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Disputing the Dispute Process: Questioning the Fairness of § 1681s-2(A)(8) and § 1681J(A)(1)(A) of the Fair and Accurate Credit Reporting Act

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DISPUTING THE DISPUTE PROCESS: QUESTIONING THE FAIRNESS OF §1681S-2(A)(8) AND §1681J(A)(1)(A) OF THE FAIR AND ACCURATE CREDIT REPORTING ACT

I. INTRODUCTION

*“We certainly would not tolerate a Government agency depriving a citizen of his livelihood or freedom on the basis of unsubstantiated gossip without an opportunity to present his case. And yet this is entirely possible on the part of a credit reporting agency.”*¹

“He [who] has lost his credit is dead to the world.”² For millions of Americans, the consumer credit report functions as a gate-keeper to the economic landscape of the twenty-first century.³ This is largely due to the fact that data collection and storage has become feasible on a large scale,⁴ which has led the credit report, a snapshot of an individual based on aggregated financial data, to become intertwined with the personal identities of millions of Americans.⁵ “An adverse credit report can impact life in ways not readily imaginable,”⁶ and has been likened to a modern Scarlet Letter.⁷ Credit reports are no longer used only to determine the interest rate of a consumer’s loan or credit

1. 115 CONG. REC. 2412 (1969) (statement of Sen. Proxmire). Senator Proxmire introduced the Fair Credit Reporting Act as a “bill to enable consumers to protect themselves against arbitrary, erroneous, and malicious credit information.” *Id.* at 2410.

2. JOHN R. FONSECA, *HANDLING CONSUMER CREDIT CASES* 445 (3d ed. 1986) (quoting GEORGE HERBERT, *JACULA PRUDENTUM* (1640)).

3. See Elizabeth Doyle O’Brien, *Minimizing the Risk of the Undeserved Scarlet Letter: An Urgent Call to Amend §1681E(B) of the Fair Credit Reporting Act*, 57 CATH. U. L. REV. 1217, 1217-18 (2008). “In 2001, seventy-five percent of households in the United States held some type of debt . . .” *Id.* at 1217.

4. See Elizabeth D. De Armond, *Frothy Chaos: Modern Data Warehousing and Old-Fashioned Defamation*, 41 VAL. U. L. REV. 1061, 1100 (2007).

5. See *id.*

6. D. Duff McKee, *Liability for Supplying False Information to Credit Reporting Agency*, 45 AM JUR. PROOF OF FACTS 3d § 1, at 221 (2010).

7. O’Brien, *supra* note 3, at 1218.

card.⁸ Today, insurance companies, landlords, utility providers, and employers look to credit reports when making pivotal decisions regarding consumers or future employees.⁹

However, what happens when an adverse mark is erroneously placed on a consumer's credit report? Congress has mandated that Credit Reporting Agencies ("CRAs") conduct a "reasonable investigation" if a consumer disputes the accuracy of any item in the credit report directly to a CRA.¹⁰ And, on July 1, 2010, a Federal Trade Commission ("FTC") regulation became effective requiring any person or entity that furnishes consumer credit information ("furnishers") to reasonably investigate inaccuracies in a consumer's credit report if the consumer directly disputes the accuracy of the information with the furnisher.¹¹

Nonetheless, the processes for handling disputes are insufficient to ensure an accurate credit reporting system. When a CRA receives a consumer dispute, it outsources the dispute to a third-party contractor in Costa Rica or the Philippines, where a minimum of twenty-two disputes are processed every hour.¹² CRAs have also managed to reduce the cost of processing dispute letters, which often contain more than one dispute, to fifty cents.¹³ Further, a furnisher is only liable to a consumer for failure to conduct a reasonable investigation if the furnisher receives the dispute from the CRA, rather than directly from the consumer.¹⁴ Compounding the problem of an insufficient dispute

8. *Who's Looking at Your Credit Report?*, SMART MONEY (Aug. 20, 2010), <http://www.smartmoney.com/spending/deals/guess-whos-looking-at-your-credit-report-11056> [hereinafter *Who's Looking*]; Chi Chi Wu, *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports*, 14 N.C. BANKING INST. 139, 139 (2010).

9. *Who's Looking*, *supra* note 8; Wu, *supra* note 8, at 139.

10. 15 U.S.C. § 1681i (2006).

11. 16 C.F.R. § 660.4 (2010) (enacted pursuant to 15 U.S.C. § 1681s-2(a)(8)(A)).

12. Anne Kadet, *Why the Credit Bureaus Can't Get it Right*, SMART MONEY (Feb. 2, 2009), <http://www.smartmoney.com/spending/rip-offs/why-the-credit-bureaus-cannot-get-it-right/?page=all>.

13. *Id.*

14. 15 U.S.C. § 1681s-2(c) (2003). When a consumer disputes information directly to a furnisher, the FTC, chief law enforcement officer of a state, or an agency designated by the state, can bring an action against the furnisher and recover "damages of not more than \$1,000 for each willful or negligent violation." *Id.*; *see*

process, credit reports are generally only available to consumers—to check for inaccuracies—once a year free of charge.¹⁵

Consumers are left without a voice. One need not look far to find “horror stories” of consumers’ fruitless attempts to correct information within their credit reports.¹⁶ For example, Kenneth Baker, a husband and father, was unable to qualify for a mortgage due to inaccuracies within his credit report.¹⁷ After a year of unsuccessful attempts to correct the inaccuracies, he felt humiliated, became depressed, and soon-after committed suicide.¹⁸ His suicide note referenced his difficulties with the CRAs.¹⁹

Under current credit reporting legislation and regulation, consumers are provided few remedies for experienced wrongs. This apparent lack of redress is due to the current credit reporting system’s failure to provide a framework of incentives and penalties to motivate CRAs and furnishers to adequately address disputes, or, more generally, to ensure the accuracy of consumer credit information. This Comment proposes that Congress establish such a framework by striking § 1681s-2(a)(8) and amending § 1681j(a)(1)(A) of the Fair Credit Reporting Act (“FCRA”).

The remainder of this Comment is divided into five sections. Section II provides an overview of the credit reporting industry, and Section III explores the prevalence of inaccuracies found within the industry. Section IV analyzes the current dispute process, including the consumer’s ability to access his or her own credit information. Section V analyzes the economic motivations that drive the credit reporting industry. Finally, Section VI proposes a framework of

also Rollins v. Peoples Gas Light & Coke Co., 379 F. Supp. 2d 964, 967 (N.D. Ill. 2005). (“It is undisputed that there is no private right of action under § 1681s-2(a).”) Section 1681s-2(a) mandates that the FTC create regulations for furnishers requiring an investigation of customer initiated disputes. 15 U.S.C. § 1681s-2(a). “The FCRA limits enforcement of subsection (a) of § 1681s-2 governing supplying accurate information exclusively to certain federal and/or state officers.” Carney v. Experian Information Solutions, Inc., 57 F. Supp. 2d 496, 502 (W.D. Tenn. 1999).

15. Fair and Accurate Credit Transactions of Act of 2003, Pub. L. No. 108-159, sec. 211, § 612, 117 Stat. 1952, 1968-69 (codified at 15 U.S.C. § 1681j(a)(1)(A)).

16. *See* Wu, *supra* note 8, at 140-41.

17. *Id.* at 140.

18. *Id.* at 141.

19. *Id.*

incentives and punishments that strikes § 1681s-2(a)(8) and amends § 1681j(a)(1)(A) of the FCRA.

II. THE CREDIT REPORTING INDUSTRY

*“There is no argument with the proposition that both consumers and industry need an efficient and accurate credit reporting system.”*²⁰

“[T]he United States has the most robust credit information system in the world.”²¹ The credit reporting industry has become a seven billion dollar industry²² by collecting and aggregating data about consumers to create credit reports—commercial “representation[s] of . . . [consumers’] reputation[s].”²³ A credit report is a record showing a consumer’s debt, and borrowing and repayment habits.²⁴ This information is tied to individual consumers through identifying information, including social security numbers, birthdates, and addresses.²⁵ Credit reports also identify the entities that furnished the information by including their addresses and telephone numbers.²⁶ All of this information is compiled by, and housed within, the three major national CRAs: Experian, Equifax, and TransUnion.²⁷ Experian alone maintains records on 215 million American consumers.²⁸ CRAs receive information from more than 30,000 furnishers who report information on approximately four billion transactions every month.²⁹

20. FONSECA, *supra* note 2, at 449 (quoting *U.S. S. Subcomm. on Financial Institutions of the Comm. on Banking and Currency*, 91st Cong. 1 (1970) (statement of Sen. Proxmire)).

21. O’Brien, *supra* note 3, at 1220.

22. Kadet, *supra* note 12.

23. De Armond, *supra* note 4, at 1068.

24. Wu, *supra* note 8, at 141.

25. *Id.*

26. *Id.*

27. *Id.*; *Your Rights: Credit Reporting*, FED. TRADE COMM’N, <http://www.ftc.gov/bcp/menus/consumer/credit/rights.shtm> (last modified Mar. 13, 2009).

28. De Armond, *supra* note 4, at 1073.

29. FED. TRADE COMM’N & BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO CONGRESS ON THE FAIR CREDIT REPORTING ACT DISPUTE PROCESS 3 (2006), available at <http://www.ftc.gov/os/comments/fcradispute/P044808fcradisputeprocessreporttocongress.pdf> [hereinafter DISPUTE PROCESS REPORT].

A consumer's credit report reflects this information within seven days of receipt.³⁰

A growing number of industries are relying on credit reports to screen consumers; these industries include insurance companies, landlords, utility providers, and employers.³¹ Nonetheless, the primary purpose of the credit report is to facilitate businesses' needs to plan for and minimize risk—to determine whether a consumer is creditworthy.³² Businesses use the credit report as a tool that allows them to “pierce the fog of uncertainty that a potential . . . [debtor] presents.”³³ When extending credit to consumers, businesses utilize risk models, which are created using credit reports, advanced marketing software, and data mining.³⁴ These risk models are used to establish the creditworthiness of borrowers so businesses can determine (1) whether to extend credit, and (2) at what interest rate the credit should be extended.³⁵ As the costs of collecting, storing, and analyzing credit-relevant data continue to decrease, it has become feasible for businesses to move toward a risk-based pricing on credit that sorts borrowers and establishes costs based on the probability that the consumer will default.³⁶ Businesses rely on credit reports to plan for and minimize risk, which requires an accurate understanding of their potential customers.³⁷ This understanding is established through the use of the credit reports compiled by CRAs.³⁸

The consumer credit information found within a credit report often originates with the same business entities that use the information to extend credit to consumers: i.e., the furnishers are often the creditors of the consumer.³⁹ These businesses track the

30. *Id.*

31. *Who's Looking*, *supra* note 8.

32. *See O'Brien*, *supra* note 3, at 1218.

33. *Id.* at 1221.

34. Erika F. Gerding, *Code, Crash, and Open Source: The Outsourcing of Financial Regulation to Risk Models and the Global Financial Crisis*, 84 WASH. L. REV. 127, 144 (2009).

35. *Id.*

36. Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 720-21 (2006).

37. *See O'Brien*, *supra* note 3, at 1217-22.

38. *See id.*

39. *See Fair Credit Reporting Act: How it Functions for Consumers and the*

performance of an account and note any on-time payments or delinquencies that a consumer might have had.⁴⁰ This information is recorded in a universal data format designed and adopted by the CRAs, Metro 2.⁴¹ Metro 2 reduces the consumer credit report and history to a numerical format that is understood and analyzed by the CRAs.⁴² In turn, every month these businesses furnish, or “dump,” the information to the CRAs.⁴³ This information is maintained and stored by the CRAs and is eventually sold, shared, or given as part of a free credit report to businesses and consumers.⁴⁴

This information is reported by furnishers to CRAs on a voluntary basis.⁴⁵ However, once a business has shared such information with a CRA, it is deemed to be a “furnisher” of consumer credit information and is subject to administrative enforcement (and in some cases civil liability) under the FCRA.⁴⁶ Furnishers participate in this voluntary system because it incentivizes consumers to pay back debts (consumers can avoid receiving an adverse mark on their report), and it can also be an advertising tool for the subprime market.⁴⁷ For

Economy; Hearing Before the H. Comm. On Fin. Servs., 110th Cong. 13 (2007) (written testimony of Leonard A. Bennett, National Association of Consumer Advocates), available at http://www.naca.net/_assets/shared/633201869867878750.pdf.

40. *See id.*

41. CHI CHI WU & ELIZBETH DE ARMOND, NAT’L CONSUMER LAW CTR., FAIR CREDIT REPORTING 177-79 (6th ed. 2006); *Metro 2 Information*, CONSUMER DATA INDUSTRY ASS’N, <http://www.cdiaonline.org/Metro2/content.cfm?ItemNumber=854> (last visited Mar. 17, 2011).

42. *See Metro 2 Format: Base Segment*, COLLECT!, <http://www.collect.org/Help/metro2formatbasesegment.html> (last visited Mar. 17, 2011), for an example of the Metro 2 format.

43. WU & DE ARMOND, *supra* note 41, at 177-79.

44. FED. TRADE COMM’N, FTC FACTS FOR CONSUMERS: YOUR ACCESS TO FREE CREDIT REPORTS 1 (2008), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre34.pdf> [hereinafter FTC FACTS].

45. Interagency Guidelines Concerning the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies, 12 C.F.R. pt. 41 app. E (2010).

46. *See* 15 U.S.C.A. § 1681s-2 (2003). “[A] private cause of action exists for consumers against furnishers of credit information for failing to follow proper reinvestigation procedures, under § 1681s-2(b).” *Cisneros v. Trans Union, LLC*, 293 F. Supp. 2d 1167, 1174 (D. Haw. 2003).

47. Bennett, *supra* note 39, at 13. Mr. Bennett’s practice is devoted to the

example, companies may state they will help the consumer rebuild their credit. However, the main incentive to participate stems from the wide-scale reliance on credit reports.⁴⁸ Furnishers are often the same entities looking to credit reports when making business decisions, and the system only works when everyone participates.⁴⁹ If some companies did not furnish information, then the integrity of the entire credit reporting industry would be adversely affected.

The credit reporting industry consists of three parties: the consumer, the furnisher, and the CRA. The consumer initiates and maintains debtor-creditor relationships with furnishers. The furnishers report the happenings of these relationships to the CRAs. The CRAs collect, aggregate, and analyze data received from furnishers. The CRAs profit from this data by selling it to creditors, employers, insurers, and even consumers.⁵⁰

III. PREVALENCE OF INACCURACIES

“Perhaps the most serious problem in the credit reporting industry is the problem of inaccurate or misleading information.”⁵¹

Introducing the Fair Credit Reporting Act in 1969, Senator Proxmire made it clear that even a nominal percentage of inaccuracies within the credit reporting industry would pose substantial risks⁵²:

There have been no definitive studies made of just how accurate . . . the information in the files of [the CRAs is]. But even if it is 99 percent accurate . . . the 1 percent inaccuracy represents over a million people. While the industry might be satisfied with a 1-percent error, this is small comfort to the 1 million citizens whose reputations are unjustly maligned. Moreover the composition of the 1 million persons is constantly shifting. Everyone is a potential

private enforcement of the FCRA and has “lost only four FCRA cases out of hundreds prosecuted.” *Id.* at 2.

48. See O’Brien, *supra* note 3, at 1218.

49. *Id.*

50. DISPUTE PROCESS REPORT, *supra* note 29, at 3; see also Bennett, *supra* note 39, at 5.

51. 115 CONG. REC. 2411 (1969) (statement of Sen. Proxmire).

52. *Id.*

victim of an inaccurate credit report. If not today, then perhaps tomorrow.⁵³

A good credit report can open the doors to a consumer's new home or car.⁵⁴ It also has a bearing on the consumer's ability to obtain credit and insurance at a fair price.⁵⁵ However, a bad credit report can quash many of these opportunities or make them much more expensive.⁵⁶ Despite the significance of the information within credit reports, "errors are unfortunately quite common in the credit reporting system."⁵⁷ An error in a consumer's credit report can have significant consequences and bring undue hardship to the consumer.⁵⁸ On a macro level, inaccuracies within the credit reporting system are generally detrimental to the economy.⁵⁹ Businesses rely on credit reports as a predictor of a consumer's credit behavior, and to determine whether a consumer poses an acceptable risk.⁶⁰ When the data relied upon is inaccurate, the credit report "become[s] a far less effective predictor of future credit behavior."⁶¹

Because of the magnitude of the credit reporting industry,⁶² it is impossible to have an accurate snapshot of its health. Nonetheless, continuous legislation and regulation are not axiomatic of a healthy

53. *Id.*

54. Wu, *supra* note 8, at 139.

55. *Id.*

56. *Id.*

57. *Id.* at 143.

58. *Id.* at 139-41. For a plethora of anecdotal evidence on the adverse effects an inaccurate credit report can bring to a consumer, see *id.* at 144. Consumers who have been misrepresented and denied credit because of inaccuracies often partake in fruitless fights against CRAs, because CRAs have been known to vigorously defend lawsuits brought by individual consumers. *Id.* at 148. These inaccuracies have led consumers to be denied student loans, to be penalized with higher credit card interest rates, and even to be denied credit. *Id.* Frustrated by this alienation, consumers have described having breakdowns and have even committed suicide. *Id.*

59. See Bennett, *supra* note 39, at 4; see also De Armond, *supra* note 4, at 1091.

60. See Bennett, *supra* note 39, at 4; see also De Armond, *supra* note 4, at 1091.

61. Bennett, *supra* note 39, at 4.

62. CRAs process approximately four billion transactions a month. DISPUTE PROCESS REPORT, *supra* note 29, at 3.

system. Further, there are many indications that the credit reporting industry is not in peak condition. In 2002, a review of 500,000 consumer reports revealed “29% of consumers had variances of 50 points or more in their credit scores derived from credit reports from each of the three major [CRAs].”⁶³ These numbers lead to the conservative inference that at least eight million Americans are put at risk for being mistakenly identified as a subprime applicant, placing them in a position to pay more for credit.⁶⁴ Another study conducted by the Federal Reserve Board of Governors reviewed 248,000 credit reports and found “70% of consumers had at least one trade line account with incomplete information.”⁶⁵

Further, in 2004 the U.S. Public Interest Research Group conducted a survey of adults in thirty states and found “25% of the credit reports surveyed contained *serious errors* that could result in the denial of credit.”⁶⁶ These serious errors include accounts incorrectly marked as delinquent or being in collections, accounts attributed to a consumer that do not belong to him or her, and bankruptcies, tax liens or other judgments that are not attributable to the consumer.⁶⁷ Of all the credit reports surveyed, 79% had errors or mistakes of some kind.⁶⁸ Even the trade association for the CRAs, the

63. ALISON CASSADY & EDMUND MIERZWINSKI, NAT’L ASS’N OF STATE PIRGS, *MISTAKES DO HAPPEN: A LOOK AT ERRORS IN CONSUMER CREDIT REPORTS 6* (2004), available at cdn.publicinterestnetwork.org/assets/BEevuv19a3KzsATRbZMZlw/MistakesDoHappen2004.pdf (noting the results of a report conducted by the Consumer Federation of America (CFA) and the National Consumer Reporting Association, a “group of small independent credit bureaus”).

64. *Id.*

65. *Id.*

66. *Id.* at 11 (*emphasis added*).

67. *Id.*

68. *Id.* at 13. Some of the errors included (1) listing a 28-year-old lawyer’s current employment as the job she held during high school, (2) listing “a consumer’s business partner as his spouse” despite the consumer being widowed for twenty years, and (3) listing a student loan as open despite being paid several years before. *Id.* at 12. Other common errors included inaccurate personal information, loans being listed multiple times, closed accounts being listed as open, and missing accounts. *Id.*

68. Wu, *supra* note 8, at 144 (citing DISPUTE PROCESS REPORT, *supra* note 29, at 12).

68. FED. TRADE COMM’N, REPORT TO CONGRESS UNDER SECTIONS 318 AND 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003, at 2 (2004),

Consumer Data Industry Association (CDIA), has reported that 21.8% of consumers who order their credit report file a dispute.⁶⁹ The FTC is currently conducting “an ongoing study of the accuracy and completeness of information contained in consumer reports prepared or maintained by CRAs and methods for improving the accuracy and completeness of such information.”⁷⁰ This eleven-year study is required by the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”) and will be finalized and reported to Congress in 2014.⁷¹

Through the compilation of credit reports, the credit reporting industry creates the commercial identities of millions of American consumers.⁷² CRAs owe a duty to consumers to represent them as accurately as possible. This duty includes addressing discrepancies. CRAs also owe a duty to customers who use the information prior to extending credit to consumers. The creditors rely on this information as a predictor of a consumer’s credit behavior.⁷³ Further, CRAs owe a duty to furnishers. When the CRA displays inaccurate information about a consumer in the credit report, the consumer may believe the creditor and furnisher are inaccurately reporting the information, thus adversely affecting the debtor-creditor relationship. By failing to maintain accurate records, CRAs not only do a disservice to consumers, but to the economy in general.⁷⁴ An examination of the process for disputing inaccuracies will lead to a better understanding of why inaccuracies still persist throughout the industry.

IV. THE DISPUTE PROCESS

“It would be unrealistic to expect credit reporting agencies to be absolutely correct on every single case. But it seems . . . that

available at <http://www.ftc.gov/reports/facta/041209factarpt.pdf> [hereinafter FED. TRADE REPORT] (quoting Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat 1952, 1999 (2003)).

69. Wu, *supra* note 8, at 144 (referring to DISPUTE PROCESS REPORT, *supra* note 29).

70. FED. TRADE REPORT, *supra* note 68.

71. *Id.*

72. De Armond, *supra* note 4, at 1068.

73. Bennett, *supra* note 39, at 4.

74. *Id.*

consumers affected by an adverse rating do have a right to present their side of the story and to have inaccurate information expunged from their file."⁷⁵

In the 1960s, "the executive branch proposed the establishment of a national data bank with personal information on every U.S. citizen."⁷⁶ This idea was quickly abandoned due to privacy concerns.⁷⁷ Nonetheless, a private credit reporting industry arose.⁷⁸ Noticing "[credit reporting] system[s] [had] been built up with virtually no public regulation or supervision,"⁷⁹ Congress passed the FCRA in 1970.⁸⁰ "[The] objective [of the] fair credit reporting [act was] . . . to insure that the credit information system [would be] responsive to the needs of consumers as well as creditors."⁸¹

With the inception of the FCRA, Congress knew and understood that a perfectly accurate credit reporting system would not be feasible.⁸² Tellingly, "[t]he legislative history . . . characterizes the dispute and correction process as the heart of . . . efforts to ensure the ultimate accuracy of the consumer report."⁸³ The dispute process is a safeguard that ensures credit reports portray the most accurate information possible.⁸⁴ Because inaccuracies will be present within the credit industry, it is essential to have an expedited dispute process that allows consumers to clear their name of any undeserved, adverse marks. It is also essential that the credit reporting industry is transparent, allowing consumers to track inaccuracies.

75. 115 CONG. REC. 2412 (1969) (Senator Proxmire introducing the FCRA).

76. *Id.* at 2411.

77. *Id.*

78. *Id.*

79. *Id.* at 2410.

80. Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1128 (1970) (codified as amended at 15 U.S.C. §§1681-1681x).

81. 115 CONG. REC. 2411 (1969) (providing Senator Proxmire's explanation of the need for a fair credit reporting bill).

82. *See id.* at 2412; Bennett, *supra* note 39, at 18.

83. Bennett, *supra* note 39, at 18 (citation omitted) (internal quotation marks omitted).

84. *Id.*

A. *The Logistics*

The FCRA requires that CRAs, free of charge, conduct a “reasonable reinvestigation” of information disputed by consumers.⁸⁵ After a consumer disputes information, the CRA must provide the furnisher “all relevant information regarding the dispute” within five business days.⁸⁶ This reinvestigation must be finalized by the CRAs no later than thirty days after the consumer sends the dispute.⁸⁷ And, no later than five days after the reinvestigation is conducted the CRA must give written notice of outcome to the consumer.⁸⁸ This requirement has generally been enforced by the FTC.⁸⁹ However, with the passing of the Dodd-Frank Wall Street Reform and Consumer Protection Act,⁹⁰ a Bureau of Consumer Financial Protection will be tasked with enforcing the FCRA jointly with the FTC.⁹¹ The Bureau is also given rulemaking authority for “federal consumer financial law.”⁹²

Under the FCRA, a private cause of action is only available for willful⁹³ or negligent noncompliance.⁹⁴ However, proving actual damages may be difficult because a consumer would have to show that, but for the inaccuracy in the credit report, the consumer would have received a lower interest rate or would not have been denied credit.⁹⁵ Still, some courts have allowed emotional distress and humiliation to be included in recovery for actual damages.⁹⁶

85. 15 U.S.C. § 1681i (2003).

86. *Id.*

87. *Id.*

88. *Id.*

89. 15 U.S.C. § 1681s (2003).

90. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

91. *Id.* § 1015, 124 Stat. at 1974.

92. *Id.* § 1022, 124 Stat. at 1980.

93. 15 U.S.C. § 1681n (2003). This law creates statutory damages of not less than \$100 and not more than \$1,000, and punitive damages if the court allows. *Id.* CRAs have been held liable for not complying with a consumer’s request for a reinvestigation. *See Collins v. Retail Credit Co.*, 410 F. Supp. 924 (E.D. Mich. 1976).

94. 15 U.S.C. § 1681o (2003).

95. *See Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th

The reasonableness of the CRAs' reinvestigation procedures is often called into question.⁹⁷ The current dispute process has turned into "an automated and perfunctory process that is a mockery of how a real dispute process should function."⁹⁸ As one commentator has remarked, "All important components of the credit reporting system are automated. What human involvement remains is solely that of data entry, much of it accomplished overseas."⁹⁹ This is in part due to the economic motivations driving the credit industry, which are discussed below in Section V. Perhaps exasperating this situation, CRAs created a web-based application known as the Online Solution for Complete and Accurate Reporting ("e-OSCAR") to handle disputes.¹⁰⁰ CRAs and furnishers utilize e-OSCAR to create and respond to credit information disputed by the consumer.¹⁰¹ The CDIA claims that over 83% of all disputes are processed via e-OSCAR.¹⁰²

The e-OSCAR application boils disputes down to two-digit codes¹⁰³ that represent one of twenty-six predefined categories.¹⁰⁴ The problem with automating the dispute process and "boiling a dispute down"¹⁰⁵ to a numerical code is that disputes are sent without supporting documents such as billing or payoff statements.¹⁰⁶ CRAs

Cir. 1995).

96. *Id.*; Saenz v. Trans Union, LLC, 621 F. Supp. 2d 1074, 1085 (D. Or. 2007).

97. Wu, *supra* note 8, at 155. CRAs should build some form of qualitative oversight into their automated system. One court has held that the automated system may not be sufficient: "By relying on its automated system . . . , Experian could be found by a reasonable juror to have been reckless." Campbell v. Experian Info. Solutions, Inc., No. 08-4217-CV-C-NKL, 2009 WL 3834125, at *9 (W.D. Mo. 2009).

98. Wu, *supra* note 8, at 156.

99. Bennett, *supra* note 39, at 3.

100. See *About e-OSCAR*, E-OSCAR, <http://www.e-oscar.org/about> (last visited Mar. 17, 2011).

101. *Id.*

102. DISPUTE PROCESS REPORT, *supra* note 29, at 15.

103. Bob Tedeschi, *Faulting Credit Firms on Fixing Errors*, N.Y. TIMES, Feb. 6, 2009, at RE6, available at http://www.nytimes.com/2009/02/08/realestate/08mort.html?_r=1.

104. DISPUTE PROCESS REPORT, *supra* note 29, at 15.

105. Tedeschi, *supra* note 103.

106. Wu, *supra* note 8, at 158.

claim that because sending the relevant documentation would be difficult, they have created a comment box within e-OSCAR, which allows individuals submitting disputes to enter a textual explanation of the dispute.¹⁰⁷ This box is called the “FCRA Relevant Information field” and is limited to a single line of text with a limited character count.¹⁰⁸ An employee from TransUnion testified that the FCRA Relevant Information Field is used in less than 10% of all disputes.¹⁰⁹ In addition to their automation, disputes are often handled overseas, where quotas must be met, requiring up to twenty-two disputes to be processed per hour.¹¹⁰

Consumers who are lucky enough to be on the CRAs “VIP List,” however, need not worry themselves with the e-OSCAR debacle.¹¹¹ These complaints receive “priority processing” or “additional processing procedures.”¹¹² Many of the individuals on the CRAs’ “VIP List” will receive a dedicated representative or high level employee to personally handle their dispute.¹¹³ While the majority of disputes are handled overseas in the Philippines or Costa Rica in a highly automated manner, VIPs need not worry because they will have their dispute handled domestically by a dedicated representative.¹¹⁴ What does it take to find oneself on the CRAs’ “VIP List?” If an individual is a “judge, senator, congressman, government official, attorney, paralegal, professional athlete, actor, director, member of the media or a celebrity,” they are likely to get preferential treatment from a CRA when disputing inaccuracies.¹¹⁵ CRA employees also receive this preferential treatment.¹¹⁶

The CRAs’ automated process for handling disputes raises serious questions of reasonableness. Moreover, it seems even CRAs are aware

107. *Id.* at 175. One commentator argues that it would not be difficult for the CRAs to submit a scanned, electronic copy of the documents. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 181; *see also* Kadet, *supra* note 12.

111. Wu, *supra* note 8, at 184; Kadet, *supra* note 12.

112. Kadet, *supra* note 12.

113. *Id.*; Bennett, *supra* note 39, at 5.

114. Kadet, *supra* note 12; Bennett, *supra* note 39, at 6.

115. *See* Kadet, *supra* note 12; Bennett, *supra* note 39, at 5; *see also* Wu, *supra* note 8, at 184-85.

116. Wu, *supra* note 8, at 185.

of these questions, as they've created a "VIP List" for individuals who seem to be in positions to expose the automated process, bring suit for violations of the FCRA, or seek legislative reform.¹¹⁷

B. Transparency

Understandably, consumers will not file a dispute unless they are aware of inaccuracies in their credit report. Because consumers have no say in determining whether their data is included in a credit report, at the very least they should have free access to this information.¹¹⁸ Noting these concerns, Congress, in 2003, amended the FCRA by passing the Fair and Accurate Credit Transactions Act ("FACTA")¹¹⁹ "to prevent identity theft, improve resolution of consumer disputes, improve the accuracy of consumer records, [and] make improvements in the use of, and consumer access to, credit information."¹²⁰

Prior to FACTA, consumers could only receive their credit report free of charge once every twelve months *under limited circumstances*.¹²¹ FACTA expanded consumers' right to receive a free copy of their credit report every twelve months.¹²² Pursuant to FACTA, the "big three" nationwide consumer credit reporting agencies—Equifax, Experian, and TransUnion—have created a centralized location (www.annualcreditreport.com) for consumers to request a free annual copy of their credit report.¹²³ Consumers are also able to receive a free copy of their credit report after receiving "adverse notice"; i.e., after being denied credit.¹²⁴ If a consumer wishes to receive a copy of his or her credit report under any other

117. Kadet, *supra* note 12; Bennett, *supra* note 39, at 5; *see also* Wu, *supra* note 8, at 184-85.

118. Wu, *supra* note 8, at 181.

119. Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952.

120. *Id.*

121. 15 U.S.C. § 1681j (1997), *amended by* 15 U.S.C. § 1681j (2006).

122. Fair and Accurate Credit Transactions Act of 2003, sec. 211, § 612, 117 Stat. at 1969 (codified at 15 U.S.C. 1681j).

123. 15 U.S.C. § 1681j(a)(1)(B) (2003); *About Us*, ANNUALCREDITREPORT.COM, <https://www.annualcreditreport.com/cra/helpabout> (last visited Nov. 30, 2010).

124. 15 U.S.C. § 1681j (2006).

circumstances, he or she must pay a “fair and reasonable fee” that is determined by the FTC.¹²⁵ Further, as discussed below in Section V, CRAs have created an industry out of credit monitoring. CRAs market products to consumers that give them the ability to track the information in their credit report at any point in time.¹²⁶

Giving consumers a glimpse of their commercial identity once a year hardly seems sufficient. This insufficiency becomes particularly glaring when one considers the prevalence of inaccuracies and the fact that CRAs have mechanisms in place that can easily allow consumers to track this information.¹²⁷ In order for consumers to dispute inaccuracies in their credit reports, they must first be aware of them. Having access to a free credit report once a year does not offer consumers the ability to have an accurate perception of their commercial identity.

V. AN EXAMINATION OF MOTIVATIONS

*“[T]he core problem . . . is that few market incentives exist to motivate the credit [reporting] industry to voluntarily correct accuracy problems”*¹²⁸

“The present credit reporting system is broken.”¹²⁹ Numerous reports continue to show the credit reporting system is plagued by inaccuracies.¹³⁰ Even the industry trade group has admitted to

125. 15 U.S.C. § 1681g (2006).

126. See, e.g., FREECREDITREPORT.COM, <http://www.freecreditreport.com> (last visited Nov. 30, 2010); FTC FACTS, *supra* note 44, at 1-2. Freecreditreport.com is not authorized to fill orders for the free annual credit report consumers are entitled to under the FCRA. *Id.* The FTC refers to sites like freecreditreport.com, which is owned by Experian, as “imposter sites.” FTC FACTS, *supra* note 44, at 2.

127. See FREECREDITREPORT.COM, *supra* note 126. Credit monitoring services are offered to consumers at \$14.95 a month and enrollment is automatic after a “trial period.” *Id.*

128. WU & DE ARMOND, *supra* note 41, at 17 (citing *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the Comm. on Banking, Finance, and Urban Affairs Before the H.R.*, 102d Cong. 214 (statement of Dr. Mary Culnan)).

129. Bennett, *supra* note 39, at 3.

130. *Id.*; see also CASSADY & MIERZWINSKI, *supra* note 63, at 6.

substantial inaccuracies within the industry.¹³¹ Despite the fact that such problems lead to a poor public perception of the industry, CRAs have not been overly proactive in addressing accuracy issues. In fact, the industry continues to argue for a more lax standard for the handling of consumer disputes.¹³² An examination of the credit industry's motivations is needed to explain this inaction.

When faced with liability, CRAs claim it is impossible to control the accuracy of the more than 3.5 billion pieces of account information they receive every month.¹³³ CRAs continually argue “that creditors are better situated [than CRAs] to determine the accuracy of information.”¹³⁴ Following this reasoning, CRAs rely on the “general rule of garbage-in-garbage-out”: if inaccurate information about a consumer is furnished to a CRA, inaccurate information will be reported in that consumer's credit report.¹³⁵ Experian's director of public education has even stated, “We're the library We don't write the book.”¹³⁶ CRAs continually defer liability by claiming they are not in the best position to ensure the accuracy of *the products they sell*.

According to an industry expert, “[T]he core problem . . . is that few market incentives exist to motivate the credit [reporting] industry to voluntarily correct accuracy problems because consumers are not the agencies' paying customers.”¹³⁷ The creditors who either furnish or use the information aggregated by the CRAs are the primary customers.¹³⁸ Individual entities have been found to pay CRAs

131. Wu, *supra* note 8, at 144.

132. See Wu, *supra* note 8, at 172 (citing cases where the court has rejected arguments by CRAs claiming that the furnishers are in the best position to determine the accuracy of disputed information).

133. Kadet, *supra* note 12.

134. Wu, *supra* note 8, at 172.

135. De Armond, *supra* note 4, at 1096; Kadet, *supra* note 12.

136. Kadet, *supra* note 12 (claiming if furnishers give inaccurate information to CRAs, the CRAs produce an inaccurate credit report).

137. WU & DE ARMOND, *supra* note 41, at 17 (citing *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the Comm. on Banking, Finance, and Urban Affairs Before the H.R.*, 102d Cong. 214 (statement of Dr. Mary Culnan)).

138. Wu, *supra* note 8, at 180.

millions of dollars each year.¹³⁹ Creditors therefore have the ability to choose which CRA they will purchase information from.¹⁴⁰ An entity functioning as both creditor and furnisher is less likely to work with a CRA that demands intensive review of consumer disputes.¹⁴¹ Rather than spend time on resolving disputes, furnishers and CRAs benefit from an expedited dispute process.¹⁴²

Driven by market incentives to create an expedited dispute process, CRAs created the e-OSCAR system, mentioned above in Section IV.¹⁴³ CRAs and furnishers utilize e-OSCAR to create and respond to credit information that is disputed by the consumer.¹⁴⁴ The CDIA claims that over 83% of all disputes are processed via e-OSCAR.¹⁴⁵ Furnishers that do not utilize e-OSCAR submit paper disputes via mail or fax to the CRAs.¹⁴⁶ CRAs, however, have announced they plan to require all disputes to be processed via e-OSCAR.¹⁴⁷ The CRAs may be requiring all furnishers to utilize e-OSCAR because e-OSCAR produces revenue for the CRAs; they charge furnishers \$0.30 for each dispute sent to the furnisher via e-OSCAR.¹⁴⁸ “[T]he more automated disputes [e-OSCAR] sends out, the more money it generates.”¹⁴⁹ In 2005, e-OSCAR was moved from the non-profit CRA lobbyist group, CDIA, to a for-profit company, Online Data Exchange, L.L.C.¹⁵⁰

Because CRAs can create revenue by sending disputes to furnishers through e-OSCAR, CRAs have incentive to reduce the cost of consumer dispute resolution to increase revenue.¹⁵¹ Instead of

139. *Id.*

140. *Id.* at 181.

141. *Id.*

142. *Id.*

143. *About e-OSCAR*, *supra* note 100.

144. *Id.*

145. DISPUTE PROCESS REPORT, *supra* note 29, at 15.

146. *Id.* at 15-16.

147. *Id.*

148. *e-OSCAR Costs*, E-OSCAR, <http://www.e-oscar.org/costs.htm> (last visited Nov. 30, 2010).

149. Bennett, *supra* note 39, at 4.

150. *Id.*

151. *Id.*

investing efforts to create solutions to deal with inaccuracies, CRAs have reduced the amount of resources they use to investigate consumer disputes.¹⁵² For example, Equifax used to spend \$4.67 to process each dispute letter. Recently, they outsourced this process to the Philippines, where dispute letters, often containing many disputed items, can be processed for \$0.57 each.¹⁵³ An Equifax employee estimated that Philippine workers were only allowed to spend four minutes on each dispute, and a TransUnion manager stated that “workers are expected to complete up to 22 cases an hour.”¹⁵⁴

As stated above, furnishers pay \$0.30 to handle *each disputed item*.¹⁵⁵ So, by reducing the cost of processing dispute letters, CRAs can actually see a profit from the dispute process “by charging furnishers for investigations [of each disputed item].”¹⁵⁶ “[T]he more automated disputes [e-OSCAR] sends out, the more money it generates.”¹⁵⁷ Because CRAs can profit from inaccuracies, they are presented little economic incentive to proactively address accuracy issues. Paired with the fact that consumers are not the paying customers, this lack of incentive underscores why CRAs are reluctant to proactively deal with accuracy issues and consumer disputes. The resulting situation may help to illustrate why consumers have had such difficulty correcting inaccuracies on their report with the CRAs.

On the other hand, as a practical matter, furnishers have an incentive to address consumer credit disputes because of the ongoing business relationship they often share with consumers. While CRAs have a fairly discrete relationship with consumers, they do not offer significant services to consumers and have little incentive in correcting a consumer’s credit report; furnishers have a relationship with their consumers and want to keep their customers happy.

There is yet another way CRAs profit from inaccuracies in credit reports. CRAs have created and marketed products that allow

152. *Id.*

153. Wu, *supra* note 8, at 183. Not all disputes are handled this way. CRAs maintain a list of “VIPs” including attorneys, politicians, and celebrities. VIP disputes are handled by high-level employees located within the United States. *Id.* at 185.

154. Kadet, *supra* note 12.

155. *e-OSCAR Costs*, *supra* note 148.

156. Wu, *supra* note 8, at 184.

157. *Id.*

consumers to monitor their credit.¹⁵⁸ These products are marketed to consumers through statements such as, “Make sure your reports are accurate & free of fraud.”¹⁵⁹ These products present “almost zero marginal cost to the [CRAs], yet they sell [them to consumers] for \$150 a year or more.”¹⁶⁰ By selling these products to consumers, CRAs are deferring their duty to maintain accurate information to paying consumers. As one commentator has noted, “[C]onsumers are faced with what can fairly be described as credit extortion. Consumers are told to buy the CRA products or else remain in fear that they will be inaccurate and full of fraud.”¹⁶¹

These services allow CRAs to profit on two fronts: from the consumer and from the furnisher. CRAs see a profit from selling these credit monitoring services to consumers.¹⁶² On the consumer front, this profit can be as much as ten percent of the CRAs’ operating revenue.¹⁶³ These services lead to an increased awareness of credit report inaccuracies by consumers. When consumers dispute these inaccuracies, CRAs see a profit from the e-OSCAR dispute system. While CRAs may argue that use of these products represents a step towards addressing inaccuracies, this approach to ensuring accuracy is not correct.

Most consumers “cannot avoid having a credit history.”¹⁶⁴ Consumers cannot determine whether their information is collected by CRAs.¹⁶⁵ Nonetheless, CRAs want consumers to pay for the ability to monitor their reports for inaccuracies.¹⁶⁶ Further, despite requests by furnishers for a free dispute submission process,¹⁶⁷ CRAs profit when

158. Bennett, *supra* note 39, at 5. Freecreditreport.com is such a credit monitoring product that Experian markets to consumers. See FREECREDITREPORT.COM, *supra* note 126.

159. Bennett, *supra* note 39, at 5.

160. Aleksandra Todorova, *Credit-Monitoring: A False Sense of Security*, SMART MONEY (Jan. 23, 2009), <http://www.smartmoney.com/spending/rip-offs/credit-monitoring-services-a-false-sense-of-security>.

161. Bennett, *supra* note 39, at 5.

162. *Id.*

163. *Id.*

164. Wu, *supra* note 8, at 180.

165. *Id.*

166. See FREECREDITREPORT.COM, *supra* note 126.

167. DISPUTE PROCESS REPORT, *supra* note 29, at 16.

furnishers seek to correct inaccuracies through e-OSCAR.¹⁶⁸ CRAs profit from furnishers addressing consumer disputes despite the fact that furnishers voluntarily provide CRAs with consumer information.¹⁶⁹ In effect, CRAs make money from information that is voluntarily provided by furnishers by selling consumer credit monitoring products and generating income through the dispute process itself. The current system allows CRAs to exploit the same parties that allow it to survive. CRAs will continue to thrive by finding ways to profit at the expense of consumers and furnishers.

VI. A FRAMEWORK OF INCENTIVES AND PUNISHMENTS

The current credit reporting system is flawed. In order to fix a credit reporting system that continually fails consumers and businesses, incentives must be implemented that will reward furnishers for reporting accurate information about consumers to CRAs. Commentators are split on how best to address the accuracy issues plaguing the credit reporting industry. Proposed solutions include (1) strengthening a consumer's private right of action against CRAs,¹⁷⁰ (2) passing liability from CRAs to furnishers,¹⁷¹ (3) clarifying the accuracy standards that CRAs must comply with,¹⁷² (4) addressing accuracy issues prior to the time a dispute is submitted,¹⁷³ and (5) reviving common law torts against furnishers.¹⁷⁴ These arguments fail to adequately consider the voluntary nature of the consumer credit reporting industry. A new framework is needed that both rewards accuracy and punishes inaccuracy.

168. *e-Oscar Costs*, *supra* note 148; *see also* Wu, *supra* note 8, at 184.

169. *See* DISPUTE PROCESS REPORT, *supra* note 29, at 34.

170. CASSADY & MIERZWINSKI, *supra* note 63, at 14.

171. Neil Vanderwoude, Comment, *The Fair Credit Reporting Act: Fair for Consumers, Fair for Credit Reporting Agencies*, 39 SW. L. Rev. 395, 409 (2009).

172. O'Brien, *supra* note 3, at 1218-20.

173. De Armond, *supra* note 4, at 1100.

174. *Id.* at 1118 (calling for an application of the common law tort of defamation to CRAs and furnishers).

A. Streamline the Dispute Process: A Call to Strike § 1681s-2(a)(8)

Section 1681s-2(a)(8) allows consumers to dispute information directly with the furnisher.¹⁷⁵ Under current law consumers can dispute information with either a CRA¹⁷⁶ or a furnisher.¹⁷⁷ Administrative agencies have the ability to enforce provisions of the FCRA regardless of whether the consumer initiates the dispute with a CRA or a furnisher.¹⁷⁸ However, the only way to establish civil liability is for the consumer to initiate the dispute with a CRA.¹⁷⁹ Once a dispute is sent to a CRA, a consumer can sue the CRA for either willful¹⁸⁰ or negligent¹⁸¹ noncompliance with the FCRA. Civil liability can attach to a furnisher if the consumer sent the original dispute to the CRA, and the CRA in turn communicated the dispute to the furnisher.¹⁸²

On the surface, it makes sense for consumers to dispute inaccurate information with the entity that is furnishing the information. Information within a credit report originates with furnishers. The furnisher houses the original information and has the ability to modify the underlying records that are reported monthly to the CRAs. However, the credit reporting industry is voluntary,¹⁸³ meaning that furnishers are under no obligation to report information to CRAs.

175. 15 U.S.C. §1681s-2(a)(8) (2003).

176. *Id.* § 1681i.

177. § 1681s-2(a)(8).

178. 15 U.S.C. § 1681s (2003).

179. *See id.* § 1681s-2(c) (2003).

180. *Id.* § 1681n.

181. *Id.* § 1681o.

182. *Id.* § 1681s-2(b); *see also* *Stafford v. Cross Country Bank*, 262 F. Supp. 2d 776, 783 (W.D. Ky. 2003) (“[Section] 1681s-2, subsection (b), contains no limitations on the availability of remedies. Based on this clear statutory difference, the Court concludes § 1681s-2(b) does allow a consumer to bring a private cause of action against a furnisher of credit information for either negligent, § 1681o, or willful, § 1681n, violations of the FCRA. Virtually all courts considering this issue are in agreement.”).

183. *Interagency Guidelines Concerning the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies*, 12 C.F.R. pt. 41 app. E (2010).

Placing undue burdens on furnishers may prompt some furnishers, especially smaller ones, to stop reporting information to CRAs.¹⁸⁴

Further, not all inaccuracies are attributable to furnishers¹⁸⁵: “Many credit reporting inaccuracies are caused entirely by the CRAs.”¹⁸⁶ These inaccuracies include “mixed” or “mismerged” files where items on a credit report belonging to someone other than the consumer are reflected on the consumer’s credit report.¹⁸⁷ A “mixed file” can also result from identity theft—a problem not attributable to furnishers.¹⁸⁸ Furnishers should not be responsible for investigating all errors on a consumer credit report, particularly those that are not attributable to them.

Despite the fact that the information in the credit report originates with furnishers, CRAs are better equipped to handle disputes. CRAs are the “library”¹⁸⁹: they house information and offer it to consumers and business. If a piece of information is inaccurate, they alone have the ability to alter or stop reporting it, meaning the ability to take it off the shelves. Further, CRAs are in the business of selling information. They have created complex automated systems for handling disputes, allowing them to process dispute letters, often containing multiple disputes, at about only \$0.50 each.¹⁹⁰ Their system of handling disputes by outsourcing disputes all around the world¹⁹¹ is complex. Conversely, the activities of furnishers vary in size, nature, complexity, and scope.¹⁹² Smaller furnishers are not in a position to adequately investigate consumer disputes where any investigation would prove unduly burdensome.¹⁹³ Furnishers are not in the business

184. DISPUTE PROCESS REPORT, *supra* note 29, at 9. Some furnishers already choose not to report information about certain consumers out of a concern that other lenders will compete for the consumers. This is prevalent with elite and subprime customers. *Id.*

185. *See* Bennett, *supra* note 39, at 7-12.

186. *Id.* at 7.

187. *Id.* (“One study found that 44% of consumer reporting complaints to the FTC involved mismerged files.”).

188. *Id.*

189. Kadet, *supra* note 12.

190. *Id.*

191. *See id.*

192. *See* 16 C.F.R. § 660.3 (2010).

193. *See* Procedures to Enhance the Accuracy and Integrity of Information

of confirming the accuracy of information and are therefore not equipped to do so. Further, as discussed above in Section V, CRAs profit from the dispute process at the furnisher's expense. Because CRAs profit from the process, they should bear the brunt of the investigation.

Most importantly, consumers are unlikely to be aware that a dispute filed directly with a furnisher does not implicate the civil liability that a dispute filed with a CRA will. By filing a dispute with a CRA, consumers preserve their ability to bring a suit against *either the furnisher or the CRA*. However, when a consumer files a dispute with a furnisher, they are effectively denying themselves relief. This confusion places consumers in a perilous position. Consumers are likely to dispute inaccurate information directly with the furnisher because doing so is logical: information originates with the furnisher, so the furnisher should be able to correct it. But, by disputing information directly with a furnisher, consumers are actually doing themselves a great disservice.

By striking § 1681s-2(a)(8) of the FCRA, consumers will have a single location to dispute information; namely, the CRAs. Information will flow in one direction—from the consumer to the CRA, and then to the furnisher if necessary. Section 1681s-2(a)(8) complicates the dispute process by allowing communication to flow in multiple directions, from the CRA to the furnisher, or from the furnisher to the CRA. Further, under § 1681s-2(a)(8), a single dispute can be initiated with both the CRA and the furnisher. It is difficult to track a dispute or attach liability when information is flowing in multiple directions. An efficient, streamlined dispute process is needed.

If communication flows in a single direction, CRAs and furnishers will be encouraged to work together to create a dispute resolution process that accommodates their business needs while still ensuring accuracy. This incentive will be driven by the potential “punishment” of liability that attaches to disputes originating with the CRA. The likely result will be a modification of the e-OSCAR application. The program's capabilities will likely be expanded to include electronic copies of relevant documents, allowing furnishers to more accurately address disputes sent to them from CRAs.

Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act, 74 Fed. Reg. 31,485, 31,493 (July 1, 2009).

Striking § 1681s-2(a)(8) will add accountability to the industry by attaching civil liability to all disputes. It will also streamline the dispute process. Attaching liability to the process will create incentives for CRAs and furnishers to create an expedited dispute process.

B. Promote Transparency: A Call to Amend § 1681j(a)(1)(A) of the FCRA

With the advent of the FCRA, Congress understood that many consumers are not familiar with the credit reporting industry.¹⁹⁴ The intent of the FCRA is “to enable consumers to protect themselves against arbitrary, erroneous, and malicious credit information.”¹⁹⁵ Section 1681j(a)(1)(A) of the FCRA requires CRAs to furnish a copy of a consumer’s credit report to the consumer “once during any 12-month period upon request of the consumer.”¹⁹⁶ If consumers are unaware of the inaccuracies in the credit report they will not dispute them. This puts consumers at risk of being denied, or paying more than they should, for credit.¹⁹⁷ When consumers are only given no-charge access to their credit reports once per year, they are not provided adequate opportunity to protect themselves.

CRAs have the ability to monitor a consumer’s credit report and access it at any point in time.¹⁹⁸ These credit monitoring services have “almost zero marginal cost to the [CRAs], yet they sell it for \$150 a year or more.”¹⁹⁹ The CRAs are deriving a profit from consumers who wish to be informed of their credit score,²⁰⁰ these consumers are, in essence, victims of “credit extortion.”²⁰¹ Congress should eliminate the CRAs’ ability to extort consumers by requiring CRAs to be more

194. See 115 CONG. REC. 2410 (1969) (statement of Sen. Proxmire) (“You may not have heard of retail credit, but there is a good chance it has heard of you.”).

195. *Id.*

196. 15 U.S.C. § 1681j (2003).

197. CASSADY & MIERZWINSKI, *supra* note 63, at 6.

198. See FREECREDITREPORT.COM, *supra* note 126. Freecreditreport.com offers consumers the ability to purchase a credit monitoring product sold by Experian, which is one of the major CRAs.

199. Todorova, *supra* note 160.

200. See FREECREDITREPORT.COM, *supra* note 126.

201. Bennett, *supra* note 39, at 5.

transparent. CRAs should be required to offer consumers real-time access to their credit reports at no charge. By requiring that CRAs provide consumers with free access to credit reports without limitation, the accuracy and integrity of the credit reporting industry will no longer be diluted through the use of “imposter sites.”²⁰²

At the very least, CRAs should be required to give consumers free credit reports at least once per quarter. Further, because consumers may be unaware they can obtain free credit reports, CRAs should be required to give notice to consumers at least once per year. This notice should outline the process for obtaining a free copy of the consumer’s credit report. CRAs already possess the contact information for every consumer for whom they have a credit report. While this mandate will cause CRAs to incur cost, the benefit to the economy greatly outweighs this. This move will prompt CRAs to provide real-time service for free rather than comply with costly notice requirements. Consumers will be able to more accurately keep track of their accounts, reducing rates of identity theft. In addition, creditors will develop a more accurate understanding of the consumer when the overall accuracy of the credit reporting industry improves.

Section 1681j(a)(1)(A) should be amended to require that CRAs offer real-time credit tracking services to consumers with credit reports. Section 1681j(a)(1)(A) should also require CRAs to notify consumers of the process for obtaining access to the free credit monitoring service annually via mail or e-mail.

VII. CONCLUSION

The current credit reporting landscape is monolithic. CRAs are fed a massive amount of free data which is then repackaged and sold. Voluntary furnishers of this information are facing increasing liability to ensure the accuracy and integrity of the information, and consumers

202. FTC FACTS, *supra* note 44. Freecreditreport.com is not authorized to fill orders for the free annual credit report consumers are entitled to under the FCRA. *Id.* at 1-2. The “government-sanctioned website” for consumers to receive free copies of their credit reports is AnnualCreditReport.com. *Id.* at 1. However, this website does not receive the \$19 million in advertising that the “imposter site,” FreeCreditReport.com, received in the third quarter of 2008. Stacey L. Bradford, *FreeCreditReport.com: Not So Free – Still*, SMART MONEY (Jan. 23, 2009), <http://www.smartmoney.com/spending/rip-offs/freecreditreportcom-not-so-free-still>.

continue to cry for help with no avail—all while the cost of collecting, storing, and analyzing credit-relevant data continues to decrease for CRAs.²⁰³ CRAs are the primary beneficiaries of the credit reporting industry, yet legislation and regulation fail to reflect this by placing burdens on the parties being exploited by CRAs.

Striking § 1681s-2(a)(8) from the FCRA will streamline the dispute process. It will also encourage CRAs and furnishers to work together to create an expedited dispute resolution process. In addition, amending §1681j(a)(1)(A) of the FCRA will create more informed consumers. Consumers will know when their commercial identities are not accurate and will have the opportunity to dispute the inaccuracies. This framework will not only allow CRAs to remain profitable and allow businesses to more accurately plan for risk, it will also give consumers peace of mind knowing they are able to obtain credit at a fair price.

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203. Willis, *supra* note 36, at 720-21.

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