

Consumer Reporting (#44, 45, 46, 48, 126, and 1389)

Congress enacted the Fair Credit Reporting Act (“FCRA”) in 1970,¹ and the Dodd-Frank Act transferred rulemaking authority to the Bureau effective July 2011. The Bureau issued a consolidated restatement of the FCRA’s implementing regulation, Regulation V,² but otherwise it has not engaged in significant rulemaking related to consumer reporting. The Taskforce recommends that the Bureau amend Regulation V in various respects and research certain consumer reporting issues, and it recommends that Congress amend the FCRA to address class actions.

Rulemaking and Interpretive Issues

Between 1970 and 2011, the Federal Trade Commission (“FTC”) issued numerous informal interpretations and guidance, including over 400 staff opinion letters and a staff compliance manual. The FTC initially consolidated these in its 1990 FCRA commentary,³ which it was updating when Congress passed the Dodd-Frank Act. To assist the Bureau and the public, the FTC published a compendium of its FCRA interpretations, often referred to as the “40-Year Report,”⁴ that included updates to the 1990 commentary and other staff letters, informal opinions, and rulemakings.

The degree to which the public may rely on the FTC’s interpretations is uncertain. As with the prior 1990 commentary, the interpretations in the 40-Year Report have no binding legal effect, though courts have sometimes cited them as persuasive authority. The Bureau has stated generally that it gives “due consideration” to informal guidance that other agencies issued prior to the Dodd-Frank Act, but that it determines whether to apply such guidance “in light of all relevant factors,” such as the formality of the guidance and its persuasiveness.⁵ The public thus cannot predict reliably which aspects of the 40-Year Report the Bureau or a court may find persuasive. Consequently, consumers may be uncertain of their rights, while furnishers,

¹ 15 U.S.C. §§ 1681–1681x. Congress has amended the FCRA numerous times.

² Bureau of Consumer Fin. Protect., *Fair Credit Reporting (Regulation V)*, 76 Fed. Reg. 79307 (Dec. 21, 2011); Bureau of Consumer Fin. Protect., *Correcting Amendments*, 77 Fed. Reg. 67744 (Nov. 14, 2012); Bureau of Consumer Fin. Protect., *Finalization of Interim Final Rules (Subject to Any Intervening Amendments) Under Consumer Financial Protection Laws*, 81 Fed. Reg. 25323 (Apr. 28, 2016).

³ Fed. Trade Comm’n, *Statement of General Policy or Interpretation; Commentary on the Fair Credit Reporting Act*, 55 Fed. Reg. 18804 (May 4, 1990) (rescinded July 2011).

⁴ Fed. Trade Comm’n, *40 Years of Experience with the Fair Credit Report Act: An FTC Staff Report with Summary of Interpretations*, 2011 WL 3020575 (July 2011), [[HYPERLINK](https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf) “<https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf>”].

⁵ Bureau of Consumer Fin. Protect., *Identification of Enforceable Rules and Orders*, 76 Fed. Reg. 43569, 43570 (July 21, 2011) (“The CFPB will give due consideration to the application of other written guidance, interpretations, and policy statements issued prior to July 21, 2011, by a transferor agency in light of all relevant factors, including: whether the agency had rulemaking authority for the law in question; the formality of the document in question and the weight afforded it by the issuing agency; the persuasiveness of the document; and whether the document conflicts with guidance or interpretations issued by another agency.”).

consumer reporting agencies (“CRAs”), and users of consumer reports may be uncertain of their obligations.

The Taskforce recommends that the Bureau adopt the FTC’s interpretations set forth in the 40-Year Report—specifically, that the Bureau identify the interpretations that it finds persuasive and to which it gives weight, updating them as necessary. Preferably, the Bureau would do so by codifying the interpretations as official commentary to Regulation V. Pending any rulemaking, the Bureau may wish to take an interim measure clarifying the aspects of the FTC’s interpretations on which the public may rely. Such an approach would give the public and courts greater certainty about how the Bureau interprets the FCRA.

When Congress enacted the Dodd-Frank Act, the FTC was also revising the content and model disclosures for the FCRA’s summary of consumer rights,⁶ notice to furnishers of information to CRAs,⁷ and notice to users of consumer reports.⁸ The FTC issued a proposed rule that would have, among other things, added information relating to the then-new Furnisher Direct Dispute Rule, improved the notices’ clarity, and deleted certain information that the FCRA does not require.⁹ However, the FTC did not finalize the rule because its authority transferred to the Bureau. In 2018, the Bureau issued an interim final rule amending the summary of consumer rights to incorporate new statutorily-required language,¹⁰ but it has not generally revised the notices as would have the FTC’s proposal.

The Taskforce recommends that the Bureau engage in rulemaking to update the summary of consumer rights, notice to furnishers, and notice to users. As the FTC observed, adding information about the Furnisher Direct Dispute Rule and revising the language on the notices could improve consumers’ understanding of their rights and furnishers’ and users’ understandings of their duties. It also may be helpful to consider how the language that Congress added to the summary of consumer rights in 2018 interacts with other information on that form. To ensure the revised disclosures’ efficacy, the Bureau should conduct consumer testing of at least the summary of consumer rights, if not all three notices.

The Bureau should also clarify the obligations of CRAs and furnishers when responding to consumer disputes. CRAs and furnishers report that they receive many repeated, frivolous disputes, of which credit repair organizations submit a large portion. But they express reluctance to use the FCRA’s streamlined dispute-response procedures applicable to “frivolous or irrelevant” disputes because of uncertainty about when they have satisfied the requirement to “reasonably determine[]” that a dispute is in fact frivolous or irrelevant.¹¹ Investigating and responding to disputes thus reportedly imposes a greater burden on CRAs and furnishers than may be necessary to comply with the law. It also gives them an incentive respond superficially to disputes—such as removing accurate negative information from a consumer’s file to avoid additional disputes or rejecting a meritorious dispute without sufficient investigation. Either

⁶ FCRA section 609(c) (15 U.S.C. § 1681g(c)).

⁷ FCRA section 607(d)(2) (15 U.S.C. § 1681e(d)).

⁸ *Id.*

⁹ Fed. Trade Comm’n, *Summary of Rights and Notices of Duties Under the Fair Credit Reporting Act*, 75 Fed. Reg. 52655 (Aug. 27, 2010).

¹⁰ Bureau of Consumer Fin. Protect., *Summaries of Rights Under the Fair Credit Reporting Act (Regulation V)*, 83 Fed. Reg. 47027 (Sept. 18, 2018).

¹¹ FCRA section 611(a)(3) (15 U.S.C. § 1681i(a)(3)); 12 C.F.R. § 1022.43(f).

outcome is harmful generally to consumers and the market because it reduces the amount of accurate information available to creditors and other users of consumer reports.

The Bureau should clarify through rulemaking what constitutes a reasonable determination that a dispute is frivolous or irrelevant. In particular, it may be beneficial for the Bureau to identify examples of disputes that are (or are not) frivolous or irrelevant and the steps that CRAs or furnishers must or may take in various factual circumstances. Relatedly, with respect to disputes that are not frivolous or irrelevant, the Bureau should consider clarifying the FCRA's requirement that a CRA or furnisher conduct a "reasonable [re]investigation" of disputed information.¹² Again, the public may benefit from examples of disputes regarding various types of alleged furnishing errors and steps that would (or would not) constitute a reasonable investigation.

Research Issues

In 2003, Congress enacted the Fair and Accurate Credit Transactions Act, which, among other things, required the FTC to conduct a national study of the accuracy and completeness of consumer credit reports. The FTC summarized its findings in a series of six reports; of particular note, its 2012 report addressed findings from the first national study designed to engage all the primary groups that participate in the credit reporting and scoring process.¹³ Stakeholders commonly cite to the 2012 report, including for its finding that 26 percent of study participants identified at least one potentially material error on at least one of their three credit reports.¹⁴

The FTC and the Bureau continue to engage with stakeholders regarding the accuracy of consumer reports,¹⁵ and the Bureau recently announced plans to conduct a follow-up to the FTC's influential 2012 report. The Taskforce wholeheartedly endorses these endeavors because they will add greatly to the Bureau's and the public's knowledge regarding trends in consumer reporting. The study will also inform the public whether improvements made to the CRAs' dispute investigation practices since the 2012 study, such as forwarding documentation provided by consumers as attachments to the disputes submitted to creditors, has had the intended effect of improving accuracy.

The Taskforce recommends that the Bureau update the FTC's 2012 study periodically, so that it can assess how the accuracy and completeness of consumer reports change over time, as well as monitor trends in the types of furnished information. In addition, while the FTC's 2012 study addressed accuracy concerns that existed at the time, the Taskforce recommends that the Bureau also focus on how consistently various types of information are included in consumer reports, in light of the financial system's increasing reliance on new technology and expanded datasets. These studies could provide valuable insight to the consumer reporting market,

¹² FCRA section 611(a)(1)(A) (15 U.S.C. § 1681i(a)(1)(A)); 12 C.F.R. § 1022.43(a).

¹³ Fed. Trade Comm'n, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003* (Dec. 2012), [[HYPERLINK "https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf"](https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf)].

¹⁴ *E.g.*, *id.* at i & App'x D.

¹⁵ For example, the FTC and the Bureau held a joint workshop in 2019 regarding accuracy in consumer reporting. See Fed. Trade Comm'n, *Accuracy in Consumer Reporting Workshop* (Dec. 10, 2019), [[HYPERLINK "https://www.ftc.gov/news-events/events-calendar/accuracy-consumer-reporting-workshop"](https://www.ftc.gov/news-events/events-calendar/accuracy-consumer-reporting-workshop)].

including to the accuracy and completeness of any non-traditional, or alternative, data that may be furnished.

As part of these studies, the Bureau should research consumer reporting issues that arise in connection with a consumer's bankruptcy. Commenters to the Taskforce RFI, as well as the American Bankruptcy Institute's ("ABI") recent Commission on Consumer Bankruptcy, noted that the interplay of the FCRA and the Bankruptcy Code can raise questions about how a creditor complies simultaneously with both laws.¹⁶ The FCRA contains two discrete provisions regarding bankruptcy,¹⁷ but they do not state how a creditor furnishes accurate and complete information about debts owed by consumers who have filed bankruptcy or are co-liable with another person who has filed bankruptcy. The ABI Commission's report identified several specific issues, including examples of potentially inaccurate furnishing or inconsistent reporting methods, though it noted that it had not yet explored whether these are widespread problems. The Commission recommended further study.

The Taskforce echoes the ABI Commission and recommends that the Bureau research issues in consumer reporting related to bankruptcy. In particular, the Bureau should investigate the accuracy and completeness of information furnished regarding debts in bankruptcy and consider whether potential uniform reporting standards are necessary. Depending on the Bureau's findings, it may wish to provide guidance to stakeholders or engage in rulemaking under the FCRA, or Congress may need to amend relevant statutes.

Also as part of the recommended studies, the Bureau should consider researching consumers' use of security freezes. In 2018, Congress enacted the Economic Growth, Regulatory Relief, and Consumer Protection Act ("EGRRCPA"), which prohibited nationwide CRAs from charging a fee to place, remove, or temporarily lift a security freeze. The Taskforce received feedback that some consumers may nonetheless have difficulty placing or removing security freezes, and additional research may help determine whether such issues are pervasive and whether they occur at the CRAs subject to EGRRCPA.

Legislation

The FCRA affords consumers a private right of action and the ability to seek damages for violations. Unlike other consumer protection statutes, however, it does not have any limitations on the class action civil penalties. To promote consistency among consumer protection laws, the Taskforce recommends that Congress amend the FCRA to impose appropriate limits on civil penalties in class actions.

Recommendations:

- 44. *The Bureau should engage in rulemaking to clarify the obligations of CRAs and furnishers with respect to disputes under the FCRA. In particular, the Bureau should provide guidance on when an entity has***

¹⁶ Am. Bankruptcy Inst., *Final Report of the ABI Commission on Consumer Bankruptcy* § 5.05 (2019), [[HYPERLINK "https://consumercommission.abi.org/commission-report"](https://consumercommission.abi.org/commission-report)].

¹⁷ FCRA section 605(a)(1) (providing that consumer reports generally must exclude information about bankruptcy cases that arouse more than ten years before the date of the report), (d)(1) (stating that any consumer report that contains information about a bankruptcy must include the specific chapter of bankruptcy and, if applicable, that the consumer withdrew the bankruptcy case before a final judgment). (15 U.S.C. § 1681c(a)(1), (d)(1).) The FTC's 40-Year Report provides various guidance regarding bankruptcy (see Comments 605(a)(1)-1 through -3, 607(b)-6, and 611(a)-3), but they are limited in scope and, as discussed above, are not binding.

“reasonably determin[e]” that a dispute is frivolous or irrelevant, and it should consider clarifying what constitutes a “reasonable investigation” of disputed information. The Bureau should consider providing examples of conduct that does, and does not, satisfy these standards in various factual circumstances.

- 45.** *The Bureau should engage in rulemaking to codify as Commentary to Regulation V the FTC’s interpretations of the FCRA, which are set forth in the FTC’s 40-Year Report. The Bureau should assess whether any of the interpretations requires updates or revisions.*

~~139.~~ **138.** *The Bureau should engage in rulemaking to update and revise the FCRA’s summary of consumer rights, notice to furnishers of information to CRAs, and notice to users of consumer reports. The Bureau should conduct consumer testing on the summary of consumer rights to ensure its efficacy, and it should consider testing the notices to furnishers and users.*

- 48.** *The Bureau should update periodically the studies of credit reporting errors that the FTC conducted pursuant to the Fair and Accurate Credit Transactions Act. The Bureau’s studies should include a focus on whether consumer reports include all the types of information that they should include, and it should research the nature and scope of any consumer reporting problems that arise in connection with a consumer’s bankruptcy case. The Bureau should consider researching whether consumers are able to obtain and remove security freezes appropriately.*

- 124.** *[The Bureau should research consumer reporting issues that arise in connection with a consumer’s bankruptcy.]*

[Combined with #48.]

- 126.** *Congress should adopt class action civil penalty limitations for FCRA, to bring the FCRA civil liability provision in line with similar laws.*

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