Fair Credit Reporting Act Update—2009

*By Andrew M. Smith, Peter Gilbert, and Scott Johnson**

Introduction

More than six years ago, Congress enacted the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"),[1] which added to the Fair Credit Reporting Act ("FCRA")[2] substantial obligations for businesses, but left many of the most important of the new duties to be implemented by federal agency rulemaking. In the past year, the federal regulatory agencies completed two more of these rules, and one of the prior rules became the subject of controversy and litigation.

In addition to summarizing these rulemaking proceedings, this Survey examines selected FCRA litigation developments and discusses recent amendments to the FCRA that govern the marketing of consumer reports directly to consumers and limit the ability of lenders and insurers to market to individuals who are under twenty-one years of age.

Rule Concerning the Accuracy and Integrity of Furnished Information

The FACT Act added to the FCRA a new provision requiring the Federal Deposit Insurance Corporation ("FDIC"), Federal Reserve Board ("FRB"), Office of the Comptroller of the Currency ("OCC"), Office of Thrift Supervision ("OTS"), National Credit Union Administration ("NCUA"), and Federal Trade Commission ("FTC") (collectively, the "Agencies") to establish guidelines designed to promote the accuracy and integrity of information furnished to consumer reporting agencies and to prescribe rules requiring entities that furnish such information, referred to as "furnishers," to establish policies and procedures for implementing those guidelines.[3] On July 1, 2009, the Agencies published a final rulemaking

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1. Pub. L. No. 108-159, 117 Stat. 1952 (2003) (codified in scattered sections of 15 & 20 U.S.C.) [hereinafter FACT Act].

2. Pub. L. No. 91-508, Title VI, 84 Stat. 1114, 1128 (1970) (codified as amended at 15 U.S.C.A. §§ 1681–1681x (West 2009)).

3. *See* FACT Act, *supra* note 1, § 312, 117 Stat. at 1989–90 (codified at 15 U.S.C. § 1681s-2(e) (2006)).

titled 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 (the "Furnisher Rule").[4] Compliance with the Furnisher Rule is required by July 1, 2010.[5]

The Furnisher Rule requires furnishers to establish and implement written policies and procedures designed to promote the accuracy and integrity of the information that they furnish.[6] Information furnished is "accurate" under the rule if it correctly reflects the terms of the account, the consumer's performance on the account, and the identity of the consumer.[7] Information furnished has "integrity" under the rule if it is substantiated by the furnisher's records, is furnished in a way that minimizes the likelihood that it may be incorrectly displayed in a consumer report, and includes any information that the agencies have listed in the guidelines as mandatory.[8] At present, the Agencies have identified only the credit limit as a mandatory reporting field.[9] Concurrent with the rulemaking, however, the agencies issued an Advance Notice of Proposed Rulemaking seeking comment on whether the account opening date or other data fields should also be made mandatory.[10]

The Furnisher Rule gives furnishers the flexibility to establish policies and procedures that are "appropriate to the nature, size, complexity, and scope of each furnisher's activities,"[11] but requires that, in doing so, they consider and incorporate relevant guidelines published in connection with the Furnisher Rule.[12] The guidelines provide that the furnisher's policies and procedures must be "reasonably designed" to ensure accuracy and integrity, including by conducting reasonable investigations in response to consumer disputes and updating information furnished to reflect changes to the current status of an account, such as changes caused by any transfer or cure of an account.[13] The guidelines detail considerations a furnisher should take into account in establishing its policies and procedures, such as reviewing existing practices that might compromise the accuracy or integrity of information furnished and evaluating the effectiveness of its existing policies and procedures and the specific methods the furnisher uses to provide information to consumer reporting agencies.[14] The guidelines list a series of "components" that a furnisher should address in developing its policies and

4. 74 Fed. Reg. 31484 (July 1, 2009) (to be codified at 12 C.F.R. pts. 41, 222, 334, 571 & 717 and 16 C.F.R. pt. 660) [hereinafter Furnisher Rule].

5. *Id*. at 31484.

6. *Id*. at 31525 (to be codified at 16 C.F.R. § 660.3(a)).

7. *Id*. (to be codified at 16 C.F.R. § 660.2(a)).

8. *Id*. (to be codified at 16 C.F.R. § 660.2(e)).

9. *Id*. at 31527 (to be codified at 16 C.F.R. pt. 660 app. A § I(b)(2)(iii)).

10. Guidelines for Furnishers of Information to Consumer Reporting Agencies, 74 Fed. Reg. 31529 (July 1, 2009).

11. Furnisher Rule, *supra* note 4, 74 Fed. Reg. at 31525 (to be codified at 16 C.F.R. § 660.3(a)).

12. *Id*. at 31525–26 (to be codified at 16 C.F.R. § 660.3(b)).

13. *Id*. at 31527 (to be codified at 16 C.F.R. pt. 660 app. A § I(b)).

14. *Id*. (to be codified at 16 C.F.R. pt. 660 app. A § II).

procedures, such as the use of standardized data reporting formats, record retention, creation of internal controls, implementation of training, oversight of service providers, furnishing of information after portfolio transfers, updating systems of records to avoid furnishing inaccurate data, and responding to disputes.[15]

Duties Regarding Disputes Received Directly from Consumers

The FACT Act also required the Agencies to identify the circumstances under which a furnisher must investigate disputes received directly from consumers as to the accuracy of information furnished to a consumer reporting agency.[16] Previously, the FCRA required furnishers to conduct a reasonable investigation only in response to "indirect" consumer disputes—that is, disputes initially directed to consumer reporting agencies and subsequently forwarded to furnishers.[17] Under the Furnisher Rule, however, furnishers must also conduct a reasonable investigation of disputes received directly from consumers.[18] To trigger the requirement to investigate, the dispute must relate to the consumer's liability for a credit account or other debt with the furnisher, the terms of the account, the consumer's performance on the account, or other information regarding an account or relationship between the furnisher and the consumer.[19]

After receiving a qualifying dispute, furnishers are required to conduct a reasonable investigation, review all relevant information provided by the consumer, and report the results within thirty days.[20] If the furnisher concludes that it has furnished inaccurate information, it must report a correction to each consumer reporting agency to which it provided the inaccurate information.[21]

The Furnisher Rule identifies a number of exceptions to the investigation requirements. A furnisher need not investigate a direct dispute if (i) the dispute relates to information that the furnisher has not furnished to a consumer reporting agency, such as identifying information, public records, or information provided by another furnisher;[22] (ii) the furnisher reasonably believes that the direct dispute is submitted by, or on a form prepared by, a credit repair organization;[23] or (iii) the furnisher has reasonably determined that the dispute is frivolous or irrelevant,[24] such as where the consumer's direct dispute notice does not provide the information required by the Furnisher Rule,[25] or the dispute is substantially

15. *Id*. (to be codified at 16 C.F.R. pt. 660 app. A § III).
16. *See* FACT Act § 312, 15 U.S.C. § 1681s-2(a)(8) (2006).
17. *See* FCRA § 623(b), 15 U.S.C. § 1681s-2(b) (2006).
18. Furnisher Rule, *supra* note 4, 74 Fed. Reg. at 31526 (to be codified at 16 C.F.R. § 660.4).
19. *Id*. (to be codified at 16 C.F.R. § 660.4(a)).
20. *Id*. (to be codified at 16 C.F.R. § 660.4(e)).
21. *Id*. (to be codified at 16 C.F.R. § 660.4(e)(4)).
22. *Id*. (to be codified at 16 C.F.R. § 660.4(b)(1)).
23. *Id*. (to be codified at 16 C.F.R. § 660.4(b)(2)).
24. *Id*. (to be codified at 16 C.F.R. § 660.4(f)).
25. *Id*. (to be codified at 16 C.F.R. § 660.4(f)(1)(i)).

the same as one already submitted.[26] Where a furnisher determines that it is not required to investigate a dispute for one or more of these reasons, the furnisher, within five business days of its determination, must notify the consumer of the reasons for its determination and identify any information needed to investigate the disputed information.[27]

Under the Furnisher Rule, furnishers can limit the scope of disputes they are obligated to investigate by managing the addresses they provide to consumers.[28] If a furnisher specifies an address for submitting direct disputes, either on the credit report or in writing to the consumer, the furnisher is only required to investigate disputes submitted to the specified address.[29] A furnisher that does not provide any such address must investigate and respond to a qualifying dispute received at "any business address."[30]

Coverage of the Identity Theft Red Flags Rule

The FACT Act also required the Agencies to prescribe joint regulations requiring companies that engage in certain types of financial activity to adopt policies and procedures to identify identity theft risks.[31] On November 9, 2007, the Agencies published the final regulations (the "Red Flags Rule") under the FACT Act with a mandatory compliance date of November 1, 2008.[32]

Over the past year, controversy arose with respect to the coverage of the FTC's Red Flags Rule. In response, the FTC has on three separate occasions delayed enforcement of its Red Flags Rule because "a number of industries and entities . . . [have] expressed confusion and uncertainty about their coverage by and/or obligations under the rule."[33] In addition, the FTC Chairman issued a public statement that the FTC was delaying its enforcement of the Red Flags Rule "[g]iven the ongoing debate about whether Congress wrote this provision too broadly."[34] As of this writing, the FTC had delayed enforcement of its Red Flags Rule until June 1, 2010.[35]

26. *Id*. (to be codified at 16 C.F.R. § 660.4(f)(1)(ii)).
27. *Id*. (to be codified at 16 C.F.R. § 660.4(f)(2)–(3)).
28. *Id*. (to be codified at 16 C.F.R. § 660.4(c)).
29. *Id*. (to be codified at 16 C.F.R. § 660.4(c)(1)–(2)).
30. *Id*. (to be codified at 16 C.F.R. § 660.4(c)(3)).
31. *See* FACT Act § 114, 15 U.S.C. § 1681m(e) (2006).
32. Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. 63718, 63718 (Nov. 9, 2007) [hereinafter Identity Theft Red Flags].
33. Fed. Trade Comm'n, FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, 16 C.F.R. 681.1, at 2 (Apr. 2009), *available at* http://www.ftc.gov/os/2009/04/P095406redflagsextendedenforcement.pdf [hereinafter Apr. 2009 Red Flags Extension].
34. Press Release, Fed. Trade Comm'n, FTC Will Grant Three-Month Delay of Enforcement of 'Red Flags Rule' Requiring Creditors and Financial Institutions to Adopt Identity Theft Prevention Programs (Apr. 30, 2009), http://www.ftc.gov/opa/2009/04/redflagsrule.shtm.
35. *See* Fed. Trade Comm'n, FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, 16 C.F.R. 681.1, at 1 (Oct. 2009), *available at* http://www.ftc.gov/os/2009/10/091030redflagsrule.pdf.

The Red Flags Rule applies to any "financial institution" or "creditor" that offers or maintains "covered accounts."[36] A "financial institution" is a bank or a person that holds a "transaction account" (as that term is defined in section 19(b) of the Federal Reserve Act) for a consumer.[37] The term "creditor" has the same meaning as under the Equal Credit Opportunity Act ("ECOA"): "any person who regularly extends, renews, or continues credit . . . ."[38] A "covered account" is (i) any consumer-purpose account designed to permit multiple payments; and (ii) any other account for which there is a reasonably foreseeable risk to customers or to the financial institution or credit grantor from identity theft.[39]

The FTC, either directly or through its staff, has stated that the Red Flags Rule applies to many entities traditionally not within the FTC's jurisdiction, such as government entities and nonprofit organizations.[40] The FTC has also stated that telecommunications carriers and public utilities regulated by the Federal Communications Commission and state public utility commissions are subject to its Red Flags Rule.[41] In addition, the FTC has stated that it plans to enforce its Red Flags Rule against entities regulated by the U.S. Securities and Exchange Commission, such as mutual fund companies and securities broker-dealers that extend margin credit[42] or offer accounts that permit account holders to write checks.[43] The FTC staff has also issued informal guidance indicating that it plans to apply its Red Flags Rule to schools and universities that offer tuition payment plans[44] or permit students to hold funds in an account to be used for purchases at local stores.[45]

Moreover, the FTC has interpreted the definition of "creditor" broadly to include, for example, "retailers that . . . collect . . . credit applications for third party lenders,"[46] as well as lawyers, health care providers, accountants, and other professional services providers that bill in arrears for their services.[47]

36. *See* Fed. Trade Comm'n, Business Alert, New "Red Flag" Requirements for Financial Institutions and Creditors Will Help Fight Identity Theft (June 2008), http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt050.shtm. *See also* 16 C.F.R. § 681.1(b)(7) (2009) (defining "financial institution"); *id*. § 681.1(b)(5) (defining "creditor"); *id*. § 681.1(b)(3) (defining "covered account").

37. 16 C.F.R. § 681.1(b)(7) (2009) (incorporating by reference 15 U.S.C. § 1681a(t) (2006)).

38. ECOA § 702, 15 U.S.C. § 1691a(e) (2006); *see also* 16 C.F.R. § 681.1(b)(5) (2009).

39. 16 C.F.R. § 681.2(b)(3) (2009).

40. *See* Tiffany George & Pavneet Singh, Fed. Trade Comm'n, *The "Red Flags" Rule: Are You Complying with New Requirements for Fighting Identity Theft?* (Sept. 2008), http://www.ftc.gov/bcp/edu/pubs/articles/art10.shtm.

41. Identity Theft Red Flags, *supra* note 32, 72 Fed. Reg. at 63750.

42. *See* George & Singh, *supra* note 40.

43. *See* Apr. 2009 Red Flags Extension, *supra* note 33, at 1.

44. *See* Federal Trade Commission, The Red Flags Rule: Frequently Asked Questions, http://www.ftc.gov/bcp/edu/microsites/redflagsrule/faqs.shtm (last visited Oct. 13, 2009) [hereinafter Red Flags Rule FAQs] (FAQ C.5).

45. *See id*. (FAQ B.15).

46. *Id*. (FAQ B.1).

47. *See* Fed. Trade Comm'n, FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, 16 C.F.R. 681.1, at 1 n.2 (July 2009), *available at* http://www.ftc.gov/os/2009/07/P095406redflagspolicy.pdf; Apr. 2009 Red Flags Extension, *supra* note 33, at 1 n.3.

The FTC staff has attempted to temper this expansive interpretation of its authority by limiting the coverage of the Red Flags Rule in certain respects. For example, the FTC staff has said that employee retirement plans or flexible spending accounts would not be "covered accounts" unless offered by an entity that is otherwise a "creditor" or "financial institution";[48] that lawyers who are paid solely by retainer or contingent fees are not subject to the Red Flags Rule;[49] and that a retailer does not become subject to the Red Flags Rule merely by virtue of accepting a credit card.[50] The FTC staff has also issued informal guidance stating that the staff would not be inclined to recommend enforcement action against certain "low risk" covered entities, such as persons or firms who know their clients or customers personally, who perform services in and around the customers' homes, or "are involved in a type of business where identity theft is rare."[51]

Despite these efforts to reduce the tension, the FTC's interpretation of the coverage of its Red Flags Rule has drawn criticism from Congress and litigation from some of the entities that the FTC contends are covered by the Red Flags Rule. The Committee on Appropriations of the U.S. House of Representatives, in favorably reporting out the FTC's appropriations bill for fiscal year 2010, stated:

> The Committee is extremely concerned by the Federal Trade Commission's decision that small-sized health care providers are subject to the Red Flags Rule . . . . Health care providers have informed the Committee that the cost of compliance with the Red Flags Rule has the potential to be excessively burdensome on small health care providers and that this decision is not in compliance with the Regulatory Flexibility Act . . . . While the Committee appreciates that the FTC has taken some steps to address the concerns of small businesses, the Committee believes more needs to be done. The Committee requests the FTC to . . . better defin[e] and narrow[], as far as possible, the circumstances under which the rule applies to these entities.[52]

More recently, a federal district court enjoined the FTC from enforcing the Red Flags Rule against lawyers engaged in the practice of law,[53] holding among other things, that Congress could not have intended the FTC to regulate lawyers without a clear statement to that effect[54] and that lawyers should not be considered "creditors" under the ECOA.[55]

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48. Fed. Trade Comm'n, Frequently Asked Questions: Identity Theft Red Flags and Address Discrepancies 6 (2009); Red Flags Rule FAQs, *supra* note 44 (FAQ B.14).

49. *See* Red Flags Rule FAQs, *supra* note 44 (FAQs B.5 & B.6).

50. Fed. Trade Comm'n, Fighting Fraud with the Red Flags Rule: A How-to Guide for Business 10 (2009), *available at* http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus23.pdf.

51. Red Flags Rule FAQs, *supra* note 44 (FAQ E.3).

52. H.R. Rep. No. 111-202, at 65 (2009).

53. *See* Am. Bar Ass'n v. FTC, No. 09-1636 (RBW), 2009 WL 4289505 (D.D.C. Dec. 1, 2009). *See also* Am. Bar Ass'n v. FTC, 430 F.3d 457 (D.C. Cir. 2005) (holding that attorneys engaged in the practice of law are not "financial institutions" subject to provisions under the federal Financial Modernization Act requiring protection of consumer financial information).

54. *See Am. Bar Ass'n*, 2009 WL 4289505, at *7–13. *See also Am. Bar Ass'n*, 430 F.3d at 471 ("It is undisputed that the regulation of the practice of law is traditionally the province of the states."). *But see* Michael F. Fleming, *"So That's the End of It, Right?" Lawyers' Obligations Arising from Gramm-Leach-Bliley Since* ABA v. FTC, 60 Consumer Fin. L.Q. Rep. 547, 550 (2006) (noting some limits on this principle).

55. *See Am. Bar. Ass'n*, 2009 WL 4289505 at *14–18. *See also* Reithman v. Berry, 287 F.3d 274, 277–78 (3d Cir. 2002) (concluding that lawyers are not creditors: the "hallmark of 'credit' . . . is the

Litigation Developments

Updating of Information Following Resolution of a Consumer Dispute

As noted above, consumers may dispute information in their consumer report to a consumer reporting agency, which then must forward the disputed information to the furnisher for reinvestigation.[56] The furnisher is then required to reinvestigate the disputed information, and, unlike most other FCRA provisions pertaining to furnishers of information, consumers may sue furnishers for failure to comply with this requirement.[57] The FACT Act amended these furnisher reinvestigation provisions of the FCRA to require furnishers to update their files following an investigation of information disputed by a consumer to a consumer reporting agency.[58] Specifically, a furnisher must modify, delete, or "permanently block the reporting of" any "item of information disputed by a consumer [that] is found to be inaccurate or incomplete or cannot be verified after . . . reinvestigation."[59] As discussed below, two U.S. appellate courts have recently tested the limits of this provision.

Fourth and Ninth Circuit Cases

The U.S. Court of Appeals for the Fourth Circuit addressed this issue in *Saunders v. Branch Banking & Trust Co. of Virginia*.[60] In *Saunders*, the plaintiff alleged that he had incurred fees and penalties in connection with his automobile loan as a result of BB&T's accounting errors, and had refused to pay the charges.[61] BB&T began reporting the unpaid debt to consumer reporting agencies, allegedly preventing Saunders from obtaining subsequent credit on favorable terms.[62] Saunders disputed the debt with one or more consumer reporting agencies, which in turn forwarded the dispute to BB&T for investigation.[63] BB&T updated its reported information, but did not note that Saunders had disputed the information.[64] Saunders brought suit alleging that BB&T had failed to fulfill its duties under 15 U.S.C. § 1681s-2(b)(1) by, among other things, failing to conduct an adequate investigation of his dispute and failing to update its records following its investigation.[65] At the district court level, the jury found in favor of

right of one party to make deferred payment," but lawyers do not routinely grant such a "unilateral right to defer payments" and the "express terms of [lawyers'] fee agreements plainly manifest their right to prompt and full payments").

56. *See* 15 U.S.C. § 1681s-2(b) (2006); *see also supra* note 17 and accompanying text.

57. *See* 15 U.S.C.A. § 1681n (West 2009).

58. *See* FACT Act, *supra* note 1, § 314(b), 117 Stat. at 1995–96 (codified at 15 U.S.C. § 1681s-2(b)(1)(E) (2006)).

59. 15 U.S.C. § 1681s-2(b)(1)(E) (2006).

60. 526 F.3d 142 (4th Cir. 2008).

61. *Id.* at 145.

62. *Id.* at 146.

63. *Id.*

64. *Id.*

65. *Id.* at 147.

Saunders, awarding him $1,000 in statutory damages and $80,000 in punitive damages.[66]

On appeal, BB&T argued, among other things, that its failure to report the fact of the plaintiff's dispute to a consumer reporting agency was not actionable under the FCRA.[67] The Fourth Circuit, however, disagreed and upheld the lower court's award.[68] The court stated that information can be inaccurate if it is misleading in such a way that it can be expected to have an adverse effect on the consumer's credit,[69] and that the failure to note a dispute may be misleading enough to create an adverse effect.[70] The court implied, however, that a furnisher would be liable "only if it fails to report a meritorious dispute."[71]

In *Gorman v. Wolpoff & Abramson, LLP*,[72] the U.S. Court of Appeals for the Ninth Circuit echoed the *Saunders* decision. In *Gorman*, the plaintiff alleged that products he had purchased from a merchant using his credit card were defective, and he had refused to pay for them.[73] Gorman disputed the charges with his credit card bank, which continued to hold Gorman accountable for the charges.[74] The bank charged off Gorman's unpaid balance as a loss, and reported the account to the consumer reporting agencies as having been "charged-off."[75] Gorman disputed the information in his consumer report with one or more consumer reporting agencies,[76] which in turn requested verification of the debt from the bank.[77] The bank verified the account as reported, continued to report the debt as having been "charged-off," and did not report the debt as disputed.[78] Gorman sued, alleging numerous claims, including that the bank had violated its duties under 15 U.S.C. § 1681s-2(b).[79] The bank was awarded summary judgment by the district court, and Gorman appealed.[80]

On appeal, the Ninth Circuit reversed the lower court's grant of summary judgment for the bank,[81] discussing *Saunders* and deeming its reasoning persuasive.[82] Although the court considered the defendant bank's investigation of Gorman's

66. *Id*.
67. *Id*. at 149 ("BB&T contends that reporting a debt without reporting its disputed nature can *never* be deemed inaccurate as a matter of law.").
68. *Id*. at 150.
69. *Id*. at 148 (citing Dalton v. Capital Associated Indus., Inc., 257 F.3d 409, 415 (4th Cir. 2001)).
70. *Id*.
71. *Id*. at 151. The court also stated that "[c]ertainly, if a consumer has a meritorious dispute . . . the consumer's failure to pay the debt does not reflect financial irresponsibility," thereby implying that failure to report a "meritorious dispute" would result in reporting of incomplete or inaccurate information. *Id*. at 150.
72. 552 F.3d 1008 (9th Cir. 2009).
73. *Id*. at 1011.
74. *Id*. at 1011–12.
75. *Id*. at 1012.
76. *Id*.
77. *Id*.
78. *Id*.
79. *Id*. at 1013.
80. *Id*.
81. *Id*. at 1025.
82. *Id*. at 1022–23.

dispute in detail and concluded that the investigation was reasonable,[83] it also held that failing to report a debt as disputed could be misleading insofar as it "could materially alter how the reported debt is understood."[84] The court noted, however, that "reporting an *actual* debt without noting that it is disputed is unlikely to be materially misleading," and that it is only the failure to report a "bona fide dispute" that gives rises to liability under § 1681s-2(b)(1)(E).[85] Thus, the consumer still must "convince the finder of fact that the omission of the dispute was misleading in such a way and to such an extent that it can be expected to have an adverse effect" on the consumer's credit rating.[86]

Analysis of the *Saunders* and *Gorman* Decisions

The conclusion in *Saunders* and *Gorman* that it is only the failure to report a "bona fide" or "meritorious" dispute that violates the FCRA, even after, as in *Gorman*, a reasonable investigation of the disputed information has been conducted, presents an additional question: if a furnisher conducts a reasonable investigation, concludes that the information is being reported correctly, and therefore has concluded that the dispute has no merit, is it required to second-guess its own determination by reporting the information as "disputed"? Taken at face value, these decisions put furnishers in the difficult position of having to determine whether a dispute may be deemed to have "merit" even if their own thorough investigation has concluded that the dispute is meritless.

In addition, neither of the courts recognized that the FCRA already requires furnishers to report accounts as "disputed,"[87] but that Congress explicitly declined to provide consumers with the right to enforce that provision privately.[88] By permitting consumers to sue furnishers for the failure to report an account as "disputed" under § 1681s-2(b)(1)(E), the courts are importing into the FCRA a private cause of action that Congress expressly did not include in the statute.

Moreover, neither decision recognizes the futility of requiring a furnisher to report an account as having been "disputed" under these circumstances. In both *Saunders* and *Gorman*, the plaintiff had disputed information in his consumer report to the consumer reporting agency, and the consumer reporting agency had forwarded the dispute to the creditor for investigation.[89] Thus, these decisions appear to require furnishers to report back the fact of the dispute to the consumer reporting agency from which the furnishers received notice of the dispute in the first place. Moreover, consumers may accomplish this same objective by exercis-

83. *Id.* at 1017–21 (stating that the bank had "review[ed] all the pertinent records in its possession . . . [and] contacted both Gorman and the merchant. Thus . . . [the bank had] gone outside its own records to investigate the allegations contained in the [consumer reporting agency] notice, and on reading the notice, did consult the relevant information in its possession.").

84. *Id.* at 1023.

85. *Id.* (emphasis added).

86. *Id.* (internal quotation marks omitted).

87. FCRA § 623, 15 U.S.C. § 1681s-2(a)(3) (2006).

88. *Id.* § 623, 15 U.S.C. § 1681s-2(c)(1) (2006).

89. *Gorman*, 552 F.3d at 1012; *Saunders*, 526 F.3d at 146.

ing their FCRA rights to add a statement to their consumer report indicating that information disputed to a consumer reporting agency remains disputed.[90]

Last, both the *Saunders* and *Gorman* courts stated that any other holding would be tantamount to a ruling that the failure to report a dispute would never be deemed incomplete or inaccurate,[91] and that such a ruling would chill bona fide disputes and result in consumers paying disputed debts to avoid negative effects to their credit ratings.[92] This reasoning, however, ignores the fact that, where a dispute has merit and the furnisher conducts a reasonable investigation of the disputed information as required by the FCRA, the dispute may very well be (and, in most instances, *should* be) resolved in the consumer's favor. Said another way, consumers do not dispute information in consumer reports that they believe to be inaccurate simply to have the information marked as "disputed" by the furnisher; rather, they dispute such information to correct the perceived inaccuracy.

Preemption of State Restrictions on the Sharing of Information Among Affiliates

The FCRA expressly preempts state restrictions on the sharing of information among affiliated companies: "No requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control."[93] In 2003, the State of California enacted the California Financial Information Privacy Act ("CFIPA"),[94] which provides that "[a] financial institution shall not disclose to, or share a consumer's nonpublic personal information with, an affiliate unless the financial institution" has notified the consumer and provided an opportunity to opt out of the disclosure.[95] Prior to the July 1, 2004, effective date of this requirement, a group of financial services trade associations sued the Attorney General of California to enjoin his enforcement of the affiliate-sharing provisions of the CFIPA, arguing that they are expressly preempted by the FCRA.[96] Following a long and tortuous procedural history, including two separate remands to the trial court, the case was ultimately decided last year, when the U.S. Supreme Court denied the plaintiff trade associations' petition for certiorari.[97]

Despite the ostensibly broad language of the FCRA's preemption provision, which states that no state may impose a restriction on the sharing of *information*

90. *See* FCRA § 611, 15 U.S.C. § 1681i(b) (2006) (permitting consumers to add a dispute statement to their consumer report).

91. *See Gorman*, 552 F.3d at 1023; *Saunders*, 526 F.3d at 150.

92. *See Gorman*, 552 F.3d at 1023.

93. FCRA § 625(b)(2), 15 U.S.C. § 1681t(b)(2) (2006).

94. 2003 Cal. Legis. Serv. ch. 241 (Aug. 28, 2003) (S.B. 1) (West) (codified at Cal. Fin. Code §§ 4050–4060 (West Supp. 2009)).

95. Cal. Fin. Code § 4053(b)(1) (West Supp. 2009).

96. Am. Bankers Ass'n v. Gould, 412 F.3d 1081, 1086 (9th Cir. 2005), *cert. denied sub nom*. Am. Bankers Ass'n v. Brown, 129 S. Ct. 2893 (2009).

97. *See id*.

among affiliated companies,[98] the U.S. Court of Appeals for the Ninth Circuit concluded in this matter that the term "information" encompasses only the information regulated by the FCRA[99]—that is, "consumer report" information, which is defined in 15 U.S.C. § 1681a(d)(1) as information bearing on a consumer's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" (the "seven characteristics") and that is "used or expected to be used or collected . . . for the purpose of serving as a factor in establishing the consumer's eligibility" for credit or insurance, employment, or certain other authorized transactions.[100]

There is, however, some confusion regarding these decisions stemming from the fact that information shared among affiliates generally is excepted from the definition of "consumer report." Specifically, pursuant to 15 U.S.C. § 1681a(d)(2), the term "consumer report" does not include (i) information about "transactions and experiences" with a consumer that is shared among affiliates; or (ii) other information disclosed to an affiliate after the consumer has been notified and provided an opportunity to opt out of the disclosure.[101]

Initially, the district court considering this matter held that the California law was *not* preempted by the FCRA, reasoning that the FCRA regulates "consumer reports" and the information shared among affiliated persons is excepted from the definition of "consumer report."[102] This decision was reversed by the court of appeals, which held that the CFIPA is preempted to the extent that it restricts sharing among affiliates of "the *sort* of information described in the definition of 'consumer report'"—that is, the type or class of information that bears on the seven characteristics and that is used to make credit, employment, insurance, or similar decisions about consumers.[103] The court of appeals remanded the case to the district court to determine the precise scope of this preemption.[104]

On remand, the district court held that the CFIPA affiliate-sharing provisions are *completely* preempted by the FCRA.[105] The court stated that "virtually all" information bears on the seven characteristics, and, while not all information may actually be used for eligibility purposes, as a practical matter "it would be virtually impossible to ascertain in advance whether or not information collected and shared by a financial institution would satisfy an FCRA authorized purpose."[106] Thus, to hold that the CFIPA is preempted only to the extent that it seeks to regulate information shared among affiliates that is used, expected to be used, or collected for an eligibility purpose would put financial institutions in the "untenable situation" of

98. FCRA § 625(b)(2), 15 U.S.C. § 1681t(b)(2) (2006).
99. *Gould*, 412 F.3d at 1086.
100. 15 U.S.C. § 1681a(d) (2006).
101. *Id.* § 1681a(d)(2)(A).
102. Am. Bankers Ass'n v. Lockyer, No. S 04-0778 MCE KJ, 2004 WL 1490432, at *4 (E.D. Cal. June 30, 2004).
103. *See Gould*, 412 F.3d at 1086–87 (emphasis added).
104. *Id.* at 1087.
105. Am. Bankers Ass'n v. Lockyer, No. S04-0778 MCE KJM, 2005 WL 2452798, at *4 (E.D. Cal. Oct. 5, 2005).
106. *Id.* at *3.

violating the CFIPA if the information shared among affiliates is not eventually used for an eligibility purpose.[107] The district court also stated that, even if the CFIPA affiliate-sharing provisions are not completely preempted by the FCRA, the court would be unable to sever the offending portion of the requirement from the rest of the law, insofar as reforming the California statute to cure the constitutional infirmity would be "legislative work beyond the power and function of the court."[108]

The court of appeals *again* reversed the lower court.[109] The court of appeals held first that the CFIPA "has non-preempted applications," but did not elaborate on what those applications might be, stating only that plaintiff trade associations "concede" that the class of information governed by the CFIPA "indisputably includes both federally protected and unprotected information."[110] The court of appeals also held that the preempted applications of the law are able to be severed, and that the non-preempted applications should survive.[111] The court then took it upon itself to "narrow the affiliate-sharing provision of [the CFIPA] to exclude the regulation of consumer report information as defined by the FCRA, 15 U.S.C. [§] 1681a(d)(1)."[112] The defendant trade associations then petitioned the Supreme Court for a writ of certiorari, which was denied.[113]

Following these decisions, questions remain about how much of the CFIPA is preempted by the FCRA. Specifically, is the CFIPA preempted only to the extent that it purports to regulate the sharing of "consumer reports," strictly defined, or is it preempted to the extent that it regulates the "sort" of information regulated by the FCRA? If the former, then virtually none of the CFIPA is preempted, because, as noted above, 15 U.S.C. § 1681a(d)(2) largely excludes information shared among affiliates from the definition of "consumer report."[114] If the latter, however, then virtually all of the CFIPA is preempted, except to the extent that the CFIPA might apply to that very narrow class of information that does not bear on the seven characteristics and can never be used for eligibility.[115]

107. *Id.*

108. *Id.* at *4.

109. Am. Bankers Ass'n v. Lockyer, 541 F.3d 1214 (9th Cir. 2008), *cert. denied sub nom.* Am. Bankers Ass'n v. Brown, 129 S. Ct. 2893 (2009).

110. *Id.* at 1216 & n.4 (quoting defendants' brief).

111. *Id.* at 1218.

112. *Id.* (internal citation omitted).

113. *See supra* note 109.

114. *See supra* note 102 and accompanying text.

115. For example, identifying information by itself, such as the consumer's name or Social Security number, does not bear on the seven characteristics and is not used to determine eligibility. *See* Individual Reference Servs. Group, Inc. v. FTC, 145 F. Supp. 2d 6, 17 (D.D.C. 2001) (holding that the name, address, telephone number, and Social Security number do not bear on the seven characteristics), *aff'd sub nom.* Trans Union, LLC v. FTC, 295 F.3d 42 (D.C. Cir. 2002); *In re* Trans Union Corp., No. 9255, 2000 FTC LEXIS 23, at *71 (Feb. 10, 2000) (final order) (stating that the name, Social Security number, and telephone number of the consumer are not subject to the FCRA because they "[do] not . . . bear on creditworthiness, credit capacity, credit standing, character, general reputation, personal characteristics, or mode of living, unless such terms are given an impermissibly broad meaning").

It appears that the latter interpretation should prevail. In its first decision, the court of appeals stated that the CFIPA was preempted from regulating the "sort of information" covered by the FCRA; the court of appeals did not reverse the lower court's finding that the class of information covered by the FCRA is very broad. Most critically, the court of appeals held that the CFIPA is preempted to the extent that it purports to regulate "consumer report information as defined by the FCRA, 15 U.S.C. [§] 1681a(d)(1),"[116] thereby omitting any reference to the affiliate-sharing exceptions in 15 U.S.C. § 1681a(d)(2).

Update on Constitutionality of the FCRA Statutory Damages Scheme

The FCRA provides for statutory damages of "not less than $100 and not more than $1,000."[117] Last year's *Annual Survey* highlighted an opinion in which the U.S. District Court for the Northern District of Alabama found the FCRA's statutory damages provision to be unconstitutionally vague on its face and unconstitutionally excessive both on its face and as applied to the defendants.[118] In April 2009, the U.S. Court of Appeals for the Eleventh Circuit reversed that opinion in *Harris v. Mexican Specialty Foods, Inc*.[119] The Eleventh Circuit concluded that because any challenge to the FCRA's statutory damages scheme "as applied" was not ripe for consideration, the district court lacked jurisdiction to rule on the constitutionality of statutory damages "as applied."[120] Although it dismissed the "as applied" finding on procedural grounds, the Eleventh Circuit reviewed the substance of the facial challenges.[121] The court held that the FCRA statutory damages provision is not unconstitutionally vague because (i) the statute places potential defendants on notice of the conduct that violates the FCRA and the consequences thereof; and (ii) the narrow range of statutory damages "does not provide so much discretion to juries as to render their verdicts 'arbitrary.'"[122] The Eleventh Circuit also rejected the district court's conclusion that FCRA statutory damages are facially excessive.[123] The Eleventh Circuit opined that an "excessiveness" analysis was not proper because statutory damages are not punitive in nature and, even if they were, would not be excessive in every possible application as would be required to reach the conclusion that the damages scheme is unconstitutionally excessive on its face.[124]

116. *Lockyer*, 541 F.3d at 1218.
117. FCRA § 616(a)(1)(A), 15 U.S.C.A. § 1681n(a)(1)(A) (West 2009).
118. *See* Peter L. McCorkell & Andrew M. Smith, *Fair Credit Reporting Act Update—2008*, 64 Bus. Law. 579, 590–91 (2009) (discussing Grimes v. Rave Motion Pictures Birmingham, L.L.C., 552 F. Supp. 2d 1302 (N.D. Ala. 2008)).
119. 564 F.3d 1301 (11th Cir. 2009).
120. *Id.* at 1308–10.
121. *Id.* at 1310–13.
122. *Id.* at 1310–12 (citing U.S. v. Batchelder, 442 U.S. 114, 115 (1979)); F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 232 (1952)).
123. *Id.* at 1312–13.
124. *Id.*

Legislative Developments

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "CARD Act")[125] amended the FCRA with respect to the marketing of credit reports to consumers and the marketing of prescreened offers of credit and insurance to consumers under twenty-one years of age.[126] The effective date of the amendments is February 22, 2010, or nine months after the date of their enactment.[127]

The CARD Act amended 15 U.S.C. § 1681j to add a section to the FCRA regarding the marketing of consumer reports.[128] Under revised § 1681j, advertisements for free consumer reports must disclose prominently that free consumer reports are available under federal law at www.annualcreditreport.com or any other source that is authorized under federal law.[129] Television and radio advertisements for free consumer reports need not disclose that free consumer reports are available at www.annualcreditreport.com but, rather, must disclose that "[t]his is not the free credit report provided for by Federal law."[130] These disclosures must be included in both the visual and audio parts of the advertisement.[131]

The FTC is required to issue a final rule to implement the § 1681j amendments within nine months after the enactment of the CARD Act.[132] This rule will provide specific wording to be used in the required disclosures and will address internet advertisements.[133] The FTC issued a proposed rule on October 15, 2009.[134] If an advertisement is issued after the law's effective date but before the FTC's rule is finalized, the advertisement must include the disclosure: "Free credit reports are available under Federal law at: 'AnnualCreditReport.com.'"[135] The CARD Act does not specify whether television and radio advertisements, which are expressly exempted from the general requirement to disclose that free consumer reports are available at www.annualcreditreport.com, must include this interim disclosure.

The CARD Act also amended the "prescreening" provisions of the FCRA to permit a consumer reporting agency to provide consumer report information in connection with a prescreened offer of credit or insurance only if "the consumer report does not contain a date of birth that shows that the consumer has not

125. Pub. L. No. 111-24, 123 Stat. 1734 (2009) (codified in scattered sections of 15 U.S.C.) [hereinafter CARD Act]. *See also* Rick Fischer, Daniel Laudicina & Obrea Poindexter, *The New Credit Card Rules*, 65 Bus. Law. 537 (2010) (in this *Annual Survey*).

126. CARD Act, *supra* note 125, § 301, 123 Stat. at 1747–48.

127. *Id.* § 3, 123 Stat. at 1735. The date of enactment was May 22, 2009. *Id.*, 123 Stat. at 1734.

128. *Id.* § 205, 123 Stat. at 1747 (codified at 15 U.S.C.A. § 1681j (West 2009)).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Free Annual File Disclosures Amendments to Rule to Prevent Deceptive Marketing of Credit Reports and to Ensure Access to Free Annual File Disclosures, 74 Fed. Reg. 52915 (Proposed Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 610).

135. CARD Act, *supra* note 125, § 302, 123 Stat. at 1748 (codified at 15 U.S.C.A. § 1681b(c)(1)(B)(iv) (West 2009)).

attained the age of 21."[136] However, the CARD Act expressly permits a consumer reporting agency to provide such information with respect to a consumer under twenty-one years of age where "such consumer consents to the consumer reporting agency to such furnishing."[137] The CARD Act also permits a consumer reporting agency to provide consumer report information in connection with a prescreened offer of credit or insurance where the consumer report does not contain any date of birth.[138]

136. *Id.*

137. *Id.*

138. *Id.* An earlier version of this same legislation would have permitted a consumer reporting agency to furnish information in connection with a prescreened offer of credit or insurance only where the "consumer report indicates that the consumer is age 21 or older." Credit Card Accountability Responsibility and Disclosure Act of 2009, S. 414, 111th Cong. § 303. Congress could have enacted this earlier provision, which would have prohibited the furnishing of consumer report information where there was no date of birth in the consumer report, but expressly chose not to do so.