Testimony before the

U.S. SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER PROTECTION

regarding

"Making Sense of Consumer Credit Reports"

December 19, 2012

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INTRODUCTION

Mr. Chairman, Ranking Member Corker, and Members of the Subcommittee, the National Consumer Law Center thanks you for inviting us to testify today regarding consumer credit reporting and the need for reform. We offer our testimony here on behalf of our low income clients.[1]

Mr. Chairman, for over a decade, consumer advocates have complained of a credit reporting system plagued with preventable errors, and a broken dispute system that utterly fails to conform to requirements of the Fair Credit Reporting Act (FCRA). These complaints have been confirmed by numerous courts, journalists, and now a report from the Consumer Financial Protection Bureau (CFPB).

- Credit reports are plagued by inaccuracies, such as files mixing the identities of consumers; errors caused by debt collectors, creditors and other furnishers of information; and the fallout caused by identity theft. Whether the percentage of errors is

[1] The National Consumer Law Center is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. As a result of our daily contact with these advocates, we have seen many examples of the damage wrought by inaccurate credit reporting from every part of the nation. It is from this vantage point – many years of observing the problems created by incorrect credit reporting in our communities – that we supply these comments. *Fair Credit Reporting* (7th ed. 2010) is one of the eighteen practice treatises that NCLC publishes and annually supplements. This testimony was written by Chi Chi Wu and Persis Yu of NCLC, with assistance from Carolyn Carter.

33% or 1%, it is too high, especially when the errors are easily preventable with straightforward measures.

- The nationwide consumer reporting agencies (CRAs) – Equifax, Experian, and TransUnion -- are in gross violation of the FCRA's requirements to conduct "reasonable" investigations when consumers dispute errors in their credit reports. Instead of hiring trained personnel to conduct real investigations, the nationwide CRAs have developed a perfunctory automated system that consists of nothing more than translating a consumer's dispute into a two- or three-digit code, forwarding that code and a one-page electronic form to the furnisher, and parroting whatever the furnisher states in response.
- The CFPB has the authority and ability to reform this system, and in the short time that it has existed, we have seen it take significant steps. However, there are measures that Congress can take to help consumers. A consumer should have the right to ask a court to order the nationwide CRAs and furnishers to correct an error when it appears in his or her own credit report.

The problems described above don't end with the credit reports issued by the nationwide CRAs. Reports issue by specialty consumer reporting agencies, such as background check CRAs and tenant screening CRAs, are even more rife with errors and present even worse problems.

Finally, there are a number of other issues and problems with the credit reporting system that Congress should address:

- Consumers lack critical information regarding credit scores. They do not have the right to obtain a copy of the credit score most commonly used by lenders (FICO), or other types of scores based on their credit or consumer reports, such as insurance credit scores, tenant screening scores, or healthcare scores. They do not have the right to a free annual credit score.

- Millions of Americans have their credit reports damaged by medical debt, even when the debt is the result of insurance disputes or billing errors by providers, or is ultimately settled or paid off. We strongly support S. 2149, the Medical Debt Responsibility Act, which would remove paid or settled medical debts from credit reports. This approach will tremendously benefit consumers, and indeed is probably the simplest and easiest "quick fix" out there to improve the credit records of an enormous number of consumers.
- The use of traditional credit reports by employers is a growing practice that is harmful and unfair to American workers. Despite many good reasons to avoid engaging in this practice, sixty percent of employers do so today. We urge Congress to restrict the use of credit reports in employment to only those positions for which it is truly warranted, such as those requiring a national security clearance.
- The Fair and Accurate Credit Transactions Act of 2003 (FACTA) inadvertently deprived consumers of a 30 year-old pre-existing right they had to enforce the FCRA requirement that users of credit reports disclose to consumers when an "adverse action" is taken, i.e., credit or insurance is denied or provided on less favorable terms, on the basis of an unfavorable credit report. Congress can easily fix this scrivener's error and should do so, as it was never part of the legislative bargain struck by FACTA.

I. EASILY PREVENTABLE INACCURACIES PLAGUE THE CREDIT REPORTING SYSTEM

Credit reports play a critical role in the economic health and well-being of consumers and their families. A good credit history (and its corollary, a good credit score) enables consumers to obtain credit, and to have that credit be fairly priced. Credit reports are also used by other important decisionmakers, such as insurers, landlords, utility providers, and unfortunately, as we discuss below, even employers.

Thus, a consumer's credit report can have a huge impact on a consumer's life. A good credit report allows a consumer to own a home, buy a car, obtain insurance for both, get a fairly priced credit card, or perhaps secure an apartment. Conversely, a bad credit report will deny consumers those same things, or force them to pay thousands more for credit and insurance. It may even cost a consumer a vitally needed job. It is no exaggeration to say that a credit history can make or break a consumer's finances.

Despite the importance of accurate credit reports and the purpose of the FCRA to promote accuracy, systematic errors are unfortunately common in the credit reporting system. There are many types of errors in credit reports; we focus on a few of the most egregious. Most importantly, these errors are entirely preventable with some common-sense measures.

A. Categories of Avoidable Inaccuracies

1. Mixed Files

One of the most intractable and damaging types of credit reporting errors are mixed or mismerged files. Mixed files occur when credit information relating to one consumer is placed in the file of another. Mismerging occurs most often when two or more consumers have similar names, Social Security numbers (SSNs), or other identifiers (for example, when information relating to John J. Jones is put in John G. Jones' file).

Mixed files are unfortunately not an uncommon problem. When the *Columbus Dispatch* conducted a year-long investigation of credit reporting errors that included a review of credit reporting complaints to the Federal Trade Commission (FTC) and state Attorneys General during a 30 month period, the reporters found that about 6% of the 21,600 complaint to the FTC and 8% of 1842 complaints to state Attorneys General involved mixed files.[2] An older study found that 44% of credit reporting complaints to the FTC involved mixed files.[3]

Mixed files occur largely because the nationwide CRAs do not use sufficiently rigorous criteria to match consumer data precisely, even when such unique identifiers as SSNs are present. Mostly importantly, they do not match information based on all nine (9) digits of the consumer's SSN. Instead, they will match information based on seven of nine (7 of 9) digits of an SSN if the consumers' names are also similar.[4]

Mixed files could be prevented by requiring the nationwide CRAs to use stricter matching criteria when placing information into a consumer's credit report, most critically an exact match of SSNs. However, the nationwide CRAs have chosen to be excessively and unreasonably over-inclusive because, as the FTC once noted: "lenders may prefer to see all potentially derogatory information about a potential borrower, even if it cannot all be matched to the borrower with certainty. This preference could give the credit bureaus an incentive to design algorithms that are tolerant of mixed files."[5]

The nationwide CRAs have been aware of mixed file errors for decades.[6] In the early to mid-1990s, the FTC reached consent orders with the nationwide CRAs requiring them to

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[2] Michael Wagner and Jill Reipenhoff, *Credit Scars: Mixed and Marred*, Columbus Dispatch, May 7, 2012.
[3] U.S. Public Interest Research Group, *Credit Bureaus: Public Enemy #1 at the FTC*, October 1993. In this sample, U.S. PIRG analyzed 140 complaints to the FTC.
[4] *See*, *e.g.*, Reeves v. Equifax Info. Serv., 2010 WL 2036661 (S.D. Miss. May 20, 2010) (mixed file case involving similar names, different addresses but same state, and match of seven of nine SSN digits); Apodaca v. Discover Fin. Servs., 417 F. Supp. 2d 1220 (D.N.M. 2006)(describing how Equifax uses partial matching logic, including only seven of nine SNN digits, to build files).
[5] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, at 47 (Dec. 2004).
[6] For an example of a mixed file case dating from the late 1970s, *see* Thompson v. San Antonio Retail Merchants Ass'n, 682 F.2d 509 (5th Cir. 1982).

improve their procedures to prevent mixed files.[7] However, nearly two decades later, mixed files remain a significant problem.

2. Identity Theft

Identity theft is often called the "fastest growing crime" in this country, with an estimated eleven million consumers victimized by some form of the crime every year.[8] Identity theft itself presents a serious source of inaccuracies in the credit reporting system. The identity thief, however, is not the only culprit. The nationwide CRAs and furnishers bear a share of the blame as well.

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

3. Furnisher errors

Furnishers can often be the source of errors in credit reports. A furnisher might report the consumer's account with an incorrect payment history, current payment status, or balance. The error might be due to a misapplied payment or data entry error. Sometimes these errors occur

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[7] FTC v. TRW, Inc., 784 F. Supp. 361 (N.D. Tex. 1991), *amended by* (N.D. Tex. Jan. 14, 1993); In the Matter of Equifax Credit Information Services, Inc., 61 Fed. Reg. 15484 (Apr. 8, 1996) (consent order).
[8] Javelin Strategy & Research, 2010 Identity Fraud Survey Report: Consumer Version 5 (2010) .

because the creditor has not complied with industry reporting standards, such as the Metro 2 reporting format.

A particularly difficult type of error involves furnishers who have attributed a credit account to a consumer who does not owe the debt, often called an "ownership dispute." This type of dispute often involves a spouse or other authorized user who is not contractually liable for a debt. Other times, the consumer may have been the victim of identity theft. These "ownership" disputes are among the most common, constituting 33% of the disputes to nationwide CRAs.[9]

Another type of common error is the failure to mark accounts as disputed when the consumer has a legitimate bona fide dispute with the furnisher. Marking an account as disputed is required both under the FCRA as well as numerous federal consumer protection laws, such as the Fair Credit Billing Act, the Fair Debt Collection Practices Act and the Real Estate Settlement Procedures Act.

One of the CFPB's first enforcement actions (conducted jointly with the FDIC) involved allegations that American Express failed to report disputes about credit accounts to the nationwide CRAs, in violation of Section 623(a) of the FCRA, 15 U.S.C. § 1681s-2(a).[10] In addition, the CFPB's report on its supervision activities for the Fall of 2012 noted significant

[9] Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System: A review of how the nation's largest credit bureaus manage consumer data*, December 2012, at 31, available at http://www.consumerfinance.gov/reports/key-dimensions-and-processes-in-the-u-s-credit-reporting-system.

[10] CFPB/FDIC Consent Order with American Express subsidiaries (*In Re: American Express Centurion Bank*, File No. 2012-CFPB-0002; *In Re: American Express Bank, FSB*, File No. 2012-CFPB-0003; and *In Re: American Express Travel Related Services Co. Inc.*, File No. 2012-CFPB-0004, all issued Oct. 1, 2012) *available at* http://www.consumerfinance.gov/pressreleases/cfpb-orders-american-express-to-pay-85-million-refund-to-consumers-harmed-by-illegal-credit-card-practices/.

FCRA violations, including the failure of financial institutions to report disputes to the nationwide CRAs, and the inability to determine whether disputes had been fully investigated.[11]

Debt collectors and debt buyers present their own special types of credit reporting errors. These include errors created by the fact that debt buyers and collectors often obtain nothing more than a list of names and SSNs of alleged debtors. Typically, the debt buyer or debt collector does not get any of the critical supporting documentation to establish that the consumer actually owes the debt, it is the correct amount, whether there are any disputes, or even if the collector is dunning the correct consumer. Another problem is the "re-aging" of old accounts so that they stay on the credit report past the FCRA's seven year limit.[12]

A report issued by the CFPB just last week indicates that a disproportionate number of credit reporting errors involve debt collectors. This December 2012 CFPB Report finds that debt collectors generate 40% of disputes to the nationwide CRAs, despite providing only 13% of the account tradeline information in credit reports.[13]

B. Accuracy Statistics

Given the types of problems described above, one would rightfully conclude that errors are unfortunately all-too-common in the credit reporting system. Indeed, study after study has documented significant error rates in credit reports.

[11] Consumer Financial Protection Bureau, *Supervisory Highlights: Fall 2012*, at 12, *available at* http://files.consumerfinance.gov/f/201210_cfpb_supervisory-highlights-fall-2012.pdf

[12] Chi Chi Wu, National Consumer Law Center, *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports* (Jan. 2009), at 11-12, *available at* www.nclc.org/issues/credit_reporting/content/automated_injustice.pdf.

[13] Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System: A review of how the nation's largest credit bureaus manage consumer data*, December 2012, at 14, 29, available at http://www.consumerfinance.gov/reports/key-dimensions-and-processes-in-the-u-s-credit-reporting-system.

For instance, a 2010 on-line survey by the Columbus Dispatch reported that one-third of respondents said they had found errors on their credit reports.[14] A similar on-line survey by Zogby Interactive found that 37% of consumers who ordered their credit reports discovered an error, and 50% of those were not easily able to correct the error.[15] A study by the Consumer Federation of America and National Credit Reporting Association documented numerous serious errors in credit reports.[16] Studies from U.S PIRG and Consumers Union have found errors in 25% of credit reports serious enough to cause a denial of credit.[17]

The FTC is currently undertaking a comprehensive study of errors in credit reports, using expert consultants to help study participants order and review their credit reports. The results of this study should be available soon. In the second pilot phase of the study, 15 of the 128 participants (or 12%) found material errors in their credit reports.[18] Only 12 of the 15 filed disputes with the assistance of the researchers; of these, 7 resulted in changes to the credit report, 3 resulted in partial changes, and 2 cases resulted in no changes. Thus, at least 7 out of 128 participants (or 5.5%) had material errors that were confirmed due to a change upon dispute.

The credit reporting industry has attempted to rebut charges of systemic inaccuracies, commissioning a study by the Policy and Economic Research Council (PERC) claiming that fewer than 1% of credit reports are inaccurate.[19] However, further analysis of the PERC study

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[14] Jill Reipenhoff and Michael Wagner, *Credit Scars*, Columbus Dispatch, May 6, 2012.
[15] Zogby Interactive, *Most Americans Fear Identity Theft*, Zogby's American Consumer, April 2007, at 3.
[16] Consumer Federation of America and National Credit Reporting Association, *Credit Score Accuracy and Implications for Consumers*, December 17, 2002, *available at* www.consumerfed.org/pdfs/121702CFA_NCRA_Credit_Score_Report_Final.pdf ["(CFA-NCRA study"].
[17] Nat'l Ass'n of State PIRGs, *Mistakes Do Happen: A Look at Errors in Consumer Credit Reports*, at 11 (2004); Consumers Union, *What Are They Saying About Me? The Results of a Review of 161 Credit Reports from the Three Major Credit Bureaus* (Apr. 29, 1991).
[18] Federal Trade Comm'n, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003*, at 2 (Dec. 2008).
[19] Michael Turner et al., Policy and Economic Research Council, U.S. Consumer Credit Reports: Measuring Accuracy and Dispute Impacts, May 2011. This study was funded by the Consumer Data Industry Association, which provided both monetary support as well as assistance with the study implementation, along with the nationwide CRAs.

shows that an initial rate of alleged errors was actually closer to 20%, but this percentage was whittled down by excluding categories of established errors, discounting errors if the participant did not make a dispute, and excluding errors that did not change the participant's credit score by more than 25 points. In particular:

- One-third of the alleged errors were excluded from consideration as immaterial because the consumer did not file a dispute. Yet previous FTC research has noted how difficult some consumers find it to file a dispute.[20] This is the reason why the FTC provided consumers with the assistance of consultants in its study.
- Another one-third of errors involving consumers' identifying information - such as name, address, employer, or date of birth - were excluded as immaterial. While some errors of this type may be minor, other errors in identifying information can be an indication of mixed files, as discussed above in Section I.A.1. In 2004, the FTC estimated that about 4% of inquiries match to more than one file, thus indicating potential mixed files.[21] Errors in identifying information are especially critical because the copy of the credit report that a consumer receives may be different from the version that creditors and other users receive. As the National Credit Reporting Association noted regarding the PERC study,[22] consumers typically receive a sanitized version of their reports, in which all data

[20] Federal Trade Comm'n, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003*, Appendix at 17 (Dec. 2006). As the researchers in the first FTC pilot study noted, "[w]e expected that participants would be motivated to have any errors in their credit reports corrected promptly. This did not generally occur." An example of this from the FTC pilot was a consumer with a material error who explained that she did not file a dispute because "she was a single mother with twins and could not muster the time to file a dispute."

[21] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, at 58 (Dec. 2004).

[22] The NCRA stated: "Consumer disclosures require strict data inputs and have tighter matching criteria that are known to filter out some of the most common errors, credit files that have data mixed between more than one individual." Terry Clemans, Executive Direcotr, National Credit Reporting Association, Position on the Dodd-Frank Wall Street Reform Proposed Qualified Residential Mortgage Requirements, Aug. 1, 2011, at 15. The NCRA also noted that:

have been properly matched using their full name, all nine digits of the SSN, and full addresses. In contrast, a user may receive a version based on the partial match criteria discussed above in Section I.A.1. The reports employed by PERC therefore potentially exclude an entire category of mixed files.

- Any error that did not result in a correction with a score increase of 25 points was excluded as immaterial, even if the item was negative, and thus was not counted in the 1% error rate. Yet 87% of the tradelines in which there were alleged errors were modified or deleted, and 40% resulted in some increase in the participant's credit score. Thus, the error rate could just as well be characterized as 16.7% (87% of 19.2%) or 7.7% (40% of 19.2%). Second, some particularly negative items by themselves (*e.g.*, an erroneous collection account) could cause a denial regardless of the score.

Most importantly, a 1% error rate is still too high because it means 2 million consumers harmed by inaccurate reporting. If we take PERC's 1% error rate at face value, that figure translates into 2 million consumers, given the 200 million credit histories in the databases of each of the nationwide CRAs. Thus, even by PERC's analysis, 2 million consumers are harmed by inaccurate reporting. This is simply unacceptable. Would we accept it if 1% of all airplanes fell out of the sky? Would we accept it if 1% of all automobiles had defects that caused horrible accidents? This is especially egregious when errors could be prevented with straightforward measures.

Finally, note that a 1% figure was a snapshot in time. The chances of a consumer being impacted by a credit reporting error are much greater over the consumer's lifetime. For

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While the study is impressive for its professional design and depth of research, the findings just do not match the real world experiences of the average American consumer. Based on the aforesaid issues and considering the methodology of the previous study funded by the national credit bureaus, (the 1992 ACB/AA study) it looks very likely that the methodology behind this study has been carefully crafted to obtain the unrealistically low error rate it claims.

instance, consider that about 121.7 per 100,000 women (or 1.2%) in the United States have breast cancer at any time.[23] But as many women know, the "lifetime risk" of getting breast cancer is much higher at 12.4%.[24]

C. Fixing the System: The Role of the CFPB, the Nationwide CRAs and Empowered Consumers

1. The role of the CFPB

The CFPB has the authority and ability to reform the credit reporting system, and we have high hopes that it will do so. The Dodd-Frank Act gave the CFPB significant authority to regulate the nationwide CRAs, in a way that the FTC never had. The CFPB can write regulations to implement almost all of the provisions of the FCRA, including the provisions regarding accuracy and the dispute process, while the FTC only had rulewriting authority over specific provisions. 15 U.S.C. § 1681s(e). The CFPB can take enforcement action against the major players in credit reporting.

Most importantly, the CFPB has supervision authority over the "larger participants" of the credit reporting industry, including the nationwide CRAs. 12 U.S.C. § 5514(a)(1)(B). The CFPB began supervising the nationwide CRAs in September 2012, and we hope that it will be able to move them toward reforming these problems.

The CFPB also has supervision authority over the largest furnishers of information, such as banks with over $10 billion in assets. CFPB began supervision over some of these institutions earlier, and we have already seen results, as discussed above in Section I.A.3.

[23] Centers for Disease Control and Prevention, *Cancer Among Women*, May 2, 2012, at www.cdc.gov/cancer/dcpc/data/women.htm.
[24] National Cancer Institute, *Breast Cancer Risk Among American Women*, Sept. 24, 2012, at www.cancer.gov/cancertopics/factsheet/detection/probability-breast-cancer.

We commend the CFPB for taking these enforcement actions. We also appreciate that the FTC has been more active in taking enforcement actions against furnishers such as debt collectors, as well as specialty CRAs, discussed below in Section III.

However, these enforcement actions raise the troubling issue that these flagrant violations of the FCRA have been prevalent for years, with no sanction by prior regulators and no recourse for consumers. Why were major lenders such as American Express, which should be well versed in the law and have ample resources to ensure compliance, in such blatant violation of the FCRA and other federal consumer protection laws? The CRAs are culpable in this as well. Why did the nationwide CRAs not detect these problems and prompt these furnishers to improve their systems?

2. The culpability of the nationwide CRAs

Obviously, the nationwide CRAs have the critical role in fixing errors caused by their own procedures, such as mixed files. However, they also bear some responsibility for furnisher errors, which are aided and abetted by the failures of the nationwide CRAS to exercise adequate oversight.

The nationwide CRAs unquestioningly rely on furnishers and provide little oversight of the quality of the information being reported. Any error sent by the furnisher in its computer file automatically appears in the consumer's credit report, sometimes even when the information patently contradicts information appearing in other parts of the credit report. The classic example is reporting a consumer as "deceased" when active tradelines are being reported by other furnishers, clearly indicating that the consumer is still alive.[25] And as the CFPB's

[25] *See, e.g.,* Perez v. Trans Union, L.L.C., 526 F. Supp. 2d 504, 509, 510 (E.D. Pa. 2007) (question of fact for jury as to whether CRA should have detected inaccuracy in reporting consumer as deceased even though payments were reported as being made to his current accounts).

December 2012 Report noted, the nationwide CRAs "do not conduct independent checks or audits to determine if the data is accurate,…"[26] This unquestioning acceptance and re-publication of furnisher information invites abuse.

Must of the problem lies in the mindset of the nationwide CRAs, which claim they are only the database, or the "library" for the information of the furnishers, and thus have no responsibility for its accuracy.[27] But that is not what the FCRA requires. The FCRA imposes "grave responsibilities" on consumer reporting agencies to promote accuracy, and to act with "fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681. The FCRA requires them to have and follow "reasonable procedures to ensure maximum possible accuracy." 15 U.S.C. § 1681e(b).

In other words, the CRAs are not supposed to be bystanders. They are supposed to actively take steps to promote accuracy. They are supposed to be engaged, aggressive, and proactive in rooting out errors. Reasonable procedures for ensuring maximum possible accuracy surely does not include standing by and doing nothing while creditors and debt collectors blatantly violate the law.

The culpability of the nationwide CRAs is especially true when it comes to debt collectors and debt buyers. Despite being aware of these errors, the nationwide CRAs refuse to take meaningful action to exclude bad actors who provide bad data. For example, in our 2007

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[26] Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System: A review of how the nation's largest credit bureaus manage consumer data*, December 2012, at 19, available at http://www.consumerfinance.gov/reports/key-dimensions-and-processes-in-the-u-s-credit-reporting-system.

[27] *See, e.g., Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information: Hearing before the House Committee on Financial Services*, 110th Congr. 46 (2007)(oral testimony of Stuart Pratt, President and CEO, Consumer Data Industry Association)("But to put the CRAs in a position of being a small claims court, to try to adjudicate and be the oracle of truth is the wrong place for it to be. The lender will know the decision.").

testimony,[28] we cited the example of the debt buyer Asset Acceptance, which had been allegedly excluded for re-aging obsolete account information, but then reinstated as a furnisher by the nationwide CRAs.

Despite the information provided in the 2007 hearing, the nationwide CRAs continued to accept Asset Acceptance's data – even though in July 2011, one of the nationwide CRAs (TransUnion) sued it for providing inaccurate information that led to TransUnion being named as a defendant in an FCRA lawsuit.[29] And just this year, the Federal Trade Commission took enforcement action against Asset Acceptance in part over its failure to properly investigate consumer disputes and reporting of information it had reason to suspect was inaccurate.[30]

Yet there is no indication that any of the nationwide CRAs have excluded Asset Acceptance as a furnisher. In fact, the company's Annual Report filed March 2012 states "We furnish information concerning our accounts to the three major credit reporting agencies,…".[31] Asset Acceptance is only one out of many debt buyers and collectors that continually provide inaccurate information to the nationwide CRAs. For another example, see the Brim v. Midland case discussed below in Section II(D).

Unfortunately, there are very logical reasons, and tremendous incentives for the nationwide CRAs NOT to exclude bad actors or require stricter measures to reduce furnisher errors. The credit reporting industry is unlike most other American industries in a fundamental respect. The paying clients of the credit reporting industry are not consumers, but the very

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[28] *See, e.g., Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information: Hearing before the House Committee on Financial Services*, 110th Congr. 46 (2007)(statement of Chi Chi Wu, Staff Attorney, National Consumer Law Center).
[29] Complaint, Trans Union LLC v. Asset Acceptance, LLC, (Ill. Cir. Ct. Cook Cty July 12, 2011).
[30] Complaint, United States v. Asset Acceptance, LLC, Case No. 8:12-cv-182-T-27 (M.D. Fla. Jan 30, 2012).
[31] Asset Acceptance Capital Corp., 2011 Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, March 29, 2012, at 11.

creditors and debt collectors that the CRAs should be – but are not – screening the data of, auditing, and overseeing.

Moreover, consumers have no say in whether their information is included in the nationwide CRAs' databases. Most Americans cannot avoid having a credit history. Unless they are very wealthy, consumers will need to borrow money if they want to buy a house or attend college. Thus, unlike almost all other business relationships, consumers who are unhappy with the actions of a CRA cannot vote with their feet – they cannot remove the information or take their business elsewhere.

On the other hand, debt collectors and creditors do have the ability to switch between CRAs if they wish. And vigorous oversight by the nationwide CRAs, or tougher requirements for accuracy, are likely to drive furnishers away. The biggest impact of excluding a furnisher like Asset Acceptance is to cost the nationwide CRAs a paying customer; the nationwide CRAs don't profit and indeed lose money from making sure consumers are treated fairly. Furthermore, furnishers want all negative information that might possibly relate to the consumer, even if the information is of uncertain accuracy – it costs creditors more if negative information is unreported than if it is falsely reported. Thus, the nationwide CRAs have incentives to develop systems that are overly inclusive of negative information.

In short, traditional competitive market forces provide little incentive for CRAs to incur the costs to institute new procedures that ensure information is accurate or to undertake investigations to correct errors, since these activities primarily benefit consumers. Up until the creation of the CFPB, the major force doing so were consumers themselves who were willing to go to court to enforce their rights under the FCRA.

3. The vital importance of private rights and empowered consumers; the need for consumer remedies

In 1970, Congress recognized that no one has a bigger stake in the accuracy of a credit report than the consumer whose name is on it. By establishing the right of consumers to seek private redress under sections 1681n and 1681o, Congress assigned the primary enforcement role to those with the greatest interest in accomplishing such a task – the individuals whose peace of mind and material wellbeing are directly impaired by inaccurate credit reports. In the 1970 legislation, there were no exceptions to this private enforcement scheme.

And for over 40 years, private litigants have provided the most significant enforcement of the FCRA. A Westlaw search for reported Fair Credit Reporting Act cases citing either section 1681n or 1681o yields over 1,500 cases. In contrast, there was been much less enforcement by federal regulators. At best, the FTC was only able to bring several dozen FCRA cases, and most of them did not involve the accuracy of the nationwide CRAs. Prior to the CFPB, not one single banking regulator had publicly disclosed an FCRA enforcement action against a bank furnisher.

New rights were added to the FCRA in 1996 and 2003 to protect consumers, but in compromises with the credit industry, consumers were prohibited from seeking relief in court to enforce some of these rights. Most notably, many of the responsibilities placed on furnishers are only enforceable by government agencies. This includes a prohibition on reporting information that the furnisher knows or has reason to believe is inaccurate, and the requirement that furnishers handle credit reporting disputes sent directly to them. *See* 15 U.S.C. § 1681s-2(d).

Thus, a consumer who has been the victim of inaccurate information in his or her credit report simply has no resource against the furnisher, even if the furnisher deliberately and maliciously provided the wrong information. She has no resource if she files a dispute directly with the furnisher, and the furnisher ignores her. Furthermore, a part of the compromise to impose obligations on furnishers, the FCRA preempts state laws governing them, even in some cases venerable common law doctrines such as defamation and slander. *See* 15 U.S.C. §§ 1681h(e), 1681t(b)(F).

At least one court has expressed extreme frustration with this statutory scheme:

> But the FCRA's substance is even more troubling than its complex form. The statute includes numerous provisions that limit consumers' ability to enforce its mandates either by explicitly barring private actions or by imposing such burdensome procedural requirements that no layperson could possibly be expected to comply.

The court in this case, *Burrell v. DFS Services, LLC,*[32] went on to note:

> In a particularly frustrating twist, another provision of the FCRA requires several federal entities to promulgate regulations governing when and how a consumer may submit a dispute directly to a creditor, 15 U.S.C. § 1681s–2(a)(8)(A), but that provision falls under the section of the FCRA that prohibits private enforcement. See 15 U.S.C. § 1681(d). As if that were not enough, the FCRA actually takes away any alternative means that consumers could previously have used to enforce their rights by expressly preempting virtually all state law causes of action related to credit reporting. 15 U.S.C. § 1681 t(b)(1)(F); 15 U.S.C. §§ 1681 h(e).
>
> *   *   *   *
>
> Those requirements have the practical effect of insulating creditors, such as Defendants, from liability even in cases where they fail to take basic measures to protect their customers. Instead, the FCRA places the burden of ensuring the efficient functioning of the credit reporting system on the consumers themselves—laypeople who are, in most

[32] 753 F. Supp.2d 428, 444 (D.N.J. 2010).

cases, in no position to carry out that task by jumping over the technical hurdles created by the statute. Such a scheme is troubling, to say the least.

We submit that Congress should, and must act, to rectify this troubling situation. We urge Congress to provide consumers with the right, currently sorely lacking under the FCRA, to ask a judge to tell a furnisher or a CRA: "fix that report."

With one minor exception, the FCRA does not provide for declaratory or injunctive relief in actions by private parties. The vast majority of courts have held that courts do not have the power to issue an injunction under the FCRA. The FCRA is an anomaly in this respect, as the Supreme Court decision in Califano v. Yamasaki[33] provides the basis for injunctive relief for most other laws.

Providing courts with explicit authority to issue injunctive relief would further the purpose of the FCRA to "assure maximum possible accuracy."

II. THE FCRA-MANDATED CREDIT REPORTING DISPUTE SYSTEM IS A TRAVESTY OF JUSTICE

A. A Long-Documented History of Blatant Violation

As we have documented repeatedly, the FCRA dispute system developed by the credit reporting industry is a travesty of justice. The FCRA requires both CRAs and furnishers to conduct "reasonable" investigations when a consumer disputes an item in his or her credit report as inaccurate or incomplete. However, the system created by the nationwide CRAs to handle disputes is anything but reasonable. Instead, it is a perfunctory, automated process that consists of nothing more than translating consumer disputes into a two- or three-digit code, forwarding

[33] 442 U.S. 682, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979).

that code and a one-page electronic form to the furnisher, and parroting whatever the furnisher states in response.[34]

In this highly automated, computer-driven process, a consumer's dispute is communicated using a Consumer Dispute Verification form (CDV). An automated version of the form, communicated entirely electronically, is known as Automated Consumer Dispute Verification (ACDV). Furthermore, all three nationwide CRAs collaborated through the Consumer Data Industry Association to create an automated on-line reinvestigation processing system called "e-OSCAR."

This automated system is heavily dependent upon standardized dispute codes used to communicate the nature of the dispute. Approximately 44% of consumer disputes are written.[35] These written disputes often consist of a detailed letter with supporting documentation, painstakingly written by concerned and even desperate consumers. All of these documents, including a consumer's careful description of a specific dispute, are reduced to a two or three digit code that the employee of the CRA's offshore vendor[36] who glances at the material believes best describes the dispute. The code is sent to the furnisher and is often communicated alone, without supporting documentation provided by the consumer - documents such as account applications, billing statements, letters, payoff statements and even court judgments that can show overwhelming and even conclusive proof.

The overly automated and perfunctory nature of the process, and the obstacles it creates for consumers, has been noted repeatedly by consumer groups, as well as courts, regulators, and

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[34] Chi Chi Wu, National Consumer Law Center, *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports* (Jan. 2009), *available at* www.nclc.org/issues/credit_reporting/content/automated_injustice.pdf.

[35] Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System: A review of how the nation's largest credit bureaus manage consumer data*, December 2012, at 27, available at http://www.consumerfinance.gov/reports/key-dimensions-and-processes-in-the-u-s-credit-reporting-system.

[36] Usually located in India, the Philippines, Chile, or Costa Rica.

journalists. Consumer advocates raised criticism of this system during the debates leading up to the FACTA amendments of 2003. A 2006 study mandated by FACTA and conducted by the FTC and Federal Reserve Board confirmed the automated and perfunctory nature of the dispute system.[37] In a 2007 hearing before the House Financial Services Committee, several consumer advocates provided more evidence, such as materials obtained in discovery and deposition testimony, and greater details about the Kafka-esque nature of the system.[38]

In 2009, the National Consumer Law Center issued an in-depth report about the details, nature, and abuses of the credit reporting dispute system in a report called *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Report.* This report included many real-life cases, deposition testimony and other extensive cites documenting the extent of how the system prevents consumers from fixing errors and deprived them of their rights under the FCRA. We wish to submit this report (also found at www.nclc.org/issues/credit_reporting/content/automated_injustice.pdf) for the record.

Unfortunately, the abuses in the credit reporting dispute system have persisted despite this extensive history of criticism and calls for reform. Just this year, the Columbus Dispatch issued a series of articles with a similarly in-depth exposé of the dysfunctional credit reporting dispute system, proving that the abuses continue despite decades of complaints.[39]

The latest report to document the problems with the credit reporting dispute system was issued just last week by the CFPB. The CFPB's report confirmed the automated nature and hands-off approach of the nationwide CRAs, and documented that in 85 percent of cases, the

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[37] Federal Trade Commission and Federal Reserve Board, Report to Congress on the Fair Credit Reporting Act Dispute Process (Aug. 2006), at 12, available at www.ftc.gov/os/comments/fcradispute/P044808fcradisputeprocessreporttocongress.pdf

[38] *Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information: Hearing before the House Committee on Financial Services*, 110th Congr. (2007).

[39] Jill Reipenhoff and Michael Wagner, *Credit Scars Series*, Columbus Dispatch, May 7-14, 2012, available at http://www.dispatch.com/content/topic/special-reports/2012/credit-scores.html.

CRA does no more than pass along the dispute to the furnisher. Most notably, CFPB Director Cordray noted that, as consumer advocates have long alleged, "the documentation consumers mail in to support their cases may not be getting passed on to the data furnishers for them to properly investigate and report back to the credit reporting company."[40]

We believe this failure to pass along documentation submitted by the consumer deliberately violates the FCRA's requirement that a CRA include "all relevant information" about the dispute that the CRA received from the consumer. 15 U.S.C. § 1681i(2). And if all relevant communication is not forwarded, the furnisher cannot comply with the FCRA's requirement to "review all relevant information" provided by the CRA. 15 U.S.C. § 1681s-2(b)(1)(B).

B. The Nationwide CRAs' Bias against Consumers Violates the FCRA

Another fundamental problem with the credit reporting dispute process is the utter and complete bias against consumers by the nationwide CRAs. After a furnisher responds to an FCRA dispute, the nationwide CRAs' main response is to parrot whatever the furnisher says. The CRAs will accept the results of the furnisher's "investigation" even when a simple check would reveal inconsistent information. In other words, the nationwide CRAs' policies are that what the furnisher says is gospel, and even when that furnisher is a bad actor with a history of violations, such as a debt buyer. We believe this absolute bias in favor of the furnisher in dispute investigation violates the FCRA.

In fact, a number of courts have chastised the nationwide CRAs for this parroting, and their general failure to do no more than send an ACDV to the furnisher and accept its response.

[40] Prepared Remarks by Richard Cordray, Director of the Consumer Financial Protection Bureau, Credit Reporting White Paper Press Call, December 13, 2012 .

Recent cases include *Dixon-Rollins v. Experian Info. Solutions*,[41] in which the Federal District Court for the Eastern District of Pennsylvania noted:

> Significantly, the Third Circuit had already warned Trans Union that its reinvestigation procedures were deficient. The *Cushman* decision clearly instructs consumer reporting agencies that they must go beyond the original source in certain circumstances. Trans Union's attempt to avoid that instruction by citing another circuit's decision that is not on point is unavailing. Indeed, its argument suggests that it had no intention of correcting its reinvestigation procedures. It cannot avoid its obligations by creating an illusory exception. Thus, there is ample evidence to support a legal and factual determination that Trans Union's procedures are objectively unreasonable.

The District Court characterized Trans Union's behavior as reprehensible, stating "because Trans Union has been warned of its inadequate reinvestigation practices in prior cases, it may be considered a repeat FCRA offender."[42]

In *Saindon v. Equifax Information Services*,[43] the Northern District of California noted in 2009 that:

> …the monitoring and reinvestigation procedures could be seen as quite limited. The procedures could be seen by a jury as merely basic automated checks that catch missing data fields on submitted forms, which do not go to the heart of whether a source of information is trustworthy. For example, when a consumer files a complaint contesting the accuracy of an item on his or her credit report, the sole action taken by Equifax is to contact the source of the information to verify if it is accurate. If the source says that it is, the inquiry ends (Rittelmeyer Decl. ¶ 8.). This does virtually nothing to determine the

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[41] 753 F. Supp.2d 452, 464 (E.D. Pa. Sept. 23, 2010)
[42] Id. at 465.
[43] 608 F. Supp. 2d 1212, 1217 (N.D. Cal. 2009).

actual credibility of the source--which is what plaintiff asserts is lacking--or so a jury could reasonabl[y] conclude.

Another judge in this same district noted in 2010 that Equifax's history of deferring to furnishers rather than performing independent investigations, along with consent agreements with FTC and state Attorneys General, provided sufficient evidence for jury to find that the CRA ran unjustifiably high risk of violating the FCRA.[44]

The nationwide CRAs' bias in favor of furnishers – their unquestioning acceptance of the furnisher's response despite being presented with evidence and documentation by the consumer – violates the FCRA's protection for consumers. The FCRA places the burden of proof in a dispute investigation *on the furnisher*, not the consumer, as the Act provides that if disputed information is inaccurate *or cannot be verified*, it should be deleted. *See* 15 U.S.C. § 1681i(a)(5)(A). Thus, if a consumer provides evidence and documentation that she is correct, and the furnisher responds without such evidence, the disputed information is "unverifiable" by nature, and should be deleted. Yet the nationwide CRAs not only illegally place the burden of proof on the consumer, they go further by always siding with the furnisher and automatically accepting the furnisher's position – even when, in 40% of the cases, the furnisher is a debt collector or debt buyer. This is not only wrong, it is illegal under the FCRA.

C Furnishers Also Engage in Perfunctory "Investigations," with Encouragement from the Nationwide CRAs

For their part, furnishers often also conduct non-substantive and perfunctory "investigations." These procedures consist of nothing more than verifying the challenged data

[44] Drew v. Equifax Info. Serv., 2010 WL 5022466 (N.D. Cal. Dec. 3, 2010). *See also* Gorman v. Experian Info. Solutions, Inc., 2008 WL 4934047, at *6 (S.D.N.Y. Nov. 19, 2008)("Given the standard articulated in *Cushman* and Experian's claimed sole reliance on the information it received from HSBC, a jury could conclude that Experian did not reinvestigate Plaintiff's dispute in accordance with the requirements of the 15 U.S.C. § 1681" and acted in reckless disregard of the law).

by comparing the notice of dispute with the recorded information that is itself the very subject of the dispute. In such cases, combined with the CRAs' failure to conduct any independent review, the ultimate effect that no one ever investigates the substance or merits of the consumer's complaint.

Unfortunately, the trend by furnishers is to increase the automation of their dispute processes, encouraged by the nationwide CRAs. The nationwide CRAs promote the "Automated Batch Interface" which "allows Data Furnishers to receive Consumer Dispute Verification (ACDV) requests in XML batch file format" so that they can handle disputes using a mass production method.[45] And some furnishers have fully embraced this automation. For example, as we noted previously:

- **MBNA (now FIA Card Services/Bank of America)** - During the course of the Johnson v. MBNA litigation,[46] MBNA's employees testified that the company's FCRA investigation process consisted of merely confirming the name and address of consumers in the MBNA computers and noting from the applicable codes that the account belonged to the consumer. The employees revealed that they never consulted underlying documents such as account applications to determine accuracy of disputed information.
- **Capital One –** Capital One employee Pamela Tuskey described how all three of the national credit bureaus instructed Capital One personnel to simply verify information and to "make our system look like your system." The credit bureaus even discouraged the Capital One personnel from actively researching by pulling statements or similar activities.[47]

[45] e-OSCAR, Automated Batch Interface, at http://www.e-oscar.org/automated-batch-interface.aspx.
[46] 357 F.3d 426 (4th Cir. 2004).
[47] Deposition of Pamela Tuskey, Carol Fleischer v. TransUnion, Case No. CV 02-71301 (E.D. Mich.).

- **Mortgage Bankers** - Trade groups for certain furnishers/creditors have asserted that if a credit report reflects what is in the furnisher's records, it should be considered "accurate," no matter whether the furnisher's records are objectively accurate as a matter of reality. For example, the Mortgage Bankers Association has urged regulators to define accuracy as "accurate reporting of the status of the account as reflected in the furnisher's records."[48]

More recent examples of automated non-substantive processing of dispute by furnishers are:

- **USAA Federal Savings Bank** - USAA not only engages in perfunctory investigations, but a recent Sixth Circuit decision noted that: "Boggio offers deposition testimony by a USAA employee stating that USAA reviewers were *prohibited from consulting documents in his file*—including the allegedly forged check in question—and instead would have verified only his identity before responding to a CRA notice."[49]
- **Credit Bureau Collection Services -** In its 2010 complaint against this debt collector, the FTC alleged: "For certain types of disputes, such as those where the consumer claims the account is not his or hers or belongs to someone with a similar name, it is CBCS's policy and practice only to compare the name, social security number, date of birth, and address in CBCS's computer database with the information provided on ACDV forms. Where three of the four items match, CBCS will report to the CRA that it has verified the information it furnished as accurate. It is CBCS's policy that only after the consumer has

[48] *Comments of Mortgage Bankers Association re: Interagency Advanced Notice of Proposed Rulemaking: Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act*, May 22, 2006, at 4.
[49] Boggio v. USAA Federal Sav. Bank, 696 F.3d 611 (6th Cir. 2012) (emphasis added).

alleged the same type of account inaccuracy more than four times will the matter become assigned to a supervisor to do further 'investigation.'"[50]

- **Asset Acceptance -** The FTC's 2012 complaint against this debt buyer describes Asset Accepance's equally meaningless treatment of disputes: "Asset processed many ACDVs through 'batch processing,' an automated system in which certain 'identifiers' in Asset's electronic account records are automatically compared with the information provided on the ACDV forms. When the Social Security number and consumer name on the ACDV match the information in Asset's database, Asset reports to the consumer reporting agency that it has verified the information….The batch processing of comparing a consumer's name and Social Security number often does not adequately respond to the consumer's dispute and is not a reasonable investigation. … Asset does not investigate the particular merits of the consumer's claim by, for example, reviewing individual account documents, contacting the portfolio seller to verify the accuracy of the information, asking the consumer reporting agency for more information, or reviewing its own internal notes."[51]

  The FTC also noted that Asset only employs 14 to 20 "ACDV specialists" despite receiving half a million credit reporting disputes each year, and expects each each specialist to process at least 18-20 ACDVs per hour ***– or one dispute every 3.33 minutes***.

- **Midland Credit Management.**[52] Midland is another major debt buyer that engages in non-substantive, unreasonable investigations. In one case, the consumer had unimpeachable evidence that he had already paid off a debt to Dell Computers, and did

[50] Complaint, United States v. Credit Bureau Collection Services, Case No. 2:10-cv-169 (S.D. Ohio Feb. 24, 2010).
[51] Complaint, United States v. Asset Acceptance, LLC, Case No. 8:12-cv-182-T-27 (M.D. Fla. Jan 30, 2012), at ¶¶44 and 45.
[52] Brim v. Midland Credit Management, 795 F. Supp.2d 1255 (N.D. Ala. 2011)

not owe Dell anything. But Dell sent Mr. Brim's account to Midland, which reported it to the nationwide CRAs. Mr. Brim sent numerous disputes to the nationwide CRAs and Midland between 2008 and 2009. Midland responded to the notices by merely checking the dispute against its own records. Its review did not go any further than simply verifying that the debt existed on its books. Midland also responded to Brim's evidence (specifically, a bank account payment history) as "inadequate" and requested supplemental bank documents that were not available. Brim devoted nearly five years of his life to fighting a debt that he had timely paid, resulting in loss of income, loss of credit, and emotional distress.

Unsurprisingly, the last three examples involve debt collectors. As the CFPB's December 2012 report noted, and as mentioned above, debt collectors represent 40% of all credit reporting dispute, a disproportionate share given that they only provide 13% of the account tradelines on credit reports.[53] Furthermore, debt collectors have little incentive to correct errors in response to a dispute, especially since removing negative information may mean losing the opportunity to collect the debt, which is their main objective. Unlike with a creditor, the consumer is not the debt collector's customer, and has no reason to maintain a good relationship with the consumer. To a debt collector or buyer, it does not matter if the amount is wrong, there is a dispute as to liability, or they have the wrong consumer – so long as they can use the credit report to pressure the consumer to pay up.

[53] Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System: A review of how the nation's largest credit bureaus manage consumer data*, December 2012, at 14, 29, available at http://www.consumerfinance.gov/reports/key-dimensions-and-processes-in-the-u-s-credit-reporting-system.

D. What Needs to be Done

It is well past time for the credit reporting dispute system to be reformed. For too long, consumers with the misfortune of being plagued by errors have suffered under an illegal, illogical, and unjust system. Reforming the system will take the efforts of both the CFPB and Congress.

First, the nationwide CRAs must be required to have sufficient trained personnel to actually review and conduct real investigations of consumer disputes. They must be required – as the FCRA and court decisions mandate – to undertake "reasonable" investigations that consist of a "detailed inquiry or systematic examination"[54] of the evidence. This means talking to consumers and furnishers, examining documents in a meaningful manner, using human judgment to analyze a dispute, and making independent decisions. Thus, the nationwide CRAs must provide skilled trained personnel with the discretion to make decisions. Nationwide CRAs must also be required to forward to furnishers actual copies of the documents submitted by consumers.

This will require a significant investment of resources by the nationwide CRAs, especially in terms of personnel. But as the court in the Eastern District of Virginia noted:

> While this obligation to conduct a reasonable investigation may increase the cost and expense to a CRA, it is the necessary cost associated with discharging the congressionally mandated duties placed upon a company choosing to engage in a business that can have such a profound and lasting impact on consumers,…[55]

[54] Johnson v. MBNA, 357 F.3d 426, 430-431 (4th Cir. 2004).
[55] Burke v. Experian Info. Solutions, 2011 WL 1085874 (E.D. Va. Mar. 18, 2011).

The credit reporting industry will complain, as it often does, that it is not a tribunal or a small claims court. But a CRA need not act as a small claims court to simply determine that information that a consumer owes a debt is inaccurate when the consumer has a bank statement, an executed loan modification, or even a judgment showing that he or she does not owe the debt. Furthermore, in those circumstances where the CRA personnel truly cannot determine whether the consumer or the furnisher is correct, the information should be deleted. After all, the FCRA requires information to be deleted if it "cannot be verified." *See* 15 U.S.C. § 1681i(a)(5)(A). Thus, the burden should be on the furnisher, not the consumer, when there is a credit reporting dispute.

At a minimum *all* good faith disputes should be marked as such and excluded from the credit score. Currently, only some types of disputed debt are excluded from a credit score, and the dividing line is unclear and shifting. Furthermore, exclusion of some disputes from the credit score is entire voluntary and the industry could change its mind any time and start scoring all disputes. For example, consider this complaint:

> I applied for a home equity line of credit with Fifth Third Bank. Specifically I was interested in the line of credit that came with an initial rate of 2.99% with a credit score of 750 or above. A few days after the application, I was informed in writing by the loan officer that my application had been "Preliminarily Approved." However, I was told that I did not qualify for the 2.99% rate because my credit score was only 725, as reported by TransUnion.
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> As this did not make sense to me, I researched both my credit reports and my credit scores. My Equifax credit score was 802. I was unable to obtain my Experian credit score. The TransUnion credit score report provided to me by Fifth Third includes a

section stating -- "Key factors that adversely affected your credit score: 040-Dereg public recd or collection filed."

The TransUnion credit report includes mention of a $70 unpaid debt to [a local medical center] from 2009. I had refused to pay this bill because it was for an emergency room visit for my son. He had a broken hand. We registered at the emergency room and then waited for services for 4 hours, finally, at close to midnight, we left. As we never received any services, I refused to pay for the bill. I disputed the bill with the hospital and then with the collection agency.

There are no other derogatory factors listed on my credit report other than this old, disputed bill. *It is apparent to me that TransUnion is using this disputed debt in its calculation of my credit score*. To remedy this, I have tried to go on to the TransUnion website for the past five days to formally dispute the debt with TransUnion. The website does not allow one into the disputed section -- it always says there are too many users. I have tried multiple times, even in the middle of the night.

As a result, this line of credit will cost me hundreds of dollars more, and it will be thousands more if I intended to keep the line of credit open for over a year.[56]

In this case, the consumer had submitted a bona fide dispute to the debt collector, yet the collection item plunged her score by 75 points. Note that this consumer is a colleague at National Consumer Law Center. If she could not successfully nullify the impact of this negative information by disputing it, what chance does the average consumer have? Thus, Congress and/or the CFPB should require that all debts that are the subject of a dispute on a credit report

[56] Email from Margot Saunders, Of Counsel, National Consumer Law Center, Dec. 14, 2012 (emphasis added).

must be excluded from the score, unless the furnisher or CRA can prove that the dispute is not bona fide.

Furthermore, debt collectors must be subject to even stricter screening and oversight. When a debt collector is involved, it is even more critical to have independent review, given the incentives discussed above for the debt collector to ignore disputes and leave errors uncorrected. And there should be a flat-out prohibition against the nationwide CRAs to engage in parroting when a debt collector is involved. It is simply outrageous and unacceptable for the nationwide CRAs to take the unsupported, unsubstantiated word of a debt collector over a consumer, given the incentives that exist and the well-documented abuses of debt buyers.[57]

Finally, as discussed above, consumers should have the right to ask a court to order the nationwide CRAs and furnisher to fix their credit reports when there is an error. Congress cannot sit idly by while innocent consumers are victimized by credit report errors because the law does not provide them with the ability to ask a court to prevent violations of the law.

III. SPECIALTY CONSUMER REPORTING AGENCIES

"Specialty consumer reporting agencies" are the wild west of consumer reporting agencies. These consumer reporting agencies compile and maintain files relating to criminal records, residential or tenant histories, check-writing histories, employment histories, or insurance claims.

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[57] See ; Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection and Arbitration (July 2010), *available at* http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf; Robert Hobbs and Rick Jurgens, National Consumer Law Center, The Debt Machine (July 2010), *available at* http://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf; Claudia Wilner and Nasoan Sheftel-Gomes, Neighborhood Econ. Dev. Advocacy Project and Urban Justice Center, Debt Deception: How Debt Buyers Abuse The System To Prey On Lower-Income New Yorkers 1 (May 2010), *available at* http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf.

Specialty consumer reporting agencies are not required to be licensed or even registered, nor is there any one source identifying all of these companies. Therefore, as of 2012, there is no centralized location to obtain the kind of data required to generate accuracy data. Furthermore, too many users fail to comply with the FCRA's requirement to provide "adverse action" notices (explained in Section VIII below) to the employee or applicant that a consumer report has been used against them. This hinders the ability to conduct a reliable survey of consumers to determine whether they have been denied employment, housing, or any other service because of a specialty consumer report.

In Spring 2012, NCLC released a report that describes a number of ways in which criminal background screening companies make mistakes that greatly affect a consumer's ability to find employment.[58] The use of criminal background checks is controversial for a number of reasons. Whether these checks should be used for employment screening is a matter of public debate.

However, there is little debate that if these records are to be used, they must be accurate. As stated above, despite the importance of the accuracy, actual accuracy rates are not possible to obtain.[59] However, what evidence that is available indicates that professional background screening companies routinely make mistakes with grave consequences for job seekers.

Our research found that the following common errors:

- Reports that mismatched the subject of the report with another person (usually with a similar name);
- Reports that revealed sealed or expunged information;

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[58] Persis S. Yu & Sharon M. Dietrich, Nat'l Consumer Law Cent., Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses, April 2012.
[59] *See generally* SEARCH, the Nat'l Consortium for Justice Info. and Statistics, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information (2005) at 7, *available at,* www.search.org/about/news/2005/reports.asp.

- Reports that failed to include information about how the case was disposed or resolved;
- Reports that contained misleading information, such as reporting single cases or charges multiple times; and
- Reports that mischaracterized the seriousness of the offense reported.

Many of these errors can be attributed to common practices by background screening companies, such as:

- Obtaining information through purchase of bulk records, but then failing to routinely update the database;
- Failing to verify information obtained through subcontractors and other faulty sources;
- Utilizing unsophisticated matching criteria;
- Failing to utilize all available information to prevent a false positive match; and
- Lack of understanding about state-specific criminal justice procedures.

The National Association of Professional Background Screeners claims that its members have a 99% accuracy rate. However, this error rate appears to actually be the rate of the disputes received by its members. Basing an accuracy statistic on the rate of disputes is flawed for several reasons. First, this rate did not include inaccuracies in the reports of consumers for whom background check reports have not yet been issued to an employer, but may have errors that exist in their files which could cost them a job when a report is ultimately issued.

Second, this rate did not include errors in the background checks of consumers who did not file a dispute over the error. Consumers may not file a dispute over an erroneous background check report because they have no knowledge of the error. Unfortunately, too many employers fail to comply with notice requirements under the FCRA. Therefore, many people are denied employment and never know that it is due to their background check nor that they have the right to see the report and file a dispute.

We also know from the context of credit-based reports that many consumers with errors in their consumer reports do not send disputes because of lack of time or resources, educational barriers, and lack of understanding of their rights.

Although the FCRA does provide consumers with the right to preemptively review the information in their consumer file, this right is virtually meaningless for specialty consumer reports. There are hundreds, if not thousands of specialty consumer reporting agencies operating in the United States. Unlike the big three credit bureaus, there is no centralized location where a consumer can go to order his or her background check.

Fortunately, the CFPB has recently released a list of contacts for some of the largest specialty credit reporting agencies. However, it only scratches the surface of the number of background checking agencies. With thousands of specialty consumer reporting agencies operating, a consumer cannot predict which company his or her employer, insurance company, or landlord will use.

Furthermore, dispute rights are similarly meaningless with specialty consumer reports. Even if a consumer is successful in disputing information on his or her report, the opportunity may be gone, and the chances of that report being used again are small. The only way to provide meaningful protections to consumers is to take greater steps to ensure the accuracy of the reports from the outset.

There are numerous ways in which the FCRA can be improved to better fit with the realities in which specialty consumer reports are used. Consumers need, at the least, the following protections:

1. Restore the private right of action for the failure to provide adverse action notices, discussed in Section VII below. Without these notices, consumers have no idea that they have been denied employment or services based upon a consumer report and cannot take steps to correct any misinformation.
2. Require all consumer reporting agencies to be licensed and registered. Before accuracy can even be addressed, it must be known how many consumer reporting agencies even exist.
3. Require all consumer reporting agencies to undergo independent auditing of their data and records for accuracy. Current reviews of accuracy are insufficient because consumers lack the knowledge and incentive to dispute inaccurate information on a consumer report.
4. Provide the CFPB with supervisory authority over all larger participant consumer reporting agencies.
5. The CFPB should draft regulations detailing matching criteria and ensuring that information on consumer reports is up to date.

IV. CONSUMERS SHOULD HAVE THE BASIC RIGHT TO ANY CREDIT SCORE THAT IS ABOUT THEM AND THE RIGHT TO A FREE ANNUAL SCORE

One of the troubling aspects of our credit reporting system is the difficulty faced by consumers in obtaining a critical piece of information about themselves – their credit scores. Consumers do not have the right to a free credit score unless they are denied credit or charged a higher price for it. Furthermore, they have no right to obtain the score used by the vast majority of lenders – their FICO scores. They also do not have a right to see their scores that are used for non-credit purposes, such as insurance, tenant screening, or health care.

Consumers do have the right to obtain their credit reports. Though that is an important right, credit reports do not give consumers an easy-to-understand snapshot of their credit standing.

Until the 2003 amendments added by the Fair and Accurate Credit Transaction Act, consumers had no right to access their credit scores, not even for a price. After the FACT Act amendments, consumers have the right to purchase a credit score, but the credit reporting agencies need only sell them an "educational score,"[60] even though no actual creditor might ever use that score. Consumers have no right to purchase their FICO scores, even though FICO scores represent over 90 percent of the market for scores sold for credit-related decisions, according to the CFPB.[61]

The CFPB study released a study just this past September finding that, for about one out of five consumers, there are meaningful and significant differences between the educational score and FICO scores – an entire risk category of difference.[62] Yet to this day, consumers cannot purchase their FICO score based on their Experian credit report.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 improved the situation by giving consumers the right to receive their actual credit scores, the ones used by a lender, when they are denied credit or charged a higher price for it.[63] However, consumers should not have to apply for credit first and then get turned down in order to learn their FICO scores. The time for consumers to obtain their credit scores is BEFORE they need to apply for

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[60] The FCRA permits credit reporting agencies to provide "a credit score that assists the consumer in understanding the credit scoring assessment of the credit behavior of the consumer and predictions about the future credit behavior of the consumer." 15 U.S.C. § 1681g(f)(7)(A).

[61] Consumer Financial Protection Bureau, The Impact of Differences Between Consumer- and Creditor-Purchased Credit Scores: Report to Congress, July 19, 2011, at 6, *available* at www.consumerfinance.gov/wp-content/uploads/2011/07/Report_20110719_CreditScores.pdf

[62] Consumer Financial Protection Bureau, Analysis of Differences Between Consumer- and Creditor-Purchased Credit Scores, Sept. 2012, *available at* http://files.consumerfinance.gov/f/201209_Analysis_Differences_Consumer_Credit.pdf.

[63] Pub. L. No. 111-203, 124 Stat. 1376, § 1100F (2010), codified at 15 U.S.C. §§ 1681m(a) (2) and 1681m(h)(5)(E).

credit, so that they can be informed shoppers, know what kind of credit they are qualified for and to dispute any errors that are affecting their scores. Indeed, the anecdote provided in Section II.D is a good example of this issue; if the consumer had been able to obtain her TransUnion FICO score, she would have known that a collection tradeline – which she had disputed months ago -- was still affecting her score, despite it being marked as disputed.

Thus, we urge Congress to give consumers the right to obtain their credit scores – the ones used most frequently by lenders – without charge on an annual basis, just as they can obtain their credit reports.

Moreover, providing a general right to the credit score would help to enforce the existing right to a score after credit has been denied or offered at a higher price. Consumers could seek out their credit scores directly from the credit reporting agencies to compare them with the score provided by the lender.

Furthermore, we urge Congress to give consumers the right to obtain any score based on a consumer report that is about them. Currently, the FCRA only gives consumers the right to obtain scores used for granting credit.[64] Yet there are a multitude of scores based on a credit or consumer report that grade consumers for other purposes – insurance underwriting, healthcare, and tenant screening. Consumers should have the right to obtain these scores for free on an annual basis, just as they are entitled to free annual reports from specialty consumer reporting agencies.

This is a matter of basic fairness. These scores are about the consumer - they are about us. They are based on information about our behavior and our lives. They may be based on inaccurate information that we have a right to correct. To have this important information about

[64] The FCRA defines credit scores as "a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors, including default…" 15 U.S.C. § 1681g(f)(2)(A).

ourselves squirreled away in secret databases that we have no right to access seems inconsistent with the American way.

V. CONGRESS SHOULD REQUIRE THAT PAID OFF MEDICAL DEBT BE DELETED FROM A CONSUMER'S CREDIT REPORT

The National Consumer Law Center, on behalf of its low-income clients, is pleased to support the Medical Debt Responsibility Act, S. 2149. Millions of Americans struggle with overwhelming medical debts that they cannot afford to pay because they do not have health insurance. Even consumers with health insurance coverage can find that their credit histories are damaged due to medical bills, because of problems with unaffordable co-pays and deductibles, out-of-network charges, and disputes with insurance companies.

The collective scope and impact on medical debt on the credit histories of American consumers is enormous and cannot be overstated. According to the Commonwealth Fund, nearly 73 million working age adults (or about 40%) experienced problems with medical bills in 2010.[65] Of those consumers, 30 million were contacted by a collection agency for unpaid medical bills,[66] and thus were likely to have their credit reports damaged by the negative existence of a collection account on their reports.

Medical debt represents an enormous portion of debt that is collected by debt collectors. A number of studies indicate that the amount of medical debt that ends up in the hands of

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[65] Sara R. Collins, et al., The Commonwealth Fund, *Help on the Horizon: How the Recession Has Left Millions of Workers Without Health Insurance, and How Health Reform Will Bring Relief—Findings from The Commonwealth Fund Biennial Health Insurance Survey of 2010*, March 2011, at 6, *available at* http://www.commonwealthfund.org/~/media/Files/Publications/Fund%20Report/2011/Mar/1486_Collins_help_on_the_horizon_2010_biennial_survey_report_FINAL_v2.pdf.

[66] *Id.*at 10.

collection agencies - and thus is likely to be reported to credit reporting agencies - is simply stunning:

- A 2003 Federal Reserve study found that over ***half*** of entries (52%) on credit reports for collection items are for medical debts. More than one-third (36%) of medical collections had balances due, when reported, of $100 or less and the majority (nearly 70%) were for less than $250.[67]
- A later Ernst & Young study confirmed the Federal Reserve's study, finding that medical debts constituted more than ***half*** (52.2%) of the debt collected by debt collection agencies in 2010 – more than twice as much as credit card and other financial debt.[68]
- A study by Federal Reserve researchers found that that "health-care providers represented the most important group of customers [for debt collectors], accounting for more than a quarter of all revenues."[69]

The vast scope of medical debt on credit reports is troubling, because unlike collections for credit accounts, medical bills result from services that are frequently involuntary, unplanned, and unpredictable, and for which prices quotes are rarely provided. The unique nature of medical debt raise questions on whether it is appropriate data to even include on a credit report.

Most critically, consumers may find that their medical debt has been characterized as a debt in collection for credit reporting purposes even though the medical debt has been fully paid or settled. Even after the bill has a balance of zero, its mere presence as a collection matter

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[67] Robert Avery, Paul Calem, Glenn Canner, & Raphael Bostic, *An Overview of Consumer Data and Credit Reporting*, Fed. Reserve Bulletin, at 69 (Feb. 2003).
[68] Ernst & Young, *The Impact of Third-Party Debt Collection on the National and State Economies*, Feb. 2012, at 8, *available at* www.acainternational.org/files.aspx?p=/images/21594/2011acaeconomicimpactreport.pdf.
[69] Robert M. Hunt, Fed. Reserve Bank of Philadelphia, Collecting Consumer Debt in America, Bus. Rev., at 13 (2d Quarter 2007), *available at* www.philadelphiafed.org/files/br/2007/q2/hunt_collecting-consumer-debt.pdf.

remains on the consumer's credit records for seven years and will likely adversely impact a consumer's credit score. According to a spokesperson for FICO, collection items that are “paid or unpaid, large or small amounts all can affect a credit score” and “a person with a FICO score of 680 will see their score drop between 45 and 65 points. Someone with a FICO score of 780 will see their score drop between 105-125 points,…"[70]

Furthermore, the presence of a medical collection item may result from no fault of the consumer, but from the complex and convoluted nature of our health care payment system. The collection item may have resulted from a dispute between the insurance company and provider. It may result from a provider’s failure to properly bill the insurer, or the insurer’s failure to properly reimburse the provider. After all, the American Medical Association itself estimated that one in five claims is processed inaccurately.[71] Even when errors are eventually fixed, they result in long delays in payments to providers. During these delays, bills can often be sent to a collection agency, completely out of the consumer’s control.

The complexities of health insurance and medical billing also contribute to this problem. Many people are simply confused about who has responsibility for paying the bill. They are often uncertain about the explanation of benefits form, unclear of the descriptions of the procedures they have received, and unsure of whether they should pay the healthcare provider or insurer; one study found that nearly 40 percent of Americans do not understand their medical bills.[72] Some of these consumers will let a medical bill go to a collection agency because of this confusion, or they believe that their insurer will pay it. According to media reports, an

[70] Carla K. Johnson, *Late Medical Bills Can Lower Credit Scores For Consumers: How to Check and Fix Your Report*, Associated Press, Mar 4, 2012.
[71] American Medical Association, 2010 National Health Insurer Report Card, *available at* www.ama-assn.org/ama/pub/news/news/2010-report-card.page.
[72] Press Release, *Intuit Financial Healthcare Check-Up Shows Americans Confused about Medical Statements*, Apr. 27, 2010, at http://about.intuit.com/about_intuit/press_room/press_release/articles/2010/AmericansConfusedAboutMedicalStatements.html.

estimated 9.2 million Americans had a medical bill sent to a collection agency because of a billing mistake.[73]

Indeed, many of the stories from consumers about how their credit reports and credit scores were damaged by paid medical debt involve such instances of confusion, mistakes, or problems with insurers. For example:

- The New York Times documented the case of Ray White from Lewisville, TX. Mr. White received a $200 ambulance bill, which his insurer did not pay despite assurances that it would do so. Finally, after many months and many phone calls, Mr. White paid off the $200 bill, but by then the damage was done. Unbeknownst to Mr. White, the debt had been reported to the credit reporting agencies. Mr. White had no knowledge of this black mark lurking on his credit report until he and his wife went to refinance the $240,000 mortgage on their home, nearly six years later. It was only then that he learned this paid $200 bill – the result of his insurance company dropping the ball on payment - had shaved about 100 points from his credit score. With no other debts, a healthy income and otherwise pristine credit, Mr. White and his wife had to pay an extra $4,000 to secure a lower interest rate.[74]

  (This story is also an example of "parking," a practice in which debt collectors merely report a debt to a credit reporting agency without doing more, then simply wait until the consumer applies for a mortgage or other credit. At that point, the consumer will discover the collection item and then pay the debt in an attempt – in vain – to improve his or her credit score. "Parking" creates even more problems with medical debt on credit

[73] Tara Siegel Bernard, *Discrepancies on Medical Bills Can Leave a Credit Stain*, New York Times, May 4, 2012.
[74] *Id.*

reports, because consumers do not know about the problem until they are in the midst of a time-sensitive process of applying for a loan).

- The Associated Press reported the case of Iraq veteran Steve Barnes and his wife, Tara, who were refinancing their home through a Veteran's Administration program when they found out that nearly $600 in unpaid medical bills had brought down their credit scores. The bills were for treatment related to the wife's cancer, which had been turned over to a collection agency while Mr. Barnes was still talking with his insurance company about what would be covered. The $600 in unpaid bills – caused by insurance snafus – cost them an extra $1,700 in fees on their refinanced mortgage. Plus, even though Mr. Barnes and his wife paid the bill, the black mark will remain on their credit reports for seven years.[75]
- A New York City consumer who lost consciousness on a street in Atlantic City, NJ, received a bill for $800 because a passer-by called an ambulance. The consumer had revived before the ambulance showed up, and had declined to go to the hospital. It is unclear whether the $800 was a charge for first aid at the scene (having his blood pressure and vital signs checked) or because the hospital mistakenly believed that he was brought to the emergency room. In either case, the consumer disputed the $800 bill, but it remains on his credit report as a collection item. The consumer has been declined credit at least once as a result of this reporting, despite the fact that he never summoned the ambulance or went to the hospital.[76]

[75] Carla Johnson, *Medical Bills Can Cause Lingering Credit Pain*, Associated Press, Mar. 4, 2012. This article documents several more cases in which medical collection items harmed the credit reports of consumers and cost them thousands in fees when refinancing.
[76] Email from Brian Bromberg, Bromberg Law Offices, May 30, 2012.

- A West Virginia consumer applied for Medicaid, but the state agency made a series of mistakes resulting in a long delay in enrolling the consumer. Finally, the state agency fixed the mistakes, and enrolled the consumer retroactive to February 2011. Meanwhile, four of the consumer's medical bills had been sent to debt collection agencies, and these collection agencies reported the debts to the credit reporting agencies. Medicaid paid the consumer's bills, but the collection items will remain on the credit report and harm the consumer's credit score for seven years – despite the fact that the failure to pay the bills was the fault of the state Medicaid agency, not the consumer.[77]
- An Arkansas consumer was hurt in an automobile accident and taken to the hospital. The consumer filed a lawsuit against the other driver. While the consumer was waiting for a settlement with the other driver's auto insurer, one of the medical providers turned over a medical bill for $118 to a debt collection agency, which reported the debt to a credit reporting agency. Meanwhile, the $118 bill was paid in full to the medical provider – actually it was paid the day before the debt collector made the report to the credit reporting agencies. The debt has shown up the consumer's credit report as a paid collection account, dropped her credit score from 800 to 700, and prevented her from obtaining credit at the best interest rates. The debt collector refuses to delete the black mark even though the consumer paid the bill before it was reported.[78]
- A Florida consumer went to an emergency room to receive medical treatment. He gave the hospital his proper identification showing his correct address. The hospital data entry personnel made a mistake by inputting a wrong address into the hospital's system. The consumer never received a bill, and thus never paid it. In the meantime, the debt was sent

[77] Email from Deborah Weston, Staff Attorney, Mountain State Justice, Inc., June 26, 2012.
[78] Email from Kathy Cruz, Attorney, June 27, 2012.

to a collection agency. Later, the consumer applied for credit, and it was only then that he learned of the outstanding collection item from the hospital on his credit reports. The consumer called the hospital, and confirmed they had the wrong address. Despite the fact that the hospital's personnel caused the situation with the data entry error, the collection item remained on the consumer's credit report.[79]

All of these consumers, and millions more like them, have had their credit reports and credit scores severely damaged through no fault of their own by medical collection items. Furthermore, they currently have no recourse under the Fair Credit Reporting Act to fix this damage. The Ninth Circuit has held that a consumer has no remedy under the FCRA to remove a medical collection item from her credit report, because technically the patient owes the medical bill even though the default was caused by an insurance dispute.[80]

The Medical Debt Responsibility Act, S. 2149, will help ameliorate this huge problem by amending the FCRA to exclude fully paid and settled medical debt from a consumer's credit report. It is a sensible and straightforward approach that will prevent the credit records of millions of consumers from being unfairly tarnished. Rather, credit records will show that these hard-working consumers, who successfully paid off or settled their medical bills, are more creditworthy than the current system would otherwise lead a prospective lender to believe.

VI. CONGRESS SHOULD BAN THE USE OF CREDIT HISTORIES IN EMPLOYMENT WITH LIMITED EXCEPTIONS

The use of credit reports in employment is a growing practice that is harmful and unfair to American workers. Despite many good reasons to avoid engaging in this practice, more than

[79] Email from Leo Bueno, Attorney, May 14, 2010.
[80] Carvalho v. Equifax Info Serv., LLC, 629 F.3d 876 (9th Cir. 2010).

half of employers (60%) do so today,[81] a dramatic increase from only 19% in 1996.[82] We are concerned about this trend for the following reasons:

- **Credit checks create a fundamental "Catch-22" for job applicants.** A simple reason to oppose the use of credit history for job applications is the sheer, profound absurdity of the practice. Using credit history creates a grotesque conundrum. Simply put, a worker who loses her job is likely fall behind on paying her bills due to lack of income. With the increasing use of credit reports, this worker now finds herself shut out of the job market because she's behind on her bills. This leads to financial spiraling effect: the worse the impact of unemployment on their debts, the harder it is to get a job to pay them off.
- **Use of credit checks in hiring could prevent economic recovery for millions of Americans.** The use of credit history for job applicants is especially absurd in the midst of still-too-high unemployment. With the massive job losses of the past 5 years, resulting in unemployment rates of sometimes nearly 10%, this is exactly the wrong time to be permitting this unfair practice. For the many workers who have suffered damage from their credit reports because of unemployment or underemployment, the use of credit histories presents yet another barrier for their economic recovery – representing the proverbial practice of "kicking someone when they are down" for millions of job seekers.
- **The use of credit in hiring discriminates against African American and Latino job applicants.** There is no question that African American and Latino applicants fare worse than white applicants when credit histories are considered for job applications. For one thing, these groups are already disproportionately affected by predatory credit practices,

[81] Society for Human Resource Management, *Background Checking: Conducting Credit Background Checks*, Jan. 22, 2010, at http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundChecking.aspx.
[82] Matt Fellowes, *Credit Scores, Reports, and Getting Ahead in America*, Brookings Institution, May 2006 at n.3 (citing 1996 data from the Society for Human Resource Management).

such as the marketing of subprime mortgages and overpriced auto loans targeted at these populations. As a result, these groups have suffered higher foreclosure rates. Study after study has documented how, as a group, African Americans and Latinos have lower credit scores than whites. If credit scores are supposed to be an accurate translation of a consumer's credit report and creditworthiness, that means these groups will fare worse when credit history is considered in employment.

- **Credit history does not predict job performance.** Credit reports were designed to predict the likelihood that a consumer will make payments on a loan, not whether he would steal or behave irresponsibly in the workplace. There is no evidence showing that people with weak credit are more likely to be bad employees or to steal from their bosses.
- **As discussed in Section I.B., credit reports suffer from unacceptable rates of inaccuracy, especially for a purpose as important as use in employment.**

Fundamentally, the issue at stake is whether workers are fairly judged based on their ability to perform a job or whether they're discriminated against because of their credit history.

VII. CONGRESS MUST ACT TO CORRECT AN INJUSTICE RESULTING FROM A SCRIVENER'S ERROR IN THE FCRA.

The FACTA amendments of 2003 inadvertently deprived consumers of a 30 year-old pre-existing right they had to enforce the FCRA requirement that users of credit reports disclose to consumers when an "adverse action" is taken, *i.e.*, credit or insurance is denied or provided on less favorable terms, on the basis of an unfavorable credit report. 15 U.S.C. § 1681m. Congress can easily fix this scrivener's error and should do so, as it was never part of the legislative bargain struck by FACTA.

The adverse action disclosure is fundamental to ensuring the effectiveness of the FCRA's accuracy protections. The ability of consumers to seek redress for an adverse action disclosure violation has been key to its enforcement for over 30 years. FACTA itself clearly indicates that Congress had absolutely no intention of abolishing the consumer's right to seek redress of this important right. Current provisions of the FCRA, which exempt another subsection of section 1681m from private enforcement, make no sense and indicate that Congress did not intend to abolish consumer remedies for all of section 1681m.

The legislative history can be no clearer that Congress did not intend to abolish private enforcement of the FCRA's adverse action disclosure requirements when it enacted FACTA in 2003. The uncodified version of FACTA stated:

> Rule of Construction.--Nothing in this section, the amendments made by this section, or any other provision of this Act shall be construed to affect any liability under section 616 or 617 of the Fair Credit Reporting Act (15 U.S.C. 1681n, 1681o) that existed on the day before the date of enactment of this Act.

This provision expressly preserved all private enforcement rights that existed under the FCRA as of the date of the new law. While not codified in the United States Code, this provision is still effective law as part of the Statutes at Large. Pub. L. 108-159, 117 Stat. 1960, § 312(f) (2003).

After FACTA's enactment, the credit industry did not claim to have eliminated the consumer remedy for the adverse action disclosure, with the *American Banker* only noting that FACTA "*perhaps inadvertently* eliminates the existing right of consumers and state officials to sue for any violations of the adverse-action provisions of the FCRA."[83] Had Congress intended FACTA to carve private damages suits wholesale out of the user liability section of the FCRA,

[83] M. Heller, *Regulators Scurry to Close FACT Act Loophole,* American Banker (Dec. 12, 2003), at 3.

the banking and credit industry would have trumpeted that change in the days following the President’s signature.

Even four years after FACTA’s passage, industry representatives declined to claim that FACTA had intentionally abolished this private enforcement remedy. In a 2007 hearing before the full committee, Chairman Barney Frank engaged in the following colloquy with Stuart Pratt, President and CEO of the Consumer Data Industry Association, and Anne Fortney of Hudson Cook, another industry representative.[84]

> The CHAIRMAN. We will look into that. Let me just ask, the other question is to Ms. Fortney and Mr. Pratt, because both Ms. Wu and Mr. Bennett talked about the interpretation that we had sub silentio repeal of the private right of action. Do you agree that was something that was not done intentionally? And what would your view be to our restoring it? Mr. Pratt?
>
> Mr. PRATT. We didn’t work on that section of the FACT Act. It relates to the date of furnishers and the date of—
>
> The CHAIRMAN. Okay. Ms. Fortney?
>
> Ms. FORTNEY. I think the statute is clear, and that is why the vast majority—
>
> The CHAIRMAN. That wasn’t the question.
>
> Ms. FORTNEY. Okay. I know.
>
> The CHAIRMAN. Then why don’t you answer it?
>
> Ms. FORTNEY. The answer is, I don’t know that whoever drafted that—
>
> The CHAIRMAN. Fair point. But would you like to leave it the way it is?
>
> Ms. FORTNEY. I am sorry?

[84] *Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information: Hearing Before the H. Comm. on Fin. Serv.*, 110 Congr. 50 (2007).

The CHAIRMAN. Would you object if we restored the right of action that is in the bill?

Ms. FORTNEY. I don't have an opinion on that, sir.

The CHAIRMAN. Oh, okay. Then it is two to nothing, two abstentions.

Unfortunately, the mistaken use of the phrase "this section" in Section 1681m(h)(8) has been interpreted by almost all of the courts to address the issue to apply to the pre-existing adverse action requirements.[85] The scrivener's error that has deprived hundreds of consumers of their rights already, and has the potential to harm thousands more in the future, can be corrected with a very simple fix. The fix consists of the addition of three letters to two places in the FCRA:

Proposal: Revise 15 U.S.C. § 1681m(h)(8) to read:

(A) No civil actions.---Sections 1681n and 1681o shall not apply to any failure by any person to comply with this <u>sub</u>section.

(B) Administrative enforcement ---- This <u>sub</u>section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section

This change reinstates a right that had existed for over 30 years from to FACTA, and has no impact on any other provision

Thank you for the opportunity to testify, and I look forward to your questions

[85] National Consumer Law Center, Fair Credit Reporting § 8.5.5 (7th ed. 2010 and Supp.)..