.com estimated that 45,878 people in the United States have the name "Robert Smith." Researchers estimated that, for every 325 instances of Robert Smith, five of them will share the same full date of birth.[47] "Fuzzy logic" algorithms, which background screeners often use, would increase the number of matches by including people with similar names to Robert (e.g., Roberto, Roberta, Rob, Bob), or even people whose middle name is Robert.[48]

Name-only matching leads to such high error rates that the Big Three nationwide credit reporting agencies (Equifax, Experian, and TransUnion) have ceased using the practice. As a result of settlements with attorneys general in 32 states, CFPB supervision, and private class action lawsuits, the Big Three now use stricter criteria— either a Social Security Number or a date of birth—to match public records to a consumer's credit file.[49] Because most civil judgments and many tax liens do not include such data, the nationwide CRAs no longer include these records in credit reports.[50] In contrast, LexisNexis continues to disseminate reports that include non-home real property "matched" with consumers based on the same type of overly loose matching criteria that the nationwide CRAs used to use.

Name-only matching leads to such high error rates that the Big Three nationwide credit reporting agencies (Equifax, Experian, and TransUnion) have ceased using the practice.

There are many examples of false name matches, even when date of birth is overlaid. One unfortunate consumer, Catherine Taylor, was allegedly denied employment based upon an erroneous criminal background check run by ChoicePoint (which is now LexisNexis). Ms. Taylor has the misfortune of sharing the same first and last name and date of birth with another Catherine Taylor, a woman living in Illinois with a lengthy criminal history. ChoicePoint admitted in depositions that it had information in its file that would have indicated that Ms. Taylor was not the person in Illinois with the criminal record. Despite the fact that ChoicePoint had access to this information, the particular ChoicePoint product in this case was designed to give an instant result, and thus was not designed to access that information.[51] ChoicePoint's representative, Teresa Preg, testified in deposition that essentially the reports are over-inclusive because their clients want to receive "as much information as possible," even if the information might not be accurate.[52] This business decision has been lucrative for ChoicePoint (now Lexis). In ChoicePoint's decade of operation, its annual revenue grew from approximately $400 million in 1997 to approximately $1 billion in 2008 before it was purchased by Reed Elsevier Group (the parent company of LexisNexis).[53]

LexisNexis has in its database information necessary to make more accurate matches. However, the financial incentives are not aligned to lead Lexis to design its products to maximize accuracy. Perhaps, Lexis has concluded that making Accurint reports available to SSA and other government users quickly and using less costly methods are higher priorities than ensuring accurate information for those who may lose their basic subsistence income as a result of mismatched records. In addition, Lexis may be hearing from customers like SSA that they would rather obtain a report that is over-inclusive, in order to have the highest likelihood of reducing benefits overpayments—even if some of the terminations that result are improper. Neither SSA nor Lexis has much reason to be concerned about false matching, unless and until they face legal repercussions for doing so.

Disproportionate Impact on Immigrants and People of Color

Of the examples we heard about from around the country, a significant number involved immigrants or limited English proficient individuals.

One likely reason for this fact is that name-only matching is more likely to result in false matches among certain racial and ethnic minorities. "Clustering" of common surnames is even more common among ethnic minorities than among non-Hispanic white populations. Data from the 2010 Census showed that the Hispanic population had a high degree of name clustering among the measured groups, with just 26 surnames accounting for a quarter of the population and 16.3 percent of people reporting one of the top 10 names.[54] A similar pattern of name clustering was detected among other ethnic minorities, including Asian and Black Americans.[55]

In addition to the greater prevalence of clustered surnames, language barriers may exacerbate communication difficulties between SSA offices and SSI recipients charged with alleged non-home real property ownership.

Undue Burden Placed on SSI Recipients to Disprove Ownership

Another problem is that SSA offices placed a heavy burden on disabled and elderly individuals to attempt to disprove their connection with purported non-home real property. SSI recipients who denied any connection to property were told that their word (even in a sworn affidavit) was insufficient; they would have to "prove" that this property was not theirs.

Proving a negative in this context is fraught with challenges. Given that the real property records at issue do not contain any social security number or date of birth, how is an SSI recipient to prove that the person named in this deed is not, in fact, her? This is especially difficult given that most SSI recipients may not know how to search the real estate records, or how to explain the concept of community property, for example.

If the Accurint search is viewed as evidence that this person owns this piece of real estate, which was the approach taken by SSA in every case brought to our attention, it will be impossible for most SSI recipients to overcome that presumption.

The burden being placed on extremely low-income individuals is untenable. If the Accurint search is viewed as evidence that this person owns this piece of real estate, which was the approach taken by SSA in every case brought to our attention, it will be impossible for most SSI recipients to overcome that presumption.

Appeal Rights and Due Process Rights Are Not Being Honored

The examples we gathered reinforced the fact that SSA offices are sometimes failing to notify SSI recipients of their appeal rights[56] when an Accurint search is the basis for termination, and when they do provide such notification, are at times failing to continue paying benefits pending review of a timely appeal. We have reports of SSI beneficiaries losing their benefits based on the Lexis data matching program without even being notified of appeal rights. The case of Ms. Tran demonstrates that even when an appeal is filed within the timeframe for continuation of benefits, benefits are sometimes stopped. These problems raise serious due process concerns, which are discussed in the next section.

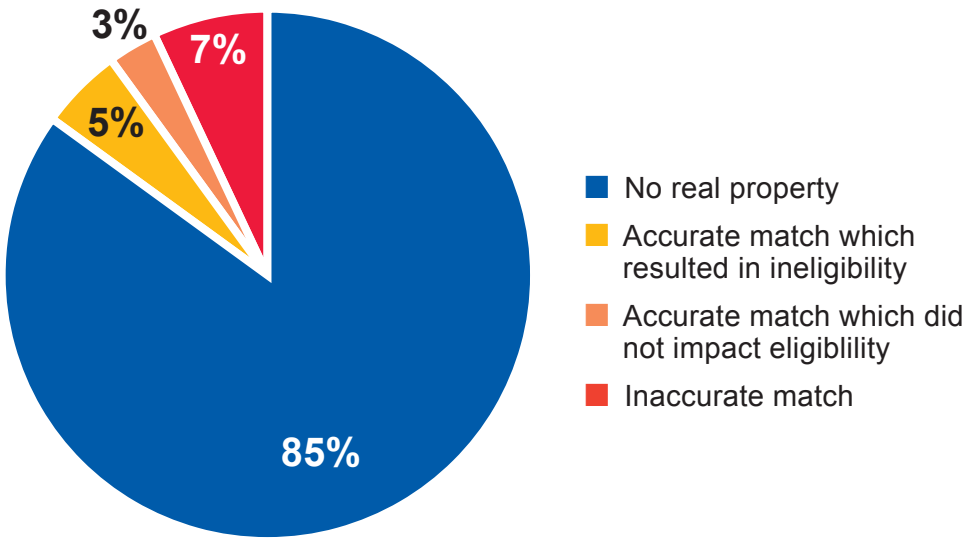
Government Report Shows Significant Error Rate

The government's own investigation confirms that there are high rates of false positive matches with the Accurint product. The U.S. Office of Inspector General (OIG) issued a report in June 2011 providing an analysis of how the Lexis database could be used to reduce non-home real property overpayments.[57] The OIG report randomly sampled 350 individuals who were receiving SSI and compared

their self-reported real property ownership to the results of the LexisNexis search. The search identified that in 298 of the 350 cases (85%), the Lexis results matched the SSI recipients' statements to the government, revealing no potential non-home real property. In 52 cases, the Lexis search returned a real property match. SSA then reviewed those matches on an individual basis, and determined that 27 of the positive results were accurate. In 25 out of the 52 instances of a property "match," SSA staff determined that the individual did not in fact own the real property. And out of the 27 correct matches, only 16 of them involved real property interests that impacted eligibility due to an interest in the home worth more than the asset limit. Therefore, 7% of the Lexis searches resulted in a false match, and only 4.6% resulted in an accurate match that would have prevented an SSI overpayment.

OIG's conclusion based on this data was that the Lexis real property search would be a cost-effective means of reducing overpayments. The 16 SSI recipients with undisclosed real property assets over the limit had received $112,000 in SSI overpayments, about half of which SSA was able to recover from recipients based on its rules on collecting overpayments. Based on the rate of accurate positive searches that the use of this Lexis product would produce, OIG estimated that it would result in identifying 541,580 SSI recipients who had failed to report non-home real property, of whom 320,940 had received improper benefits payments totaling $2.2 billion. The report did not point out that the same data showed that implementing the program without adequate safeguards would result in 473,883 SSI recipients being cut off from basic income due to a false real property match (see chart).

CHART: **Problems Identified by Government Analysis of LexisNexis Real Property Searches**



Source: U.S. Office of the Inspector General, Supplemental Security Income Recipients with Unreported Real Property, 2011, showing 7% of Accurint searches for SSI recipients returned an inaccurate real property match and only 5% reflected an accurate real property match that impacted eligibility.

SSA appears to think its use of Accurint to identify non-home real property is working well. SSA claims that the Lexis real property data program has allowed it to eliminate significant improper overpayments of SSI benefits. The agency estimates that roughly $266 million in overpayments were made as a result of undisclosed non-home real property in fiscal year 2019. SSA claims it is the fifth leading cause of SSI overpayments.[58] SSA estimated that it saved $155 million in non-home real property overpayments due to its property searches conducted in fiscal year 2018.[59] However, the estimated volume of non-home real property overpayments has remained relatively stable from 2015 to 2019 and has not gone down since the Accurint matching program was established in late 2017.[60] Total estimated overpayments (related to all factors, including non-home real property) increased slightly between fiscal year 2017 and 2018, and remained relatively level in FY 2019.[61] SSA's estimate of the supposed benefits of this data matching program has failed to account for the significant number of inaccurate real property matches. Some of the money SSA claims to be saving in reduced overpayments in fact represents improper terminations of SSI recipients who did not own disqualifying real property but have failed to prove a negative to SSA's satisfaction.

The examples discovered in our investigation and the data from the 2011 OIG report raise grave concerns about the accuracy of the Accurint reports being used by SSA to suspend and deny SSI benefits.

The examples discovered in our investigation and the data from the 2011 OIG report raise grave concerns about the accuracy of the Accurint reports being used by SSA to suspend and deny SSI benefits. The next section explains why these reports are "consumer reports" covered by the Fair Credit Reporting Act, and how that fact requires LexisNexis to impose a higher standard of accuracy.

IV. DOES THE FAIR CREDIT REPORTING ACT (FCRA) GOVERN ACCURINT REPORTS?

Purposes of the FCRA

Congress passed the Fair Credit Reporting Act (FCRA) in 1970 in an effort to protect consumers from various harmful practices occurring in the credit and consumer reporting industries, including inclusion of inaccurate information, out of date information, and privacy violations.[62] Lenders, employers, housing providers, and government agencies were able to obtain vast amounts of information about individuals and use that information to approve or deny applications for credit, work, housing, and government benefits. Consumer advocates raised concerns about the need for greater protection, and the industry itself ended up championing a bill to provide for a consistent set of rules.

Accuracy, privacy, and confidentiality issues were among the chief concerns that led Senator William Proxmire to introduce the initial bill. At the time, some consumer

reporting agencies would sell information to virtually anyone.[63] Information was used in ways inconsistent with the purpose for which it was collected and was often passed on to government agencies. Concerns about "big brother" loomed large. Reports had also surfaced of incidents in which consumers were "unjustly denied credit" because of inaccurate or incomplete information contained in reports.

Senator Proxmire commented on the need for legislation to address these problems:

> The 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.
>
> There are many varieties of inaccurate information. . . . One is the case of mistaken identity, where two individuals with the same names are confused, and the deserving individual is denied credit because of something done by the other person. . . .[64]

The Fair Credit Reporting Act as it was eventually passed involved an array of compromises. Most critically, the Act provided protection to consumer reporting agencies from state law claims for defamation and invasion of privacy in exchange for giving consumers the right to access the information in their file and dispute errors.

The statute has been amended over time, but certain key features have been present since its original passage in 1970. These include:

- Consumers have the right to access information in their files at a consumer reporting agency;
- Consumers are entitled to certain notices, including when information from a consumer report is used against them;
- Consumer reporting agencies covered by the act may not sell consumer reports except for one of the "permissible purposes" defined by the statute; and
- Consumer reporting agencies have a duty to maintain reasonable procedures to ensure maximum possible accuracy and to investigate consumer disputes regarding the accuracy of information in their files.[65]

Data Brokers: Covered or Not?

The data industry, already well developed when the FCRA became law in 1970, has exploded in the decades since. Technology available now allows companies to collect, store, and interconnect data in ways that were not possible before. Data brokers sell all manner of information about individuals. They obtain this information from a combination of public records, publicly available information, and non-public

consumer information that consumers have provided to companies from which they obtain products or services.[66]

Given the sensitive information collected and sold by data brokers and the risks of harm to consumers from the improper disclosure of accurate information as well as the propagation of inaccurate information, the public benefits from appropriate regulation of the industry. Unfortunately, no one law governs all of the various uses of the information collected by these companies. Data brokers may or may not be covered by the FCRA, the Gramm-Leach-Bliley Act, and a patchwork of other state and federal laws.

Federal agencies have recognized that the FCRA applies to data brokers that sell data for purposes covered by the FCRA and have cited them for failing to comply with the Act. In 2013, the Federal Trade Commission (FTC) issued letters to ten companies engaged in the sale of consumer data, warning that their practices could violate the FCRA's prohibitions on the sale of consumer information.[67] The FTC identified these ten companies after a test shopping investigation in which FTC staff members posed as individuals or companies seeking information, and found that these companies were willing to sell consumer information without complying with the FCRA.[68] In addition, the FTC has brought enforcement actions against data brokers that used inadequate security measures, leading to data breaches and identity theft. Among these was an enforcement action against ChoicePoint, the company whose later purchase by LexisNexis brought with it the Accurint suite of products.[69]

Whether data brokers are covered by the FCRA depends on whether they meet the definition of a consumer reporting agency and whether the product they are selling meets the statutory definition of a consumer report.

A consumer reporting agency (CRA) is defined by the Act as:

> [A]ny person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.[70]

Thus, a company is a CRA covered by the statute only if it engages in the practice of assembling or evaluating information for the purpose of furnishing consumer reports. A consumer report, in turn, is defined as:

> [A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.[71]

The first part of the definition of credit report, whether the information in question bears on one of the seven factors, is usually not in question. Most consumer data collected and sold will have some bearing on at least "personal characteristics" or "mode of living." Certainly this is true of Accurint reports used by SSA; information related to real property owned by an SSI recipient would bear on the individual's personal characteristics or mode of living, as well as their credit capacity and credit worthiness.

The second part of the definition of consumer report, how the data is "used or expected to be used," is where most of the inquiry lies. Information will be a consumer report, and the provider will be a CRA, if the data is used or expected to be used "in whole or in part" as a factor in establishing the consumer's eligibility for credit, insurance, employment, or some other permissible purpose listed in Section 1681b. Those other permissible purposes include, as relevant here, sale to a person whom the CRA has reason to believe:

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status.[72]

A report is a consumer report covered by the FCRA if it is used or expected to be used for one of these permissible purposes. It is a broad scope of coverage. If the report is used or expected to be used for one of the covered purposes, then the Act applies, and the CRA may *only* sell the information for a permissible purpose.

Key FCRA Terms

Consumer Reporting Agency (CRA): A person who regularly engages in the practice of assembling or evaluating information for the purpose of furnishing consumer reports

Consumer Report: any communication of information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, which is used or expected to be used or collected for the purpose of establishing the consumer's eligibility for credit or insurance, for employment purposes, or for certain "permissible purposes" under the Act.

Permissible purposes include: extension of credit, collection of an account, employment purposes, insurance underwriting, and determining eligibility for a license or other government benefit.

Accurint: Covered or Not?

LexisNexis is a data broker. It sells a suite of products containing consumer information to a range of different users. It acknowledges that some of its products, such as LexisNexis Risk Solutions, are consumer reports.[73] But as discussed in the next section, LexisNexis also has a history of denying that some of its products are consumer reports.

The key question, then, is whether Accurint is being used by SSA, or is expected to be used, for one of the FCRA's permissible purposes.

One permissible purpose under the FCRA is potentially relevant: sale to a person that "intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status."[74] SSA is required to consider financial status in awarding SSI benefits, and is using the Accurint report in connection with a determination of the consumer's eligibility for this government benefit. The FCRA provides a permissible purpose to consider financial status as a condition of eligibility for a benefit, both for initial qualification and for continuing eligibility.[75]

So how do SSA and Lexis claim that Accurint is not a consumer report covered by the FCRA, given that the use seems to fall squarely within this permissible purpose under the Act? They appear to rely on statements in the SSA procedural manual saying that the Accurint search must be used not to "deny or suspend benefits," but merely to "establish a lead."[76]

The SSA manual provides that SSA employees who suspect that an SSI recipient may have failed to disclose ownership of a piece of real property, or transferred it away for less than fair value, may conduct a search using the Accurint database. When a search returns pieces of real estate identified as being linked to the recipient, the employee is supposed to contact the recipient and ask about the property. If the recipient "accepts the validity" of the information contained in the Accurint report, SSA treats it as a first party report—as if the recipient had reported the property—and benefits may be suspended on this basis if the asset puts the recipient over the resource limit. If the recipient disputes the validity of the information, SSA is required to "develop the information as a third party report," which is supposed to be independently investigated.[77]

This attempt to carefully evade the FCRA's coverage falters on a number of points.

First, even if the Accurint report is being used only to "establish a lead," it strains credulity to argue that it is not being used "*in connection with* a determination of the consumers' eligibility" for a government benefit. The meaning of "in connection with" and "eligibility" have not been explored with respect to the government benefits purpose. In the context of eligibility for credit, the FTC clarified that a fraud database should be considered a consumer report under the FCRA even if lenders using the

data would not be permitted to deny applicants based on information from the database, but would use it merely as a "checkpoint."[78] This is analogous to SSA saying that the Accurint report is being used to "establish a lead."

Second, "eligibility" should be broadly construed. As the court carefully explained in *Adams v LexisNexis*, another case against Lexis-Nexis, the term should encompass a determination of whether an individual is "qualified to participate" or "worthy to be selected," including being "eligible" for collection based on being the person who owes particular debts included in a report.[79] The court reconciled the convoluted language of the statute to reach the conclusion that a report sold for the purpose of identifying debts owed by a particular person was a consumer report because it was "used or expected to be used or collected," in whole or in part, for the purpose of "serving as a factor" in establishing a consumer's "eligibility" for collection of a consumer credit account.[80] Similarly, the information contained in the Accurint report is "used or expected to be used" as a factor in establishing eligibility (or ineligibility) for asset-based SSI benefits.

Moreover, despite the language in the SSA procedural manual stating that the Accurint search should be used only to establish a lead, evidence has shown that in fact SSA employees are terminating benefits based solely on the results of the real property search. The procedural manual sets out steps that must be taken to verify information with the recipient,[81] but we heard of many instances in which SSA employees apparently failed to comply with these procedures. We also heard reports of SSA employees failing to conduct any independent investigation regarding the purported real estate asset, as in Ms. Sims and Ms. Tran's cases, in which a review of the deed records would have shown that the property was jointly owned with someone who was not their spouse. In these situations, the Accurint report is being used to conclusively determine eligibility for a government benefit.

What of the Fact that LexisNexis Claims It Does Not Intend to Provide a Consumer Report?

The Accurint website claims that the product is not a consumer report as defined by the FCRA and "may not be used for any purpose permitted by the FCRA."[82] By disclaiming any intent to provide a consumer report, Lexis joins an increasing trend of companies attempting to skirt coverage of the Act. Unfortunately, recent court decisions have sown confusion regarding the effectiveness of this tactic, and may be encouraging companies to attempt to evade legal requirements through boilerplate disclaimers.

In *Kidd v. Thomson Reuters*, the Second Circuit addressed the question of whether Thomson Reuters acted as a consumer reporting agency covered by the FCRA in furnishing its online research platform CLEAR. The plaintiff in the case, Lindsey Kidd, was denied a job after a background check using CLEAR falsely showed that she was convicted of theft.[83] Employment purposes are covered by the FCRA.

Thomson Reuters explains in its marketing materials that CLEAR "may not be promoted or used for FCRA-regulated purposes," and potential subscribers are required to certify that they do not plan to use the platform for any FCRA-covered purpose.[84] The Second Circuit concluded that the undisputed record evidence showed that Thomson Reuters did not intend to furnish a consumer report in the CLEAR platform, and concluded that therefore the company was not a consumer reporting agency under the FCRA.[85]

However, Thomson Reuters's disclaimer and contractual requirement were far from the only basis for the court's conclusion regarding its intent. The company presented evidence that Ms. Kidd's search was one of just 46 known instances of misuse of the CLEAR platform out of 144 million searches conducted between 2012 and 2016.[86] Users of the platform were required to certify a non-FCRA covered purpose each time they used it. When Thomson Reuters suspects that a user may be violating the allowed use restrictions, it conducts an investigation and bans the user from accessing the portal until they sign a contract promising to use CLEAR only in ways allowed by Thomson Reuters.[87] The company presented evidence that it had in fact terminated the accounts of subscribers responsible for ten improper searches.[88] The Second Circuit warned that the "totality of a defendant's actions" must be the determining factor in whether a company intends to furnish a consumer report, and it is not possible to escape regulation by the FCRA "merely by disclaiming an intent to furnish consumer reports."[89] In contrast to the substantial steps that Thomson Reuters took to prevent misuse of CLEAR, LexisNexis actively sells and promotes Accurint to government agencies for use in connection with SSI eligibility.

In *Zabriskie v. Fannie Mae*, the Ninth Circuit delved into whether a company is covered by the FCRA if it claims it does not assemble consumer data "for the purpose" of furnishing a consumer report. Fannie Mae sells proprietary software called Desktop Underwriter to mortgage lenders, which use this software to evaluate a consumer and determine whether a mortgage loan extended to a particular individual would be eligible for purchase by Fannie Mae.[90] For a period of time Desktop Underwriter contained a programming error that made it look as if borrowers who had previously gone through a short sale (i.e., a sale of their home for less than the balance owed on the mortgage) had actually gone through a foreclosure. The Zabriskies alleged that they were blocked from obtaining a new mortgage loan because Desktop Underwriter returned this kind of inaccurate report regarding their credit history. The Ninth Circuit rejected the Zabriskies' FCRA claim because it held that Fannie Mae's subjective intent was not to provide a consumer report—a report that Fannie Mae intended to be used to determine credit eligibility—but rather intended to provide software that told a lender whether Fannie Mae would likely purchase the loan.[91] The Circuit Court seemed unswayed by the fact that in reality some lenders might use the Desktop Underwriter report to determine whether to extend a loan at all.[92]

The *Zabriskie* opinion calls into question how courts will measure the intent of a company when that company knows that its subscribers are using data for purposes covered by the FCRA. The facts around the real world use of Fannie Mae's product were not well presented by the Ninth Circuit in its discussion. The Circuit court cherry-picked facts and overlooked other facts that would have supported a contrary outcome. The Court alluded to the fact that some lenders "will inevitably" use Fannie Mae's tool in a determination of eligibility for credit, but did not set forth whether that in fact occurs rarely or routinely. It seemed important to the outcome of the case that Fannie Mae was not in fact selling any new data regarding applicants that lenders did not already have, and that Fannie Mae had a legitimate purpose for its software independent of allowing lenders to assess creditworthiness.[93] It also seemed to matter that Fannie Mae's business is not primarily as a data seller, but rather as a purchaser of mortgage loans on the secondary market. Generally, the court did not seem to want to hamper Fannie Mae's role in providing liquidity to the mortgage market.[94]

Despite the *Zabriskie* court's scant description of the factual record in that case, courts still should be concerned about the facts of how purchasers are really using a company's data product in attempting to deduce whether such a company is acting *for the purpose* of providing a consumer report. Several courts have signaled that a contractual limitation on use of the product should not be outcome determinative.[95] Rather, as the court in *Kidd* explained, courts should look at the use or expected use of a product based on evidence of the third-party user's conduct. When a company's sole business is selling data and it has reason to believe that its clients are using that data for FCRA-covered purposes, including the fact that the company is not implementing controls to prevent such FCRA-covered uses, the FCRA should apply.

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Prior Litigation Involving Accurint

Lexis has been sued more than once in suits alleging that various Accurint products are consumer reports and that Lexis, failing to acknowledge that fact, is flagrantly violating the FCRA. In *Adams v. LexisNexis*, the district court denied Lexis's motion for judgment on the pleadings, holding that despite the company's protestations, material facts remained in dispute with respect to whether the Accurint report qualified as a consumer report.[96] In *Berry v. LexisNexis*, the plaintiffs alleged that Lexis was acting as if Accurint was not a consumer report while knowing that many or even most of its customers would use the product for purposes covered by the FCRA.[97] In that case, the parties reached a class settlement in 2013 that imposed certain terms and restrictions up through June 30, 2020. In its order approving the settlement, the district court inaccurately summarized an FTC opinion letter as

having stated that Accurint for Collections reports did not fall within the FCRA and did not involve credit reports.[98] In fact, the FTC opinion letter does not state that the FTC voted that the product was not a consumer report. Rather the letter explains that the FTC brought the case under its FTC Act authority and not under the FCRA, and therefore FCRA sanctions were not appropriate.[99]

What Does it Matter if Accurint is a Consumer Report?

If Accurint for Government is a consumer report covered by the FCRA, significant protections of the statute would apply:

- LexisNexis would have a statutory duty to follow reasonable procedures to ensure maximum possible accuracy of the Accurint reports it sells, under 15 U.S.C. § 1681e(b);
- LexisNexis would have to provide an annual free copy of the report to consumers upon request, 15 US.C. § 1681j(a)(1)(C);
- LexisNexis would have to give consumers a mechanism or process for disputing inaccuracies in their Accurint reports, and would be required to investigate those disputes, under 15 U.S.C. § 1681i;
- LexisNexis would only be allowed to provide the reports if the user had a permissible purpose under 15 U.S.C. §§ 1681b;
- SSA would have to provide an adverse action notice whenever it terminates, suspends, or reduces a recipient's SSI benefits or takes any adverse action on the basis of information contained in an Accurint report. Such notices would include:
  - The name, address, and telephone number of the consumer reporting agency that furnished the report to the user
  - A statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken
  - The right to obtain a free copy of a consumer report from the agency within 60 days pursuant to 15 U.S.C. §1681j
  - The right to dispute the accuracy or completeness of any information in a consumer report pursuant to 15 U.S.C. §1681i

These protections are critical to alleviate the reported problems with false matches and improper benefits terminations caused by SSA's use of Accurint reports. It would not be difficult for SSA and LexisNexis to comply with these requirements. SSA already acknowledges that another LexisNexis product, Accuity, is a consumer report, and provides notice of the consumer's right to request a free copy of their Accuity report in the Notice of Planned Action letter.[100] SSA and Lexis should immediately acknowledge that these rules apply to Accurint, and implement the necessary protections.[101]

Another reason to clarify this issue is that it affects the scope of state regulation and availability of state law claims. The FCRA bars state law claims related to certain conduct and subject matter areas regulated by the FCRA. If in fact Accurint for Government were not a consumer report, then the FCRA's preemption provisions and protections against liability for defamation and other state law causes of action would not apply. Additionally, states could much more freely and easily regulate LexisNexis and its sale of such reports to government agencies. Existing state laws could also be applicable, such as the California Consumer Privacy Act.[102]

V. DUE PROCESS CONCERNS WITH SSA'S USE OF ACCURINT

Constitutional Due Process Rights

The Fifth Amendment of the United States Constitution states, in relevant part, that the federal government may not deprive a person of "life, liberty, or property, without due process of law."[103] In *Goldberg v. Kelly*, the Supreme Court ruled in 1970 that recipients of means-tested public benefits must be afforded the "opportunity to be heard" before their benefits can be suspended.[104] The Court held that a pre-termination evidentiary hearing was necessary when recipients require the benefit payments for their basic needs, and the government has an interest in ensuring that eligible recipients are not erroneously terminated. The government should not deprive the recipient of the means to survive while appealing the claim:

> . . . the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate.[105]

SSI benefits, as a means-tested program for extremely low-income recipients, are subject to the same due process protections as in *Goldberg*.[106] In the context of a benefit suspension due to alleged ownership of non-home real property, the most important of these procedural safeguards are a timely and adequate notice detailing the reasons for a proposed suspension of benefits and having benefits continue to be paid pending a decision on the appeal.[107] For over 40 years, SSA has had in place regulations concerning the SSI program that conform to the requirements of *Goldberg* and constitutional due process. These regulations establish an administrative appeal process that, on paper, protects the due process rights of SSI recipients who face a suspension of benefits.[108]

However, in practice, the notices sent by SSA about these Accurint data matches are usually inadequate and misleading. Often, the only explanation given in the notice is that "you have countable resources worth more than $2,000." In the section of the notice that lists "Your Resources That We Count," the only information

given is “Real Estate” with a dollar value, but no identifying information about where the property is located or what the SSI recipient’s ownership interest might be. These suspension notices do not give SSI recipients sufficient information to allow them to present a meaningful defense against SSA’s planned action.

Suspension notices do not give SSI recipients sufficient information to allow them to present a meaningful defense against SSA’s planned action.

The harmful impact of these inadequate and misleading notices is exacerbated by the fact that, in a significant number of cases, the suspension notice was generated before an investigation to determine whether the SSI recipient actually owns the property, and was not justified, i.e., the supposed “match” produced a false positive. The danger of harm is immediate and severe, since an erroneous match may result in the complete suspension of SSI benefits for the recipient. The existence of an appeals procedure is not enough to undo the harm caused when benefits are suspended because of a defective notice based on extremely lax matching standards.

Furthermore, in some instances, SSI recipients were prevented from continuing to receive their benefits even when they file an appeal within the 15-day deadline. We have heard from advocates who were told by local SSA office supervisors that their clients had no due process rights in these cases and were not eligible to continue receiving their SSI benefits while their appeal was pending because the benefits were being suspended based on information from a data exchange program. These individuals went for many months without their only source of income in an obvious violation of due process protections. An internal review by SSA showed that this system error is the norm, not the exception. In late 2013, SSA reviewed 64 requests for reconsideration filed by SSI recipients. 11 of those appeals were filed within 15 days of the date of the notice (requiring continuing benefits), and none of those 11 continued to receive benefits.[109]

Individuals went for many months without their only source of income in an obvious violation of due process protections.

Even when a piece of real property is actually connected with the individual in question (a true positive match), the circumstances often justify excluding the property from countable resources or the value of the property may not in fact exceed the resource limit. Often the non-home real property was inherited from a family member without a will. The ownership of the property may be divided among many heirs, requiring a complicated probate process before it can be sold. Or, if the property is unoccupied, this could be due to severe damage to the home from fire, flood, or storm, making the property unlivable and greatly reducing its fair market value. There are good reasons for a more careful and deliberate review of alleged non-home real property, even in the event of an accurate positive match, prior to benefits termination.

Due to the significant harm that flows from an improper termination and the high likelihood of errors posed by Accurint reports, more process is constitutionally

required. This is especially true because SSI recipients are, by definition, either elderly or disabled. Benefits recipients should be given a fair and well-informed opportunity to dispute the real property report before a decision is made to suspend benefits. In addition, SSA should expand the window of time to obtain continuing benefits pending an appeal, and ensure that offices are honoring these due process rights.

Accuracy and Due Process Standards from Federal Agency Guidance

Section 1184 of the Social Security Act permits SSA to engage in information exchanges with data providers in order to prevent improper payments "without the need for verification by independent or collateral sources."[110] Another federal law, the Computer Matching and Privacy Protection Act of 1988 (Matching Act),[111] requires that agencies independently verify information obtained through a matching program before taking adverse action against an individual based on it. It applies only to uses of government data bases, so does not apply to SSA's information exchange with Lexis. Nonetheless, the federal Office of Management and Budget (OMB) guidance recommends that government agencies such as SSA should still follow certain best practices from the Matching Act.

OMB has advised agencies to consider applying the principles of the Matching Act when a commercial database is involved. OMB Memoranda 01-05— Guidance on Inter-Agency Sharing of Personal Data–Protecting Personal Privacy from December 2000 states "Although this guidance applies directly only to programs covered by the Matching Act, agencies should consider applying these principles in other data sharing contexts."[112] It further provides:

> Accuracy.
>
> Because information shared among agencies may be used to deny, reduce, or otherwise adversely affect benefits to individuals, it is critical that agencies have reasonable procedures to ensure the accuracy of the data shared. At a minimum, this should include providing individuals the right to access and to request amendment of their records, as required by the Privacy Act.
>
> To ensure accuracy, agencies must also adhere to the due process requirements found in the Matching Act. Pursuant to 5 U.S.C. 552a(p), before an agency takes adverse action against an individual based on the results of information produced by a matching program, it must independently verify the information unless there is a determination by the relevant Data Integrity Board, for a limited class of information, that there is a high degree of confidence that the information is accurate. Agencies must also, at least 30 days before taking adverse action (unless statute or regulation states otherwise), provide notice to the individual of the agency's findings and provide an opportunity to contest those findings.

In June 2018, OMB reiterated this point when it re-issued Appendix C to OMB Circular A-123, Requirements for Payment Integrity Improvement.[113] SSA should adopt these procedural protections in its procedural manual, the POMS, to ensure that SSI beneficiaries are not harmed by inaccurate information.

Inaccuracies in commercial datasets are common. For credit reporting agencies, the definitive study conducted by the Federal Trade Commission found that 21% of consumers had verified errors in their credit reports, 13% had errors that affected their credit scores, and 5% had serious errors that would significantly impact their eligibility for credit.[114]

If Accurint has similar error levels, there must be verification by a human being before SSA takes action to terminate, suspend, or reduce a recipient's benefits. It is not acceptable for SSA to suspend or reduce the benefits of 5% or even 1% of SSI beneficiaries over erroneous information when review by a human could readily catch them. And this is even more true with Accurint, which may have even higher error levels than credit reporting agencies, given its use of name-only matching criteria. Verification is also needed with the use of automated matching, where errors often manifest in the form of illogical information that can be detected by human review. A good example: the case of Teresa Sims, previously discussed, where a review of the property records showed the property was jointly owned with a spouse, yet Teresa Sims had never been married.

VI. RECOMMENDATIONS

The examples discussed in Section II of this report, and others that we uncovered in our investigation, show insufficient accuracy standards and procedural safeguards. These examples spanned several years and arose from different SSA offices around the country. SSA was alerted to the problem, and has not taken sufficient actions in response.

We recommend the following actions to address this problem.

- LexisNexis should acknowledge that Accurint for Government is a consumer report and should implement stricter matching standards in its algorithm to ensure maximum possible accuracy. Name-only matching is extremely unreliable. Lexis has access to data that could be overlaid with the public records data to result in lower rates of error.
- SSA should stop using Accurint until stricter matching criteria are put in place. Considering the severity of the harm and the inability of SSI recipients to disprove the allegations, the agency must insist on a higher standard of accuracy.

LexisNexis and SSA should acknowledge that Accurint for Government is a consumer report, and LexisNexis should implement stricter matching standards to ensure maximum possible accuracy.

- SSA should recognize that because the Accurint search is a consumer report, it must issue a notice of adverse action as required by the FCRA, informing consumers of their right to request a copy of the report and to dispute inaccurate information.
- SSA should ensure that local offices conduct an independent investigation, including oral and written communication with the SSI recipient as well as a human review of the real property records in question, before suspending benefits or taking any other adverse action.
- SSA should ensure that local offices properly protect recipients' due process rights.
- SSA should enhance its due process protections to allow for continuing benefits pending the outcome of any appeal of a benefits suspension based on non-home real property that is submitted within 60 days of the benefits suspension notice.
- SSA should translate the relevant notices, and LexisNexis should translate the Accurint report, into the top languages spoken by consumers who have limited proficiency in the English language.

In addition to Lexis's duty to ensure maximum possible accuracy, SSA has certain duties as a user of a consumer report. The FCRA imposes duties on SSA when using Accurint to terminate, reduce, or suspend a recipient's benefits.

The most important of these duties is the requirement to provide an adverse action notice under the FCRA, 15 U.S.C. 1681m(a). Any person, including a governmental agency such as SSA, [115] who uses a consumer report to take an adverse action must provide this notice. An adverse action includes "a denial or cancellation of… or any other adverse or unfavorable change in the terms of, any license or benefit described in [section 1681b(a)(3)(D)] of this title."[116] The "benefits" described in Section 1681b(a)(3)(D)] includes eligibility for SSI benefits.[117]

Thus, SSA must provide an adverse action notice whenever it suspends or reduces a recipient's SSI benefits based on an Accurint report. This notice is in addition to the Notice of Planned Action discussed in Section I that SSA must provide to SSI beneficiaries before their benefits are reduced or suspended.

The FCRA adverse action notice must include:

- The name, address, and telephone number of the consumer reporting agency that furnished the report to the user
- A statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken
- The right to obtain a free copy of a consumer report from the agency within 60 days pursuant to 15 U.S.C. §1681j
- The right to dispute the accuracy or completeness of any information in a consumer report pursuant to 15 U.S.C. §1681i

Because Accurint is a specialized type of consumer report that is different from the credit reports with which most consumers are more familiar, we suggest a specialized notice to explain what type of report was used (an example is included in Appendix A). Furthermore, in addition to the adverse action notice, SSA should provide a copy to the recipient of the Accurint report that it relied upon to suspend or reduce the recipient's benefits. Under the FCRA, Accurint cannot prohibit SSA from sharing the report with the recipient.[118]

Many of the individuals impacted by false real property matches are immigrants like Ms. Tran. As a federal agency, SSA is obligated to comply with Title VI of the Civil Rights Act of 1964 to provide language access to limited English proficient (LEP) individuals. SSA should provide translations of adverse action notices in the top LEP languages. Similarly, because LexisNexis is receiving federal funds as a federal contractor, Title VI and Executive Order 13166[119] require it to provide language accommodations. Entities covered by Title VI are required to have a language access plan in which they assess the language needs of the relevant population and create a plan for serving those individuals. To meet these obligations, Lexis must provide meaningful access for LEP SSI recipients to Accurint reports by translating them into the top LEP languages spoken in the United States. SSA and Lexis should start with the top five languages spoken by LEP individuals in the U.S. (Spanish, Chinese, Vietnamese, Korean, and Tagalog) and add more languages over time.

VII. CONCLUSION

The federal government is buying data from LexisNexis with the purported goal of reducing improper SSI payments to individuals who own unreported non-home real property. While there may be a role for this kind of data matching program, maximum accuracy and procedural safeguards are essential. LexisNexis and SSA are trying to evade coverage of the key consumer protection statute designed to prevent the kind of harm one might expect to see in the market for the sale of data: inaccurate information. By arguing that Accurint for Government is not a consumer report, Lexis is evading its obligation to ensure maximum possible accuracy of the information contained in its reports and provide a pathway for disputes of inaccurate information, and SSA is evading its obligation to provide notices when adverse actions are taken based on the data in these reports.

The population impacted by this data matching program represents some of the most vulnerable in our society—elderly people and people with disabilities living on basic subsistence income. When they are cut off from that income based on an inaccurate real property match, it puts at risk their housing, food security, and physical and mental health. Our Constitution and the Fair Credit Reporting Act, in

addition to our moral obligation to these members of our society, require that they be afforded better protection than the current SSA-Accurint data matching program provides. LexisNexis and the SSA must be held accountable to make changes quickly, as lives are at stake.

ENDNOTES

1. 42 U.S.C. §§ 402, 423.
2. 26 U.S.C. § 3101.
3. 42 U.S.C §§ 1381–1383f.
4. *Id.* § 1381.
5. Social Security Administration, SSI Federal Payment Amounts for 2020. See Social Security Administration Program Operations Manual System (POMS), General Information About State Supplementation, SI 01401.001 (2016); Understanding Supplemental Security Income SSI Benefits—2020 Edition.
6. 42 U.S.C. § 1396a(a)(10)(A)(i)(II). Currently nine states, known as "209(b) states," do not make SSI recipients automatically eligible for Medicaid: Connecticut, Hawaii, Illinois, Minnesota, Missouri, New Hampshire, North Dakota, Oklahoma, and Virginia (Social Security Administration, Program Operations Manual System (POMS), Medicaid and the Supplemental Security Income (SSI) Program, SI 01715.010).
7. Personal Income in 2019, Current Population Survey, Annual Social and Economic Supplement, PINC-08, Source of Income in 2019, People 15 Years Old and Over by Income of Specified Type in 2019, Age, Race, Hispanic Origin, and Sex.
8. Patricia Martin, *Why Researchers Now Rely on Surveys for Race Data on OASDI and SSI Programs: A Comparison of Four Major Surveys*, SSA Research and Statistics Note No. 2016-01 (Jan. 2016).
9. Social Security Administration, SSI Monthly Statistics, February 2021, Table 2.
10. 20 C.F.R. §§ 416.1102, 416.1104.
11. Social Security Administration POMS, Distinction between Assets and Resources, SI 01110.100.
12. *Id.*
13. 20 C.F.R. § 416.1210. See Social Security Administration POMS, Resources Exclusions, SI 01130.050–01130.740.
14. 20 CFR 416.1212.
15. Social Security Administration, POMS, Real Property Following Reasonable but Unsuccessful Efforts to Sell it Throughout a 9-Month Period of Conditional Benefits, SI 01130.140.
16. Social Security Administration POMS, Determining Equity Value, SI 01140.042. What Values Apply to Resources, SI 01110.400.
17. When an individual transfers a countable resource to another person for *less than* fair market value, SSA will assess a transfer penalty, and the individual will be ineligible for SSI benefits for up to three years. When SSI recipients are notified by SSA that their benefits will be suspended because they are over the *resource limit*, they typically are not told about the *transfer penalty*. The recipients then give away the excess resource(s) under the impression this will help them retain their SSI benefits. Instead they then learn they will continue to be ineligible for an extended period because of the transfer penalty.
18. 42 USC § 1383(b); 20 C.F.R. § 416.537.
19. Social Security Administration POMS, Supplemental Security Income (SSI)–What Is an Overpayment?, SI 02201.005.
20. Social Security Administration POMS, Non-Home Real Property, SI 01140.100.
21. Social Security Administration, POMS, RZ Error Profiles, SI 02305.013; Office of Inspector General, Social Security Administration, *Supplemental Security Income High-Error Profile Redeterminations*, A-07-12-11263, September 2013.
22. Social Security Administration POMS, Non-Home Real Property, SI 01140.100.
23. *Id.*
24. 20 C.F.R. § 416.1402.

25. Id. §§ 416.1409, 416.1433, 416.1468.
26. Id. § 416.1411.
27. Id. § 416.1404.
28. Goldberg v. Kelly, 397 U.S. 254 (1970).
29. 20 C.F.R. § 416.1336(b).
30. Id. § 416.1413.
31. Id. § 416.1429.
32. Id. § 416.1479.
33. Id. § 416.1469.
34. Accurint for Government website (last visited Mar. 5, 2021).
35. *Id.*
36. In theory, local property tax commissioners might have a date of birth or social security number on record for a person that has applied for a homestead property tax exemption—but this information would be contained in their internal records and would not be publicly available. Also, by definition, the properties SSA identifies as likely non-home real property are not going to have a homestead exemption in place. The homestead exemption can only be taken on owner-occupied real property.
37. Legal Services Corporation, The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans (2017).
38. Letter on file with authors.
39. Telephone interview with Becca Schonberg, Bay Area Legal Aid (Jan. 29, 2020).
40. Email from Michelle Spadafore, New York Legal Assistance Group (Feb. 20, 2020).
41. Telephone interview with David Waldfogel, Center for Public Representation, Northampton, MA (Jan. 15, 2020).
42. Telephone interview with Doris Cortes, Empire Justice Center (Jan. 17, 2020).
43. Telephone interview with Daniela De La Piedra, AARP Legal Counsel for the Elderly (Jan. 15, 2020).
44. Email from Daniela De La Piedra, AARP Legal Counsel for the Elderly (Mar. 24, 2021).
45. LexisNexis sells other databases that contain names and addresses linked with Social Security numbers. *See, e.g.*, http://www.lexisnexis.com/government/solutions/literature/smartlinx.pdf.
46. See US Gov't Accountability Office, GAO 15-162, Criminal History Records: Additional Citations Could Enhance the Completeness of Records Used for Employment-Related Background Checks 38 (2015) (private companies generally conduct name-based checks, which can decrease the accuracy of the information the check produces); Stipulated Order for Permanent Injunction and Civil Penalty Judgment, Fed. Trade Comm'n v. RealPage, Inc., No. 3:18-cv-02737-N (N.D. TX Oct. 16, 2018) (FTC alleged that RealPage used matching criteria requiring only an exact match of an applicant's last name and a non-exact match of a first name, middle name, or date of birth and lacked policies or procedures to assess the accuracy of those results).
47. Michael P. McDonald and Justin Levitt, Seeing Double Voting: An Extension of the Birthday Problem, 7 Election L.J. 111, 112, 119 (2008); cf. Sharad Goel et al., One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections at 2 (Jan. 17, 2019) (estimating that, in a study concerning voter fraud and double voting in particular, "[i]n the national voter file, . . . 97% of the votes cast with the same first name, last name, and date of birth were cast by two distinct individuals").
48. Ariel Nelson, Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing, National Consumer Law Center (Dec. 2019).
49. See Assurance of Voluntary Compliance, In the Matter of Equifax Info. Serv. L.L.C., Experian Info. Solutions, Inc., and TransUnion L.L.C. (May 20, 2015); Settlement Agreement, In the

Matter of the Investigation by the Attorney General of the State of New York, of Experian Info. Sol., Inc., Equifax Info. Serv. L.L.C., and TransUnion L.L.C. (Mar. 8, 2015); CFPB, Supervisory Highlights Consumer Reporting Special Edition 5–6 (2017). For information about the settlements reached as a result of the class action lawsuits, see the following websites: https://classactionsreporter.com/settlement/transunion-public-records-settlement/, https://classactionsreporter.com/settlement/experian-public-records-reporting-settlement/, https://www.equifaxpublicrecordsettlement.com/.

50. Chi Chi Wu, Big Changes for Credit Reports, Improving Accuracy for Millions of Consumers, National Consumer Law Center (NCLC) Digital Library (July 2017).
51. Deposition of Teresa Preg at 63-66, Taylor v. Equifax, et al, No. 4:06CV0496-GTE (E.D. Ark. Dec. 2006); See Persis Yu & Sharon M. Dietrich, Nat'l Consumer Law Ctr., Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses 7 (2012). Broken Records, 2012, pages 17 to 21.
52. *Id* at 64.
53. "Reed Elsevier to acquire ChoicePoint for $3.6 billion," The New York Times (Feb. 21, 2008).
54. *See* Joshua Comenetz, U. S. Census Bureau, Frequently Occurring Surnames in the 2010 Census, 7 (2016).
55. *Id*.
56. Email from Daniela De La Piedra, AARP Legal Counsel for the Elderly (Mar. 24, 2021).
57. Office of the Inspector General, Social Security Administration, Supplemental Security Income Recipients with Unreported Real Property, A-02-09-29025 (June 2011).
58. Fiscal Year 2020 Inspector General's Statement on the Social Security Administration's Major Management and Performance Challenges at 205 (Nov. 2020).
59. *Id.* at 206.
60. *Id.* at 205 (reflecting estimated non-home real property overpayments of $262 million in fiscal year 2015, $217 million in FY 2016, $234 million in FY 2017, $255 million in FY 2018, and $266 million in FY 2019. The Accurint data matching program was implemented in September 2017 (at the start of FY 2018).
61. Overpayments were at 7.29% of total SSI outlays in FY 2017, 8.23% in FY 2018, and 8.13% in FY 2019. *See* Social Security Administration, Program Statistics: Improper Payments Experience.
62. National Consumer Law Center, Fair Credit Reporting at § 1.4.
63. *Id*.
64. 114 Cong. Rec. 24,902, at 24,903-04 (1968) (remarks from Senator Proxmire regarding the bill which became the Fair Credit Reporting Act).
65. *See generally* the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. In 1996 the Act was amended to impose obligations on the furnishers of information in consumer reports.
66. National Consumer Law Center, Fair Credit Reporting at § 2.7.5.
67. Fed. Trade Commission, FTC Warns Data Broker Operations of Possible Privacy Violations (May 7, 2013).
68. National Consumer Law Center, Fair Credit Reporting at § 2.7.5.
69. ChoicePoint Enforcement order.
70. 15 U.S.C.A. § 1681a (West).
71. 15 U.S.C.A. § 1681a (West).
72. 15 U.S.C.A. § 1681b (West).
73. CFPB, List of List of Consumer Reporting Companies, 2021.
74. 15 U.S.C.A. § 1681b(a)(D).
75. FTC Staff Summary § 604(a)(3)(D) item 2A and B.
76. POMS Manual, SI 01140.105(F).
77. *Id*.

78. Grimes, FTC Informal Staff Opinion Letter (Mar. 3, 1993).
79. Adams v. LexisNexis Risk Information & Analytics Group, Inc., 2010 WL 1931135 (D.N.J. May 12, 2010).
80. *Id*. *See also* Hoke v. Retail Credit Corp., 521 F.2d 1079 (4th Cir. 1975) (wrestling with the interplay between § 1681a and § 1681b and concluding that a report being used in connection with a determination of eligibility for a medical license was a "consumer report" under the FCRA even though the governmental agency was not required by law to consider an applicant's financial responsibility or status).
81. POMS Manual, SSA–POMS: SI 02301.235–Failure to Provide Information (N20)–02/05/2010.
82. Accurint for Government website (last visited Mar. 5, 2021).
83. Kidd v. Thomson Reuters Corp., 925 F. 3d 99 (2d Cir. 2019).
84. *Id*. at 102.
85. *Id*. at 108-109.
86. *Id*. at 102.
87. *Id*. at 108.
88. *Id*. at 102.
89. *Id*. at 107.
90. Zabriskie v. Fed. Nat'l Mortg. Ass'n, 940 F.3d 1022 (9th Cir. 2019).
91. *Id*. at 1028.
92. *Id*.
93. The court stated, "DU contains no evaluation or new information about the borrower's creditworthiness that was not already provided by the lender or credit bureau." *Id.* at 1028.
94. *Id*. at 1025 (explaining that Congress created Fannie Mae in 1938 to "provided liquidity and stability" to the secondary mortgage market) and 1030 (pointing out that interpreting the FCRA to apply to Fannie Mae would "contradict Congress's design for Fannie Mae to operate only in the secondary mortgage market, to deal directly with lenders, and not to deal with borrowers themselves").
95. *See, e.g*., Adams, 2010 WL 1931135, at *9 n.10 ("contractual use restriction" should not control the issue; rather plaintiff would be entitled to discovery regarding whether the report was "used or expected to be used" for the purpose of serving as a factor in determining eligibility for a covered purpose); Thacker v. GPS Insight, LLC, 2019 WL 3816720, at *9 (D. Ariz. Aug. 14, 2019) (pointing out that the use or expected use of the report is relevant to determining whether it was a consumer report, but the plaintiff failed to cite evidence regarding that use or expected use).
96. 96 2010 WL 1931135, at *9 (D.N.J. May 12, 2010).
97. Berry v. LexisNexis Risk & Information Analytics Group, Inc., 2014 WL 4403524 (E.D. Va. Sept. 5, 2014) (order confirming class settlement).
98. Berry, 2014 WL 4403524, at *15.
99. Official FTC Opinion Letter to Commenter Rotenberg, In the Matter of Reed Elsevier Inc., File No. 052-3094, Docket No. C-4226 (Fed. Trade Comm'n July 29, 2008).
100. Redacted Notice of Planned Action Letter provided by Denise Miller, Law Foundation of Silicon Valley (SSA letter dated Nov. 14, 2018).
101. Chi Chi Wu, Data Gatherers Evading the FCRA May Find Themselves Still in Hot Water, National Consumer Law Center, (June 14, 2019).
102. Cal. Civ. Code § 1798.100 *et seq*.
103. U.S. Const. Amend. V.
104. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).
105. *Id*.
106. Cardinale v. Mathews, 399 F. Supp. 1163 (D.D.C. 1975).
107. *Id*. at 267-68.
108. 20 C.F.R. § 416.1400 et seq.

109. Author's notes from March 27, 2014 meeting with Acting Commissioner Colvin, senior SSA staff, and SSI advocates.
110. 42 USC 1320e-3(a)(2).
111. 5 U.S.C. § 552a(p).
112. Jacob J. Lew, Director, Office of Management and Budget, Memoranda 01-05—Guidance on Inter-Agency Sharing of Personal Data–Protecting Personal Privacy (Dec. 20, 2000).
113. Mick Mulvaney, Director, Office of Management and Budget, Transmittal of Appendix C to OMB Circular A-123, Requirements for Payment Integrity Improvement (June 26, 2018) p. 68.
114. Federal Trade Comm'n Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (Dec. 2012).
115. "Person" includes a "government or governmental subdivision or agency," which includes SSA. 15 U.S.C. at 1681a(b).
116. *Id.* at 1681a(1)(B)(iii).
117. Section 1681b(a)(3)(D) specifically refers to "a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status," which would include SSI and SSDI.
118. 15 U.S.C. § 1681e(c).
119. Title VI of the Civil Rights Act of 1964— National Origin Discrimination Against Persons With Limited English Proficiency, 65 F.R. 50123, August 16, 2000. This is the Federal Register cite for Department of Justice guidance for Executive Order 13166, Improving Access To Services For Persons With Limited English Proficiency, signed on August 11, 2000.

APPENDIX A
SAMPLE ADVERSE ACTION NOTICE

The Social Security Administration should provide a notice of adverse action with the following information when it issues a notice of planned action based on an Accurint search.

[NAME OF ENTITY PROVIDING NOTICE] [DENIAL/ACTION BASED ON] YOUR REAL PROPERTY VERIFICATION REPORT	
What is a real property verification report?	A real property verification report is generated by a private company to help us identify if you own any real estate that is not your home. A real property verification report is a type of "consumer report" regulated by the Fair Credit Reporting Act.
How did we use your real property verification report[s]?	We used information from your real property verification report to determine that you own non-home real property at the following address: [insert address]. This determination is the reason why we [suspended/denied/reduced] your benefits. We obtained your real property verification report from **[insert name of CRA]**, but **[insert name of CRA]** did not make the decision to [suspend/deny/reduce] your [type of] benefits. **[insert name of CRA]** is unable to provide you with the specific reasons why your [type of] benefits were [suspended/denied/reduced].
What if there are mistakes in your real property verification report[s]?	You have a right to dispute any inaccurate information in your real property verification report[s]. If you find mistakes in your real property verification report[s], contact **[insert name of CRA]**, which [is/are] the consumer reporting [agency/agencies] from which we obtained your real property verification report[s]. It is a good idea to check your real property verification report[s] to make sure the information [it contains is/they contain are] accurate.
How can you obtain a copy of your real property verification report[s]?	Under Federal law, you have the right to obtain a copy of your real property verification report[s] without charge for 60 days after you receive this notice. To obtain your free report[s]. contact **[inset name of CRA]**: By telephone: Call toll-free: 1-877-xxx-xxxx By mail: Mail your written request to: **[insert address]** On the web: Visit **[insert website address]**
How can you get more information about your real property verification report?	For more information about consumer reports including real property verification reports, visit the Consumer Financial Protection Bureau's website at www.consumerfinance.gov/learnmore

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