

# Fair Credit Reporting Act Update—2013

By Andrew M. Smith and Peter Gilbert\*

## INTRODUCTION

As reported in last year's *Annual Survey*,<sup>1</sup> the Bureau of Consumer Financial Protection ("CFPB") has begun its examination and supervision of consumer reporting agencies. This year, the CFPB and the Federal Trade Commission ("FTC") issued heavily publicized reports detailing consumer reporting practices and the accuracy of information in consumer reports, obtained record civil penalties in key enforcement actions under the Fair Credit Reporting Act ("FCRA"),<sup>2</sup> and issued several warning letters and guidance bulletins, with a special focus on nationwide specialty consumer reporting agencies and companies that furnish information to consumer reporting agencies. This survey summarizes these regulatory developments.

## CFPB REPORT

In December 2012, the CFPB released a report on the credit reporting infrastructure at the three largest nationwide consumer reporting agencies: Equifax, Experian, and TransUnion.<sup>3</sup> The CFPB consulted "existing reports, industry, and public sources" as background for the report, which focuses on the collection, compiling, and reporting of information about consumers in the form of credit reports.<sup>4</sup> A central theme of the report is the importance of accuracy in credit reports and at least one stated reason for the study is that understanding the credit reporting "ecosystem" is a prerequisite to considering improvements.<sup>5</sup>

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1. Andrew M. Smith & Peter Gilbert, *Fair Credit Reporting Act Update—2012*, 68 *BUS. LAW.* 593 (2013) (in the 2013 *Annual Survey*).

2. Pub. L. No. 91-508, tit. VI, 84 Stat. 1114, 1127-36 (1970) (codified as amended at 15 U.S.C. §§ 1681-1681x (2012)).

3. CONSUMER FIN. PROT. BUREAU, KEY DIMENSIONS AND PROCESSES IN THE U.S. CREDIT REPORTING SYSTEM: A REVIEW OF HOW THE NATION'S LARGEST CREDIT BUREAUS MANAGE CONSUMER DATA 2 (2012), available at [http://files.consumerfinance.gov/f/201212\\_cfpb\\_credit-reporting-white-paper.pdf](http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf).

4. *Id.*

5. *Id.* at 6 ("An understanding of how this ecosystem operates—including the basic 'plumbing' of data flows, the various participants involved, and the economic incentives each group of participants

Much of the report is devoted to summarizing general information about the credit reporting industry. For example, the report covers the history of credit reporting,<sup>6</sup> the standard file components,<sup>7</sup> the standard reporting format,<sup>8</sup> the process of credit scoring,<sup>9</sup> the roles of furnishers and users,<sup>10</sup> the practice of public record collection,<sup>11</sup> and the processing rules that nationwide consumer reporting agencies employ.<sup>12</sup> The report describes the credit reporting system as immense, with furnishers to the nationwide consumer reporting agencies providing information on “over 1.3 billion active trade lines” per month to each consumer reporting agency,<sup>13</sup> most of them provided by financial institutions.<sup>14</sup> Bank cards represent about 40 percent of the trade lines, with the remaining spread out among bank retail cards, collection accounts, education loans, closed end loans such as automobile loans and mortgages, and other unspecified accounts.<sup>15</sup>

### INACCURACIES

The report identifies three general types of credit report inaccuracies: (1) “[i]nclusion of accounts or records in a credit file that do not belong to the consumer,” (2) exclusion of accounts or records that do belong to the consumer and should be in the credit file, and (3) inaccurate representation of information within a given trade line or record.<sup>16</sup> The report highlights six causes for inaccuracies that are variously attributable to consumer reporting agencies, furnishers of credit data, providers of public records, and consumers themselves: (1) data entry errors attributable to consumers or furnishers, (2) “[b]ureau file matching inaccuracies,” (3) bureau processing errors, (4) identity theft or fraud, (5) process inaccuracies caused by public record providers or furnishers, and (6) the time lag between a transaction and its appearance in a credit file.<sup>17</sup>

### DISPUTES

The report describes the consumer dispute resolution process in detail and provides metrics on dispute rates by furnisher type, account status, and industry.<sup>18</sup> Among the 100 largest furnishers, the rate of disputes is between 0.05 percent

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may bring to their respective roles—is foundational knowledge in considering technical and policy options for improving and assuring credit report accuracy.”).

6. *Id.* at 7.

7. *Id.* at 8–9.

8. *Id.* at 15–17.

9. *Id.* at 10–12.

10. *Id.* at 13–15.

11. *Id.* at 17.

12. *Id.* at 18–20.

13. *Id.* at 14.

14. *Id.*

15. *Id.*

16. *Id.* at 23.

17. *Id.* at 24–26.

18. *Id.* at 31–33.

and 2.0 percent.<sup>19</sup> Records from collection agencies and debt buyers reflect significantly more disputes than records from other industries, and nearly 40 percent of all consumer disputes are linked to collections/debt buyers.<sup>20</sup>

The CFPB acknowledges that consumers have a greater incentive to dispute collections trade lines over trade lines in good standing<sup>21</sup> and highlights that some disputes, especially those encouraged by “certain credit repair organizations,” lack merit.<sup>22</sup> However, the CFPB also attributes the disproportionate number of collections disputes to the “discontinuous nature of consumers’ relationships with debt collectors,” noting that collectors have “limited interest in a long-term relationship with the consumer” and noting that “the collections industry’s data management practices” may compromise accuracy.<sup>23</sup> The report notes that each assignment or sale of bad debt increases the risk of data being “compromised or lost.”<sup>24</sup> Moreover, debt buyers and debt collectors “may lack the original documentation” for the underlying debt, contributing to mistakes.<sup>25</sup>

The report describes how a consumer can initiate a dispute with a consumer reporting agency, after which the consumer reporting agency forwards the dispute to the furnisher and the furnisher investigates and responds to the consumer reporting agency.<sup>26</sup> According to a Consumer Data Industry Association report based upon the responses of furnishers during a 120-day period in 2012, 22 percent of furnishers rejected the consumer’s claim, 61 percent made some modification, “13% deleted a trade line or other piece of information,” and 0.5 percent identified fraud and deleted a trade line.<sup>27</sup> Lastly, 4 percent of disputes resulted in deletion of data because furnishers failed to meet statutory deadlines.<sup>28</sup> The CFPB cautioned that the high percentage of furnishers that modify data in response to disputes is misleading because many furnishers routinely update records with the most current information upon receiving a dispute, regardless of whether the furnisher found any actual inaccuracies.<sup>29</sup>

## FTC ACCURACY REPORT

Also in December 2012, the FTC released its fifth interim report on credit report accuracy,<sup>30</sup> as required by Congress under section 319 of the Fair and

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19. *Id.* at 29 (citing industry figures); see *id.* at 30 fig. 4 (Trade Line Dispute Rates by Furnisher Size).

20. *Id.* at 29 & fig. 3 (Dispute Rates by Industry Type).

21. *Id.* at 29.

22. *Id.* at 30.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 31–32.

27. *Id.* at 33 (discussing the CDIA report).

28. *Id.*

29. *Id.*

30. FED. TRADE COMM’N, REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003 (2012) [hereinafter FTC REPORT], available at <http://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factreport.pdf>.

Accurate Credit Transactions Act of 2003.<sup>31</sup> The study evaluated the accuracy of 1,001 randomly selected voluntary participants' credit reports (2,968 credit reports in total from Equifax, TransUnion, and Experian).<sup>32</sup> Key findings of the study include: 26 percent of the participants identified at least one potentially material error on at least one of their three credit reports; 21 percent had a modification to at least one of their credit reports after disputing their errors; and 13 percent experienced a change in their credit score as a result of these modifications.<sup>33</sup> For 5.2 percent of the participants (2.2 percent of the credit reports), the resulting increase in their score was such that the consumers were likely to be offered lower rates for financial products.<sup>34</sup>

The FTC recruited a representative sample of consumers with credit histories at the three nationwide consumer reporting agencies.<sup>35</sup> Each participant reviewed his or her credit report with a contractor hired by the FTC to help the participants understand the reports and identify potential errors.<sup>36</sup> With the permission of the participants, FICO™ (formally, Fair Isaac Corporation) scored each credit report as it was initially pulled.<sup>37</sup> All credit reports with alleged errors identified by the participants were provisionally rescored by FICO™ as if all of the alleged errors were corrected as requested by the participants.<sup>38</sup> The participants disputed all potential errors through the consumer reporting agency's dispute process.<sup>39</sup> After sufficient time had passed for the dispute process to be completed, participants were provided new credit reports and new FICO scores.<sup>40</sup> The study compared these credit reports and scores to the original reports and scores as well as the provisional scores for the purpose of analyzing the volume and impact to consumers of potential and confirmed material errors.<sup>41</sup> Of the 262 participants who filed a dispute, 37 percent had their disputes fully settled as requested; 42 percent had their credit reports partially modified; and 21 percent had their disputes denied.<sup>42</sup>

As with any study, the significance of the report is subject to interpretation. The FTC issued a press release highlighting that: "One in four consumers identified errors on their credit reports that might affect their credit scores,"<sup>43</sup> referring to the 26 percent that identified at least one potentially material error on at

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31. Pub. L. No. 108-159, § 319, 117 Stat. 1952, 1999 (2003) (codified as amended at 15 U.S.C. § 1681 note (2012)).

32. FTC REPORT, *supra* note 30, at iv, 12.

33. *Id.* at 36 tbl. 4.1 (Data Summary).

34. *Id.* at 47.

35. *Id.* at 12.

36. *Id.* at 12, 18.

37. *Id.* at 12.

38. *Id.* at 12-13.

39. *See id.*

40. *Id.* at 12-13, 19-20.

41. *Id.* at 13, 19-21.

42. *Id.* at 42 tbl. 4.3 (Error Classification of Consumers Given Modification Decisions by CRAs).

43. *See* Press Release, Fed. Trade Comm'n, In FTC Study, Five Percent of Consumers Had Errors on Their Credit Reports that Could Result in Less Favorable Terms for Loans (Feb. 11, 2013), available at <http://www.ftc.gov/opa/2013/02/creditreport.shtm>.

least one of their three credit reports.<sup>44</sup> In contrast, the Consumer Data Industry Association emphasized that “only 2.2 percent of credit reports have an error that would lead to higher-priced credit for the consumer,”<sup>45</sup> referring to 2.2 percent of the credit reports with a correction that resulted in a material increase in the consumer’s score.<sup>46</sup> Apparently, accuracy is in the eye of the beholder.

## NATIONWIDE SPECIALTY CONSUMER REPORTING AGENCIES

As discussed above, the CFPB and FTC have focused enforcement efforts and regulatory guidance on nationwide specialty consumer reporting agencies. “Nationwide specialty consumer reporting agencies” are consumer reporting agencies that compile and maintain files relating to medical payments or medical records, tenant history, check writing history, employment history, or insurance claim history.<sup>47</sup> The FCRA requires nationwide specialty consumer reporting agencies to establish a “streamlined process for consumers to request” a free annual consumer report.<sup>48</sup> This streamlined process must include a toll-free telephone number,<sup>49</sup> which must be posted on the consumer reporting agency’s website and listed in the telephone directory.<sup>50</sup> Nationwide specialty consumer reporting agencies also must implement “reasonable procedures to anticipate, and respond to, the volume of consumers who will” use the streamlined process and must provide consumers with clear instructions on how to request reports.<sup>51</sup>

In November 2012, the CFPB issued a bulletin to nationwide specialty consumer reporting agencies reminding them of their obligations.<sup>52</sup> The CFPB also issued a series of warning letters to nationwide specialty consumer reporting agencies,<sup>53</sup> and it provided a sample of these warning letters that cites several violations of the streamlined process requirement, including failing to provide a toll-free number in the agency’s “Yellow Pages listings and on its Website” so consumers may request a free annual file report; lacking “adequate capacity” to accept consumer disclosure requests; and failing to provide “clear and easily understandable information and instructions to consumers.”<sup>54</sup> This effort ap-

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44. See *supra* note 33 and accompanying text.

45. See Press Release, Consumer Data Indus. Ass’n, CDIA Says “60 Minutes” Story Misleads on Credit Report Accuracy (Feb. 9, 2013), available at <http://www.cdiaonline.org/ConsumerInfo/content.cfm?ItemNumber=11041>.

46. See *supra* note 34 and accompanying text.

47. 15 U.S.C. § 1681a(x) (2012).

48. *Id.* § 1681j(a)(1)(C)(i).

49. *Id.*

50. 12 C.F.R. § 1022.137(a)(1)(ii)–(iii) (2013).

51. *Id.* § 1022.137(b).

52. CFPB BULL. NO. 2012-09 (Nov. 29, 2012), available at [http://files.consumerfinance.gov/f/201211\\_cfpb\\_NSCRA\\_Bulletin.pdf](http://files.consumerfinance.gov/f/201211_cfpb_NSCRA_Bulletin.pdf).

53. Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Issues Warning to Nationwide Specialty Consumer Reporting Agencies (Nov. 29, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-issues-warning-to-nationwide-specialty-consumer-reporting-agencies/>.

54. Form Letter from Kent Marcus, Enforcement Dir., Consumer Fin. Prot. Bureau, to unnamed Nationwide Specialty Consumer Reporting Agency (2012), available at [http://files.consumerfinance.gov/f/201211\\_cfpb\\_NSCRA\\_warning\\_letter.pdf](http://files.consumerfinance.gov/f/201211_cfpb_NSCRA_warning_letter.pdf).

pears to be consistent with the CFPB's broader policy goals: the CFPB has repeatedly urged consumers to obtain a free copy of their credit report every year,<sup>55</sup> and it also has made the free credit report requirement a focus of its consumer reporting agency examination manual.<sup>56</sup>

The FTC also was active with respect to nationwide specialty consumer reporting agencies. In August 2013, the FTC settled an enforcement action against Certegy Check Services, Inc. ("Certegy"), a check verification company and consumer reporting agency, requiring Certegy to pay \$3.5 million for FCRA violations.<sup>57</sup> This settlement is the FTC's second-largest FCRA fine, after its \$10 million settlement with ChoicePoint Inc. in 2006.<sup>58</sup> The FTC alleged that Certegy is a nationwide specialty consumer reporting agency that failed to have a streamlined process to allow consumers to obtain free file disclosures.<sup>59</sup> More specifically, the FTC claimed that Certegy "require[d] consumers to submit more information than is reasonably necessary to properly identify the consumers before Certegy provide[d] their annual file disclosures."<sup>60</sup> The FTC's complaint, however, did not specify what information Certegy required consumers to provide nor what information is "reasonably necessary" to authenticate a consumer. Authentication of consumers requesting free consumer reports can be challenging, as demonstrated by a widely publicized security failure at AnnualCreditReport.com, a website maintained by the three nationwide consumer reporting agencies (Equifax, Experian, and TransUnion), where hackers obtained consumer report information for Michelle Obama, Mitt Romney, Tiger Woods, and other celebrities.<sup>61</sup> The FTC did not address this incident or the difficulties of authentication in its action against Certegy. The FTC also alleged in its enforcement action that Certegy failed to investigate consumer disputes adequately, and it failed to have the proper written procedures in place for information that Certegy furnished to consumer reporting agencies.<sup>62</sup>

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55. See, e.g., *How Often Can I Request a Free Credit Report?*, CONSUMER FIN. PROT. BUREAU (Oct. 21, 2013), <http://www.consumerfinance.gov/askcfpb/1267/how-often-can-i-request-free-credit-report.html>.

56. See CONSUMER FIN. PROT. BUREAU, CFPB EXAMINATION PROCEDURES: CONSUMER REPORTING LARGER PARTICIPANTS 20 (2012), available at [http://files.consumerfinance.gov/f/201209\\_cfpb\\_Consumer\\_Reporting\\_Examination\\_Procedures.pdf](http://files.consumerfinance.gov/f/201209_cfpb_Consumer_Reporting_Examination_Procedures.pdf).

57. See Press Release, Fed. Trade Comm'n, Certegy Check Services to Pay \$3.5 Million for Alleged Violations of the Fair Credit Reporting Act and Furnisher Rule (Aug. 15, 2013), available at <http://www.ftc.gov/opa/2013/08/certegy.shtm>.

58. See *id.* (noting that "Penalty is Second-Largest in a Fair Credit Reporting Act Matter"); see also Stipulated Final Judgment and Order for Civil Penalties, Permanent Injunction, and Other Equitable Relief at 4, *United States v. ChoicePoint Inc.*, No. 1:06-CV-0198 (N.D. Ga. Feb. 15, 2006), available at <http://www.ftc.gov/sites/default/files/documents/cases/2006/01/stipfinaljudgement.pdf>.

59. See Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief at 5, 10–11, *United States v. Certegy Check Servs., Inc.*, No. 1:13-cv-01247 (D.D.C. Aug. 15, 2013) [hereinafter Certegy Complaint], available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/08/130815certegycmpt.pdf>.

60. *Id.* at 10.

61. See Matthew J. Schwartz, *Celeb Data Breach Traced to Credit Reporting Site*, INFO.WEEK (Mar. 13, 2013, 2:34 PM), <http://www.informationweek.com/security/attacks/celeb-data-breach-traced-to-credit-repor/240150730>.

62. See Certegy Complaint, *supra* note 59, at 8–10 (alleging violations regarding investigations of disputed information), 11 (alleging violations regarding furnisher policies).

In August 2012, the FTC announced a \$2.6 million settlement with HireRight Solutions, Inc. (“HireRight”), another nationwide specialty consumer reporting agency.<sup>63</sup> HireRight is an employment background screening company that prepares consumer reports containing information about prospective and current employees to help employers make decisions about hiring and other employment-related issues.<sup>64</sup> The FTC alleged that HireRight failed to update criminal records in a timely way and that consumers applying for jobs were not hired as a result of HireRight’s errors.<sup>65</sup> For example, in some cases a criminal conviction had been expunged but the expungement was not reflected in HireRight’s background report.<sup>66</sup> The FTC charged HireRight with violating the FCRA’s accuracy, dispute reinvestigation, and file disclosure requirements, as well as failing to have employment background screeners notify consumers before they produced a report containing derogatory public record information, like criminal convictions, bankruptcies, or tax liens.<sup>67</sup>

In April 2013, the FTC also settled an administrative enforcement action with Filiquarian Publishing, LLC (“Filiquarian”),<sup>68</sup> which operated a series of mobile applications that it advertised companies could use to conduct a “quick criminal background check for convictions” in specific states.<sup>69</sup> The FTC alleged that users of Filiquarian’s mobile applications could conduct a search on potential employees, and that Filiquarian effectively operated as a nationwide specialty consumer reporting agency without complying with the FCRA.<sup>70</sup>

The FTC also has sent warning letters to a variety of companies, like Filiquarian, that operate websites or mobile applications that allow landlords, employers, and other businesses to access information about prospective tenants, prospective employees, or other individuals with whom the businesses are contemplating engaging in a transaction.<sup>71</sup> These warning letters have indicated that these companies may be operating as consumer reporting agencies or as nationwide specialty consumer reporting agencies, with substantial obligations under the FCRA.<sup>72</sup>

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63. See Press Release, Fed. Trade Comm’n, Employment Background Screening Company to Pay \$2.6 Million Penalty for Multiple Violations of the Fair Credit Reporting Act (Aug. 8, 2012), available at <http://www.ftc.gov/opa/2012/08/hireright.shtm>.

64. *Id.*

65. *Id.*

66. *Id.*

67. See *id.*

68. See *In re Filiquarian Publ’g, LLC*, No. C-4401, slip op. at 1–6 (Apr. 30, 2013) (decision and order), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/05/130501filquariando.pdf>.

69. Complaint at 2, *In re Filiquarian Publ’g, LLC*, No. C-4401 (Apr. 30, 2013), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/05/130501filquariancmpt.pdf>.

70. *Id.* at 3–5.

71. See Press Release, Fed. Trade Comm’n, FTC Warns Data Brokers that Provide Tenant Rental Histories They May Be Subject to Fair Credit Reporting Act (Apr. 3, 2013) [hereinafter Tenant Press Release], available at <http://www.ftc.gov/opa/2013/04/tenant.shtm>; Press Release, Fed. Trade Comm’n, FTC Warns Data Broker Operations of Possible Privacy Violations (May 7, 2013), available at <http://www.ftc.gov/opa/2013/05/databroker.shtm>.

72. Tenant Press Release, *supra* note 71; see, e.g., Form Letter from Maneesha Mithal, Assoc. Dir., Div. of Privacy & Identity Prot., Fed. Trade Comm’n, to unnamed Credit Reporting Agency (Mar. 13, 2013), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-warns-data>.

To date, the FTC has issued warning letters to the operators of a number of websites that share information about consumers' rental histories with landlords;<sup>73</sup> companies that appeared to offer consumer information for use in making insurance decisions;<sup>74</sup> and companies that appeared to offer consumer information for employment purposes.<sup>75</sup>

## DATA FURNISHING

The CFPB also has been focused on issues related to the furnishing of information to consumer reporting agencies. Companies that provide information about their customers or accounts to consumer reporting agencies, called "furnishers" or "furnishers of information" under the FCRA,<sup>76</sup> have important obligations to ensure that the information they provide to consumer reporting agencies is accurate.<sup>77</sup> In addition, furnishers are required to provide certain information with respect to the accounts or customers that they report to consumer reporting agencies. For example, if a consumer has voluntarily closed an account on which information is furnished to a consumer reporting agency,<sup>78</sup> or has disputed derogatory information with respect to such an account,<sup>79</sup> the furnisher must notify the consumer reporting agency of those facts.<sup>80</sup>

In October 2012, the CFPB and the FDIC, in a joint enforcement action, announced a settlement with American Express Centurion Bank, American Express Bank, FSB, and American Express Travel Related Services Company, Inc. (collectively, "American Express") over allegedly illegal credit card practices.<sup>81</sup> Among other things, American Express allegedly failed to report customer dis-

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brokers-provide-tenant-rental-histories-they-may-be-subject-fair-credit-reporting-act/130403tenantblacklistingletter.pdf.

73. See Tenant Press Release, *supra* note 71.

74. See, e.g., Letter from Maneesha Mithal, Assoc. Dir., Div. of Privacy & Identity Prot., Fed. Trade Comm'n, to Jeff Herdzina, US Data Corp. (May 2, 2013), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-warns-data-broker-operations-possible-privacy-violations/130507databrokersusdata.pdf>.

75. See, e.g., Letter from Maneesha Mithal, Assoc. Dir., Div. of Privacy & Identity Prot., Fed. Trade Comm'n, to Alan Aronoff, U.S. Info. Search (May 2, 2013), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-warns-data-broker-operations-possible-privacy-violations/130507databrokersusinfo.pdf>.

76. See 15 U.S.C. § 1681s-2 (2012).

77. *Id.* § 1681s-2(e) (requiring the establishment of written procedures to ensure the accuracy and integrity of furnished information).

78. *Id.* § 1681s-2(a)(4) (imposing duty to provide notice of closed account).

79. *Id.* § 1681s-2(a)(3) (imposing duty to provide notice of dispute).

80. *Id.* § 1681s-2(a)(3)-(4).

81. See Joint Consent Order, Joint Order for Restitution, and Joint Order to Pay Civil Money Penalty, Am. Express Centurion Bank, No. 2012-CFPB-0002 (Oct. 1, 2012) [hereinafter AE Centurion Bank Consent Order], available at <http://files.consumerfinance.gov/f/2012-CFPB-0002-American-Express-Centurion-Consent-Order.pdf>; Consent Order, Order for Restitution, and Order to Pay Civil Money Penalty, Am. Express Bank, FSB, No. 2012-CFPB-0003 (Oct. 1, 2012), available at <http://files.consumerfinance.gov/f/2012-CFPB-0003-American-Express-Bank-FSB-Consent-Order.pdf>; Consent Order, Order for Restitution, and Order to Pay Civil Money Penalty, Am. Express Travel Related Servs. Co., No. 2012-CFPB-0004 (Oct. 1, 2012), available at <http://files.consumerfinance.gov/f/2012-CFPB-0004-American-Express-Travel-Related-Services-Company-Inc.-Consent-Order.pdf>.

putes to consumer reporting agencies,<sup>82</sup> in violation of section 623(a)(3) of the FCRA.<sup>83</sup> The CFPB specifically found that American Express:

created a system that failed to report to [consumer reporting agencies] when a consumer disputed information. Depending on [American Express’s] investigation of the dispute, [American Express] either asked the [consumer reporting agencies] to delete the information, or [American Express] reported the information to the [consumer reporting agencies] without indicating the dispute in violation of FCRA.<sup>84</sup>

These findings are puzzling. The statute requires that furnishers notify consumer reporting agencies when information that has been furnished “is disputed” by the subject consumer—that is, the statute uses the present tense.<sup>85</sup> Once the investigation is completed and the dispute has been resolved, the information presumably is no longer in dispute. For example, if the investigation is completed and the disputed information is deleted, or the dispute is otherwise resolved in the consumer’s favor, it makes no sense to require the furnisher to continue to report that the information “is disputed.”<sup>86</sup> Where the consumer disagrees with the result of the investigation, the FCRA includes special provisions that allow the consumer to place in his or her file a statement explaining the nature of the dispute,<sup>87</sup> and it requires the consumer reporting agency to include that statement in any subsequent consumer report.<sup>88</sup>

Based on the language of the CFPB’s consent order, it appears that, when a consumer informed American Express that she disputed information, American Express conducted an investigation and either “delete[d] the information, or . . . reported the information to the [consumer reporting agencies] without indicating the dispute.”<sup>89</sup> There is no recognition by the CFPB that, following completion of an investigation, the information may no longer be disputed. Nor does the CFPB mention that, where the disputed information is again reported to the consumer reporting agencies following completion of the investigation by American Express, and the consumer disagrees with the results of the investigation, the consumer can either dispute the information again or provide the consumer reporting agency with the statement for the consumer’s file.<sup>90</sup>

82. AE Centurion Bank Consent Order, *supra* note 81, at 4.

83. 15 U.S.C. § 1681s-2(a)(3) (2012) (imposing duty to provide notices of dispute).

84. AE Centurion Bank Consent Order, *supra* note 81, at 4.

85. See 15 U.S.C. § 1681s-2(a)(3) (“If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is *disputed* to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is *disputed* by the consumer.” (emphases added)).

86. *Cf. Llewellyn v. Allstate Home Loans, Inc.*, 711 F.3d 1173, 1189 (10th Cir. 2013) (holding that “a debt collector does not have an affirmative duty to notify CRAs that a consumer disputes the debt *unless* the debt collector knows of the dispute and elects to report it to a CRA”).

87. 15 U.S.C. § 1681i(b) (2012) (“If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute.”).

88. *Id.* § 1681i(c).

89. AE Centurion Bank Consent Order, *supra* note 81, at 4.

90. 15 U.S.C. § 1681i(b) (2012) (“If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute.”); *id.* § 1681s-2(a)(8)(A) (referencing

In its enforcement action against American Express, the CFPB also found that the company told consumers that paying old debts would improve their consumer reports, when in fact many of the debts were no longer being reported to the consumer reporting agencies.<sup>91</sup> In July 2013, the CFPB expanded this aspect of its enforcement action against American Express and issued a bulletin warning companies that furnish information about their customers or accounts to consumer reporting agencies not to misrepresent to consumers the effect of payment on the consumers' credit scores.<sup>92</sup> Specifically, the CFPB warned companies against the following: statements that repayment will have a positive effect on a consumer's credit report, particularly where the company does not furnish information to a credit reporting agency or the debt is beyond the seven-year limit in the FCRA when derogatory information generally cannot remain in a consumer report;<sup>93</sup> statements that repayment will improve a consumer's credit score;<sup>94</sup> and statements that repayment will improve a consumer's creditworthiness or that the consumer will subsequently receive credit as a result of repayment.<sup>95</sup> The CFPB, however, seems to introduce some uncertainty into its bright line example by cautioning companies from making any "representations about the nature or extent of improved creditworthiness."<sup>96</sup>

## CONCLUSION

In a policy speech in early 2013, CFPB Director Cordray identified four types of problems on which the CFPB will focus its rulemaking, supervision, and enforcement efforts in the coming years.<sup>97</sup> The consumer credit reporting industry may pose problems because "the paying business relationship lies between the credit reporting firm and a third party that is interested in evaluating the risks of offering credit to consumers."<sup>98</sup> Director Cordray argued that "consum-

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regulations "under which a furnisher shall be required to reinvestigate a dispute concerning the accuracy of information contained in a consumer report").

91. See AE Centurion Bank Consent Order, *supra* note 81, at 3.

92. See CFPB BULL. NO. 2013-08 (Fair Debt Collection Practices Act and the Dodd-Frank Act) (July 10, 2013) [hereinafter CREDIT REPORTS AND SCORES], available at [http://files.consumerfinance.gov/f/201307\\_cfpb\\_bulletin\\_collections-consumer-credit.pdf](http://files.consumerfinance.gov/f/201307_cfpb_bulletin_collections-consumer-credit.pdf).

93. *Id.* at 2. The FCRA generally prohibits derogatory information more than seven years old from being included in a consumer report. See 15 U.S.C. § 1681c(a) (2012).

94. CREDIT REPORTS AND SCORES, *supra* note 92, at 2-3.

95. *Id.* at 3.

96. *Id.*

97. See Richard Cordray, Dir., Consumer Fin. Prot. Bureau, Remarks at a Consumer Advisory Board Meeting (Feb. 20, 2013), available at <http://www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray-at-a-consumer-advisory-board-meeting/> (1. The "deceptive and misleading marketing of consumer financial products and services"; 2. The "existence of debt traps"; 3. "[I]n certain important markets . . . , [consumers] are unable to choose their providers of financial products or services . . . ; their clout is limited"; and 4. The "evil of discrimination").

98. *Id.*

ers have no real say in such decisions and their interests are an afterthought at best,” because the industry may have a high tolerance for inaccurate reports, which may be viewed as “no more than a statistic.”<sup>99</sup> Director Cordray has reiterated this point on several occasions,<sup>100</sup> and he has made it clear that consumer reporting will continue to be a major priority of the CFPB.

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99. *Id.*

100. See Rachel Witkowski, *CFPB’s Cordray on Senate Confirmation, QM and Future Challenges*, AM. BANKER (Aug. 19, 2013, 6:15 PM), [http://www.americanbanker.com/issues/178\\_160/cfpbs-cordray-on-senate-confirmation-qm-and-future-challenges-1061447-1.html](http://www.americanbanker.com/issues/178_160/cfpbs-cordray-on-senate-confirmation-qm-and-future-challenges-1061447-1.html) (stating that the CFPB is focused on consumer reporting and other markets “where the relationship is between two businesses and the customer is almost collateral damage in it”); Richard Cordray, Dir., Consumer Fin. Prot. Bureau, Remarks at a Meeting of the National Association of Attorneys General (Feb. 26, 2013), available at <http://www.consumerfinance.gov/speeches/prepared-remarks-of-richard-cordray-at-a-meeting-of-the-national-association-of-attorneys-general/> (referencing the possible “mistreatment of the consumer, who becomes . . . a kind of ‘bystander’ in the new business relationship”); see also CONSUMER FIN. PROT. BUREAU, CREDIT UNION ADVISORY COUNCIL MINUTES 7 (Mar. 12, 2013), available at [http://files.consumerfinance.gov/f/201303\\_cfpb\\_meetingsummary\\_cuac.pdf](http://files.consumerfinance.gov/f/201303_cfpb_meetingsummary_cuac.pdf) (stating that Director Cordray led a discussion regarding the aforementioned problems).

