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June 1, 2020

Taskforce on Federal Consumer Financial Law
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

To Whom It May Concern:

Re: Comments in Response to Request for Information to Assist the Taskforce on Federal Consumer Financial Law [Docket No. CFPB-2020-0013]

The Consumer Data Industry Association (“CDIA”) respectfully submits these comments on the Consumer Financial Protection Bureau’s (“CFPB” or “Bureau”) Request for Information to Assist the Taskforce on Federal Consumer Financial Law (“Taskforce”) regarding harmonizing, modernizing, and updating the federal consumer financial laws.

CDIA is the voice of the consumer reporting industry, representing consumer reporting agencies (“CRAs”) including the national consumer reporting agencies (“NCRAs”), regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity, helping ensure fair and safe transactions for consumers, facilitating competition and expanding consumers’ access to financial and other products suited to their unique needs.

CDIA appreciates the opportunity to comment on the Taskforce’s studies regarding how the Bureau may improve:

- the expansion of access to consumer financial products and services;
- the protection and use of consumer data;
- regulations the Bureau writes and enforces;
- federal and state coordination; and
- the market for consumer financial products and services.

Below we suggest several areas in which the CFPB could further the above goals through recommending legislative changes, clarifying or writing new regulations, and altering the Bureau’s own practices and policies. We have focused on areas where the law is antiquated because technology and societal changes have outpaced the law, anti-consumer, overly burdensome for businesses without a corresponding consumer benefit to support that burden, or unclear in a manner in which the Bureau may be able to clarify.

I. Reforming the CFPB Complaints Portal (Question 22)

The data in the complaint portal pertaining to the credit reporting ecosystem has a number of fundamental flaws. We have previously commented on ways the Bureau could improve the complaint portal but have not seen improvement in this regard,¹ including the following recommendations:

- 1) the complaint portal allows consumers to submit disputes about the accuracy or completeness of information as complaints where no dispute was previously submitted to a CRA (“first-look disputes”);
- 2) complaints are often misattributed to CRAs where the complained-of conduct relates to another party in the credit reporting ecosystem, often the furnisher of the data;
- 3) complaints submitted by fraudulent credit repair services are not flagged or segregated; and
- 4) the complaint portal data does not provide appropriate context in the presentation of data pertaining to CRAs.

Each of these flaws results in data that does not, and cannot, “provide consumers with timely and understandable information to help enable them to make responsible financial decisions and to enhance market efficiency and transparency.”²

The CFPB’s complaint portal and the manner in which it makes portal data available are confusing to both consumers and the subjects of complaints, and this confusion hinder users’ ability to have a common understanding of the data’s meaning. In addition, current treatment of “first-look disputes” in the portal is inconsistent with the statutory framework for complaint referrals in Section 611(e) of the FCRA. Without important changes to the complaint portal, the CFPB may be undermining the efficacy and integrity of the FCRA processes that the agency enforces.

The portal should require consumers to pursue the normal dispute process before filing a complaint with the CFPB. Unlike all other industries that are within the CFPB’s purview, CRAs do not have a direct customer relationship with consumers. Rather, CRAs prepare reports based on information that has been provided by lenders or other furnishers or obtained from other sources. Because of the lack of a direct relationship between CRAs and consumers, the FCRA provides a framework for maintaining the accuracy of credit report data by providing a mechanism for consumers to dispute information on their credit reports they believe to be inaccurate with the particular CRA.³ When a consumer has a potential problem with data in their file, the consumer may submit a dispute to the CRA, which in turn is required to investigate the dispute (often by submitting the dispute to the source that supplied the data under dispute), and report on the results to the consumer. This process both allows consumers to correct inaccurate information in their credit report as well as provides safeguards to protect the integrity of the credit report from dubious credit repair activity. CRAs have invested millions of dollars in working with consumers who have questions about the data in their files or who wish to submit disputes under the statutory framework constructed by Congress.

¹ See CDIA Comments in Response to Request for Information Regarding the Consumer Complaint Database: Data Normalization, Docket No.: CFPB-2015-0030 (Aug. 31, 2015).

² Request for Information Regarding the Consumer Complaint Database: Data Normalization (“RFI”), 80 Fed. Reg. 37,237 (June 20, 2015).

³ See 15 U.S.C. § 1681i.

The current portal design conflates disputes, which are subject to an established statutory scheme, with complaints expressing dissatisfaction with a financial product or service, resulting in inflated complaint numbers being attributed to CRAs. The current intake form asks consumers whether they have “disputed the issue with the credit reporting company and received a final response,” but the consumer’s answer to that question does not affect whether the consumer is able to submit a dispute/complaint, nor does it appear that the consumer is required to answer that question before proceeding with his or her dispute/complaint.⁴

In order to provide accurate complaint data associated with the nationwide CRAs and other consumer reporting agencies, the CFPB should work to differentiate disputes. This differentiation, which should be in both the design of the portal and the information that the CFPB makes available to consumers, should separate those disputes that are subject to the established FCRA statutory scheme from the complaints that may be submitted through the CFPB portal.

Specifically, the Taskforce should recommend the Bureau modify the portal in such a way that consumers should not be permitted to submit a complaint about the accuracy and completeness of credit report information against a CRA if they have not first exercised their rights under the FCRA by disputing the item directly with the CRA. Further, the CFPB should encourage consumers to submit disputes directly to the CRAs or with their lenders, and not promote the CFPB complaint portal for that purpose. Finally, in reporting complaint data, the CFPB should ensure that the complaint totals do not include first-look disputes, as the inclusion of such disputes greatly inflates the number of complaints associated with any particular CRA.⁵

In addition, there is compelling evidence that complaints are often misattributed to CRAs when it is the furnisher’s conduct that is actually the subject of the complaint and that this misattribution further contributes to complaint inflation on the portal. For example, in a review of the FTC’s 2012 publication of research on the accuracy of credit reports, CDIA found that 88% of the complaint types identified by consumers pertain to the manner in which the data *furnisher* reported their accounts and not in the way the *CRA* matched the account to a credit report.⁶ CDIA’s members have found a similar experience with the consumer complaints referred through the portal. After reviewing more than 1,000 consumer complaints referred through the portal, CDIA found that 77% of those complaints were in fact about how the consumer’s lender reported the data. This problem is compounded by the fact that the portal does not give consumers the option to add or redirect their complaint to the furnisher when submitting a complaint involving consumer reporting.

It is important to understand that CRAs are different from other entities on the portal because they are not consumer-facing businesses. Our members operate third-party databases that are reliant on information provided by the furnishers. If a consumer believes there is a problem with information

⁴ In the complaint data available to the public on the CFPB’s website, there are large numbers of accuracy complaints that contain no response for “consumer disputed.”

⁵ In a document entitled “Monthly Complaint Report” dated August 2015, the CFPB listed the entities with the highest number of complaints through the portal. If the numbers of complaints were adjusted to eliminate “first-look disputes,” the complaint volumes for the consumer reporting agencies would be greatly reduced.

⁶ See CDIA Letter of Comment re: Disclosure of Consumer Complaint Narrative Data, Docket No. CFPB-2014-0016 (Sept. 22, 2014), page 5, available at: <http://www.regulations.gov/#!documentDetail;D=CFPB-2014-0016-0118>.

in their credit records, they may perceive it to be the fault of the CRA when it is in fact the fault of the furnisher. **We urge the Taskforce to recommend the CFPB update its complaint portal to screen and discount complaints improperly attributed to CRAs.**

Further, many of the complaints on the portal relating to CRAs appear to have been generated by credit repair agencies. Fraudulent credit repair companies have no incentive to engage in lawful disputes on behalf of clients and may misuse the complaint portal tool to seek the deletion of accurate data. The portal no longer allows our members to identify to the CFPB that an incoming complaint submitted by a consumer through the portal is a result of credit repair. Because the CFPB no longer allows our members to notify the CFPB of credit repair activity, the aggregate complaint data on a per-company basis is inflated and likely populated by fraudulent attempts. **We urge the Taskforce to recommend that the CFPB segregate complaints submitted by fraudulent credit repair services in the data. The Bureau could accomplish this by, among other things, requiring an attestation as to whether a person filing a complaint is a third party filing on behalf of a consumer.**

The current way the CFPB reports data from its complaint portal does not provide appropriate context for the data. Large industries (and individual companies) will inherently have large raw numbers of complaints and disseminating this information without putting it in context of the overall industry size is misleading. Moreover, presenting data in a proper context should also account for situations where an industry is highly concentrated in terms of the number of competitors or where their products are used in billions of transactions each year. In these cases—both of which are true for our members—it is almost inevitable that the raw number of complaints associated with individual corporate names will appear large. But when these data are set into a fair and proper context (and where failings in the design of the portal are addressed), the company names may not be worthy of being highlighted in a Bureau report.⁷ **We urge the Taskforce to recommend that the Bureau undertake efforts to provide proper context before further publication of any monthly reports that include individual company data. Moreover, further reports should include clear and conspicuous disclaimers about the accuracy and other recognized limitations of the data.**

II. Legislative Solutions

The Taskforce should consider recommending changes to federal consumer financial laws to modernize the Credit Repair Organization Act (“CROA”) and align and improve the Fair Credit Reporting Act (“FCRA”), as explained below.

Credit Repair Organization Act Reform (Question 22)

CRAs and others in the marketplace are developing solutions to help consumers learn how to improve their financial situation. These entities are in a unique position to help consumers learn about managing their credit but are often stymied by outdated CROA requirements meant to protect against predatory credit repair organizations, not the beneficial consumer education services CRAs offer.

While the CFPB does not oversee CROA, it does regulate the CRAs using its authority under other laws. The CFPB has used its authority under the Consumer Financial Protection Act of 2010

⁷ See CDIA Comments in Response to Request for Information Regarding the Consumer Complaint Database: Data Normalization, Docket No.: CFPB-2015-0030 (Aug. 31, 2015).

(“CFPB”) to police unfair, deceptive, or abusive acts and practices (“UDAAP”), as well as its authority under the Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310, to successfully bring several recent enforcement actions against credit repair organizations.⁸ Meanwhile, the Federal Trade Commission’s (“FTC”) enforcement activity in this space has dropped precipitously, with the FTC seemingly ceding enforcement in this area to the CFPB. Because the means of regulating credit repair have changed—regulators are using different legal tools to protect consumers here—and consumers are demanding new kinds of services to protect themselves, it is worth revisiting whether CROA still has a purpose.

Today, more than ever, consumers are gaining access to resources to learn about their credit scores and credit standing. This is in large part due to efforts by Congress to make transparency of credit reports and scores a top priority, along with the efforts of the CFPB to encourage greater access to scores. For example, due to the passage of the Fair and Accurate Credit Transactions Act (“FACTA”) in 2003, consumers may now request a free annual credit report from each of the NCRA—Experian, Equifax, and TransUnion.⁹ And since the CFPB launched its Scores on Statements initiative in 2014, tens of millions of credit card account holders are receiving a free credit score in their monthly statements.¹⁰

The CFPB’s study on consumer reports revealed that “[c]onsumers appreciated the presence of their scores on their [credit card] statement but had questions about what actions to take once they had seen their scores.”¹¹ While some consumers viewed their credit reports as helpful to improving their scores and general financial situation, many reported that they “were not sure how to improve their scores and were confused by conflicting advice about what actions to take.” In other words, having more information is helpful, but has left consumers asking: *What do I do now?*

CRA are developing credit education services to help consumers answer this question. Recent studies show these personalized credit education services are of great help to consumers.¹² After

⁸ See *Prime Marketing Holdings, LLC* (Sept. 22, 2016), available at: <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/prime-marketing-holdings-llc/>; *CFPB Takes Actions Against Credit Repair Companies for Charging Illegal Fees and Misleading Consumers* (June 27, 2017), available at: <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-actions-against-credit-repair-companies-charging-illegal-fees-and-misleading-consumers/>; *Consumer Financial Protection Bureau Files Suit Against Lexington Law, PGX Holdings, and Related Entities* (May 2, 2019), available at: <https://www.consumerfinance.gov/about-us/newsroom/bureau-files-suit-against-lexington-law-pgx-holdings-and-related-entities/>.

⁹ Through www.annualcreditreport.com. And after the onset of the COVID-19 crisis, the three national credit reporting agencies are giving consumers free weekly access to monitor their credit reports. Cathlin Tully, Credit reports are now free, every week, *FTC Consumer Information Blog* (May 18, 2020), available at: https://www.consumer.ftc.gov/blog/2020/05/credit-reports-are-now-free-every-week?utm_source=govdelivery.

¹⁰ Consumer Financial Protection Bureau, “CFPB Reports That More Than 50 Million Credit Card Consumers Have Access to Free Credit Scores” (February 19, 2015), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-reports-that-more-than-50-million-credit-card-consumers-have-access-to-free-credit-scores/> (noting that in the first year alone, the number of consumers reached by the Scores on Statements initiatives passed the 50 million mark).

¹¹ Consumer Financial Protection Bureau, *Consumer Voices On Credit Reports And Scores* (2015), available at: http://files.consumerfinance.gov/f/201502_cfpb_report_consumer-voices-on-credit-reports-and-scores.pdf.

¹² Policy & Economic Research Council, *Personalized Credit Education: Consumer and Small Business Owner Attitudes, Impacts and Impediments* (2016), available at http://www.perc.net/wp-content/uploads/2016/11/CE_PERC_FinalReport_113016web.pdf.

completing a personalized credit education program, 62% of consumers had an increase in their credit score, with a third of those (30%) seeing a 21 point or greater score improvement. More importantly perhaps, 86% of those participants surveyed answered that their credit management skills had improved and that they were “more capable” than before the education, with 39% of those responding stating they were “much more capable.” Eighty-eight percent of consumers who participated in the post-program survey answered that they had a better understanding of what they could do that may positively affect their credit score, with 60% responding they were more likely to request their free annual credit reports, 63% stating they were more likely to look for, and dispute, perceived errors. Individuals with thin files who lack sufficient credit history information to generate a score had a 29% increase in the number of tradelines as opposed to those who did not complete the program (who saw only a 7% increase).

Consumers want information that is easy to understand and delivered in a timely manner. Most consumers who request copies of their consumer reports do so online.¹³ The failure to deliver credit education services quickly leads to a lower adoption rate. Even where personalized education services were offered free of charge, consumers were still deterred by the requirement that they wait three days to complete the program, with 46% of those surveyed in 2015 indicating they would have used the credit education program if they had not been forced to wait.¹⁴ This means a significant number of consumers who want, and would benefit from, consumer education services are not using them.

This delay is caused by the breadth of the definitions in CROA and various courts’ misinterpretations of CROA, which force companies to comply with a law that was never intended to cover them or their products and services. This makes it less likely that consumers will obtain—and benefit from—these important services at all.

Congress enacted CROA over 20 years ago to protect consumers from scammers who would falsely claim they could repair a consumer’s existing credit report history by removing negative information from their files, even when it was accurate.¹⁵ These “credit repair” operators charged exorbitant fees in advance, but failed to produce the promised results. In the process, they also abused the consumer dispute procedures, flooding CRAs with frivolous disputes. This compromised the accuracy, integrity, and reliability of consumer report information because CRAs were often forced to delete negative but accurate information in consumer report files because of this gaming of the dispute system.

CROA shielded consumers from these predatory practices in the following ways: (1) prohibiting the advance payment of fees for services, (2) giving consumers a 3-day right to cancel the services after signing a written contract, during which the services may not be provided, (3) requiring the provision of notice to consumers of their legal right to dispute and remove inaccurate information in their credit report files at no cost, and (4) prohibiting false and deceptive acts or practices in connection with credit repair services. CROA carries stiff penalties for noncompliance. It is a strict liability statute; a violation of

¹³ Consumer Financial Protection Bureau, Consumer Voices On Credit Reports And Scores (2015), available at: http://files.consumerfinance.gov/f/201502_cfpb_report_consumer-voices-on-credit-reports-and-scores.pdf.

¹⁴ Michael Turner, Michael Staten, and Patrick Walker, “Is CROA Choking Credit Report Literacy?” (April 2015), Policy and Economic Research Council (PERC), available at: <http://www.perc.net/publications/is-croa-choking-credit-report-literacy/>.

¹⁵ 15 U.S.C. §§ 1679 *et seq.*

any of its many technical requirements results in liability regardless of consumer harm.¹⁶ In addition to providing a private right of action, including class actions, the FTC and State Attorneys General may enforce CROA,¹⁷ which they have pursued vigorously.¹⁸

Importantly, in all CROA enforcement activities, the FTC and State Attorneys General have focused exclusively on true credit repair activities and have not interpreted CROA's definitions to apply to consumer education or identity theft protection services. In fact, the FTC has testified that it saw "little basis on which to subject the sale of legitimate credit monitoring and similar educational products and services to CROA's specific prohibitions and requirements, which were intended to address deceptive and abusive credit repair business practices." These services, "if promoted and sold in a truthful manner, can help consumers maintain an accurate credit file and provide them with valuable information for combating identity theft."¹⁹ In sum, the FTC has consistently drawn a distinction between (a) credit repair, which is *retroactive* in its effect (you repair, or fix, something that is broken or damaged) and (b) consumer education and other services, including identity theft protection, which are *prospective* in their application (these services help maintain the status quo or improve a situation).

Unfortunately, while courts interpreting CROA initially drew the same common-sense distinction between credit repair (which is *retroactive* in its effect) and consumer education services, including identity theft protection (which are *prospective*),²⁰ recent cases have interpreted CROA to also encompass services aimed at improving future creditworthy behavior with prospective promises of improved credit.²¹ Under these judicial interpretations, CROA may cover *any* product or service that possibly helps consumers improve their credit. Not surprisingly, such peculiar definitions of credit repair have hampered the offering and delivery of consumer credit education and other credit maintenance and improvement services, even when they really do help consumers improve their credit.

CDIA believes in reforming CROA by, at a minimum, amending the statute to allow an exception for CRAs to provide these valuable credit education services without running afoul of the statute, which we have advocated for in the past.²² But crafting the correct statutory language to separate legitimate

¹⁶ 15 U.S.C. § 1679(g).

¹⁷ 15 U.S.C. § 1679(h).

¹⁸ As the FTC testified to Congress in 2007, the FTC, in conjunction with other law enforcement agencies, state and federal, has enforced CROA in several "sweeps" since its enactment, including: Project Credit Despair (bringing 20 enforcement cases in 2006); Operation New ID-Bad Idea I and II (bringing 52 actions in 1999); and Operation Eraser (32 actions filed in 1998). See S. HRG. 110–1170 "Oversight of Telemarketing Practices and the Credit Repair Organizations Act (CROA)." Prepared Statement of the Federal Trade Commission before the Committee on Commerce, Science, and Transportation. U.S. Senate, 110th Congress, 1st Session. July 31, 2007, page 18.

¹⁹ Prepared Statement of the Federal Trade Commission before the Committee on Commerce, Science, and Transportation. US Senate, 110th Congress, 1st Session. July 31, 2007, page 20.

²⁰ *Hillis v. Equifax Consumer Servs. Inc.*, 237 F.R.D. 491, 514 (N.D. Ga. 2006) ("Congress did not intend for the definition of a credit repair organization to sweep in services that offer only prospective credit advice to consumers or provide information to consumers so that *they* can take steps to improve their credit in the future").

²¹ *Stout v. Freescore, LLC*, 743 F.3d 680, 686 (9th Cir. 2014) and *Zimmerman v. Puccio*, 613 F.3d 60, 72 (1st Cir. 2011) (finding that credit counseling aimed at improving future creditworthy behavior is credit repair).

²² Past efforts would have enabled authorized credit service providers to provide credit education and identity theft protection services following their registration with the FTC in accordance with certain requirements for registration.

credit services from illegitimate “credit repair” outfits may prove to be a complicated endeavor that does not fully address the problem. Perhaps more importantly, CROA is not inhibiting fraudulent credit repair and has fallen out of favor with regulators as a tool capable of effective enforcement in this space. Perhaps it is time to recognize that CROA has outlived its usefulness and should be repealed. As it stands, CROA is preventing companies with legitimate and consumer-friendly services from helping consumers without really inhibiting the “credit repair” problem it was designed to solve. Meanwhile, the FTC has retreated from using CROA to bring enforcement actions in this area, while the CFPB is using other tools to great effect. **We recommend that the Taskforce address this issue by advising the CFPB to recommend that Congress repeal CROA, and we encourage the CFPB to continue to use its UDAAP authority and the TSR to pursue fraudulent “credit repair” schemes.**

FCRA Civil Liability Reform (Questions 7, 22)

In governing the content and use of consumer reports, including credit reports, the FCRA gives consumers the rights of access and correction, accuracy and data quality, and privacy and confidentiality. The statute covers much more than just credit reporting agencies. Because of the broad definitions of a “consumer report”²³ and a “consumer reporting agency,”²⁴ the statute governs the business of employment screening companies, check verification companies, insurance claims report agencies, tenant screening companies, and medical record and payment agencies. In addition, the FCRA applies to literally thousands of financial and other companies that furnish information to consumer reporting agencies, which compile the reports. Moreover, virtually every business, large and small, uses consumer reports for credit determinations, insurance underwriting, employment background screening, or to meet any legitimate need to assist a consumer in a transaction initiated by the consumer for personal or household purposes.

When enacted in 1970, the FCRA created a private right of action for consumers for actual damages they sustained arising from a violation of the Act. The FCRA was amended in 1996 to permit a plaintiff to seek not just actual damages, but also, even in the absence of actual harm, statutory damages of not less than \$100 and not more than \$1,000 for any “willful” failure to comply with the Act. The 1996 amendments also included punitive damages for willful violations as determined by a court. But the 1996 amendments failed, inexplicably, to include a cap on the amount of a class action award. The amendments also expanded the obligations of employers using consumer reports²⁵ and in 2003, FACTA²⁶ created new requirements and prohibitions, to be subject to private rights of action.

These amendments and the growing trend of class action lawsuits have significantly changed the environment in which consumer reporting agencies, furnishers, and users of consumer reports operate. This combination of statutory damages, untethered from any actual harm, opened the floodgates to frequent and massive class action judgments against restaurants, retailers, Internet sellers, grocery stores, university systems, financial institutions and even the Walt Disney Company.²⁷

²³ FCRA § 603(d); 15 U.S.C. § 1681a(d).

²⁴ FCRA § 603(f); 15 U.S.C. § 1681a(f).

²⁵ Title II, Subtitle D, Chapter 1, Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (Pub. L. No. 104-208, Sept. 30, 1996).

²⁶ Title I, Subtitle A, Fair and Accurate Credit Transactions Act (Pub. L. No. 108-159, Dec. 4, 2003).

²⁷ See *Culberson II and Joseph III v. The Walt Disney Co.*, Case No. BC526351 (Cal. App. 2017).

The FCRA is unusual among consumer financial laws in its lack of monetary cap for class action litigation. It was enacted in 1970, before Congress had seen the negative consequences of the lack of such caps had in other consumer financial laws. For example, the Fair Debt Collection Practices Act (“FDCPA”), enacted in 1977, caps a class action award at the lesser of \$500,000 or one percent of the net worth of the debt collector.²⁸ The Electronic Funds Transfer Act (“EFTA”), enacted in 1990, similarly caps the class action award at the lesser to \$500,000 or one percent of net worth.²⁹ The Equal Credit Opportunity Act (“ECOA”) did the same.³⁰ Moreover, unlike the FCRA, the Truth-in-Lending Act (“TILA”), FDCPA, and EFTA do not allow for punitive damages.³¹

When the FCRA was amended in 1996, the focus was on heightened damages for *willful* violations, as opposed to negligent violations. Unfortunately, Congress did not define “willfulness” when it amended the law. Some courts have read “willful” out of the statute and allowed claims to proceed against small and large companies alike for mere technical violations – violations where there are no actual damages.³² These claims reach not just credit reporting agencies, but users of reports like employers, creditors, and retailers.

FCRA private rights of action were intended to be a mechanism to enforce compliance with the law and recover actual damages, but have metastasized to become an opportunity for trial attorneys to target employers and other users of consumer reports in order to bring large class actions alleging technical violations of the statute, often where no consumer harm is alleged. As a byproduct to the expansion of the types of businesses subject to FCRA liability over the years, the size and cost of FCRA class action litigation has put businesses in the precarious position of settling rather than defending their practices in court. When faced with the looming threat of the expenses of discovery and uncapped liability for class sizes often reaching tens of thousands of members, businesses are effectively forced to enter into settlement negotiations to avoid being forced out of business.

A 2017 study by the Consumer Data Industry Association looked at 170 FCRA class action settlements. Their total monetary sum awarded was nearly \$500 million. It is difficult to ascertain the actual distribution of a settlement to class members. However, in five out of six lawsuits examined (for which information was publicly available), class members received .000006% of the award in one action; .33% in another; .966% in a third; 12% in a fourth; and 15% in the fifth.³³ The remainder went to class action lawyers and administrative costs. The bottom line is in an environment without a cap on class action liability like the FCRA, class action lawyers are incentivized to bring FCRA class actions while consumers receive little, if any, benefit.³⁴ The CFPB has confirmed through its own research that class

²⁸ 15 U.S.C. § 1692k(a)(2).

²⁹ 15 U.S.C. § 1692k(a)(2).

³⁰ 15 U.S.C. § 1691e.

³¹ See 15 U.S.C. § 1640 (TILA); 15 U.S.C. § 1692k (FDCPA); 15 U.S.C. § 1693m (EFTA).

³² See, e.g., *Syed v. M-I, LLC*, 853 F.3d 492, 503 (9th Cir. 2017) (holding employer’s violation FCRA by including liability waiver in same document as statutorily mandated disclosure was willful, allowing statutory and punitive damages).

³³ See Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 2013) at 2, available at

<https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf>.

³⁴ *Id.*

actions rarely actually put money in the hands of consumers.³⁵ In fact, FCRA class actions may have the opposite effect on consumers by driving up the costs of consumer goods and services. The more businesses must budget for anticipated litigation costs, the more they may have to consider increasing their prices.

The Taskforce should recommend that Congress amend the FCRA to place reasonable and consistent limits on class action liability, bringing it in line with similar consumer laws. Such limits could allow consumers to continue to seek redress for violations of the FCRA in several ways. Consumers could bring individual cases seeking damages for actual harm and the costs of litigation either through willful noncompliance under Section 1681n³⁶ or negligent noncompliance under Section 1681o.³⁷ Additionally, the tool of class action litigation would still be available for violations affecting a broader population. All of these routes to court permit the award of attorneys' fees, allowing access to the courts for consumers who might not otherwise be able to afford to bring the case. In addition, state and federal regulators would continue to enforce the FCRA to help ensure industry-wide compliance. Amending the FCRA would thus allow businesses to offer beneficial products and services to consumers without fear of draconian liability.

FCRA Employment Background Screening Forms (Questions 7, 20)

A recurring theme of FCRA litigation involves technical compliance by employers relating to the use of consumer reports for employment purposes. When using a consumer report for employment purposes, an employer must, among other things, provide a "clear and conspicuous" disclosure in writing before the report is procured in a separate document that consists only of the disclosure. The statute states that the required disclosure must be in a document that "consists solely of the disclosure[.]"³⁸ But the immediately following subsection specifies that written authorization from the applicant or employee may be included as well, indicating the term "solely" is not as rigid as it may first appear. The FCRA does not define "disclosure" or explain what other information may be included.

This has left companies to try to formulate their own disclosures without running afoul of the FCRA, while leaving plaintiffs with the opportunity to argue that any additional information included on this form violates the FCRA, even where that additional information furthers rather than undermines the FCRA's purposes. Employers that include additional information about the job or the employer on the background check disclosure form, or have some other technical defect on the face of the document, have thus become attractive targets in class action litigation regardless of whether or not the plaintiffs allege any actual harm or confusion with the documents. Courts have drawn differing conclusions about what language can and cannot be included.³⁹ Some courts have interpreted the disclosure requirement

³⁵ See CFPB, Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a), March 2015, available at: http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

³⁶ 15 U.S.C. § 1681n.

³⁷ 15 U.S.C. § 1681o.

³⁸ 15 U.S.C. § 1681b(2)(A)(i).

³⁹ Some courts have held the statute's use of the word "solely" to mean no extraneous language whatsoever. See *Case v. Hertz Corp.*, 2016 U.S. Dist. LEXIS 41210 (D. Cal. Feb. 26, 2016); *Robrinzine v. Big Lots Stores, Inc.*, 2016 U.S. Dist. LEXIS 5689 (D. Ill. Jan. 19, 2016). Other courts have acknowledged the need to take a more practical approach in determining whether the extraneous language diminished the clarity of the disclosure in light of the

so stringently as to have found violations simply because other useful information—such as state law disclosures and notices of other rights the consumer has—is included in the disclosure form.⁴⁰

This lack of clarity allows settlements arising from activity that did not harm consumers at all, but which give rise to massive awards, little of which ever reaches the consumers involved. In *Erin Knights and Tresca Prater, et al. v. Publix Super Markets, Inc.*,⁴¹ for example, the Publix supermarket chain agreed to pay nearly \$6.8 million to settle a FCRA lawsuit. The FCRA requires employers that conduct pre-employment background checks to provide a written disclosure to applicants prior to the check—and that disclosure must be a “document that consists solely of the disclosure.”⁴² Publix allegedly provided the necessary disclosure, but that same document also included other additional language. The class included more than 90,000 members. Theoretically, each class member was awarded \$75, but after awarding attorneys’ fees of nearly \$2.4 million dollars and class representative service payments, each class member’s take home came to around \$48. No harm was ever alleged, let alone proven, in that case.

The CFPB could provide much needed clarity and guidance through a rulemaking. The CFPB has ample experience in the development of model forms for consumers, such as the updated mortgage forms, and the CFPB could promulgate model safe harbor forms for disclosure and authorization that would properly and consistently inform consumers of the use of consumer reports in employment and provide for a much-needed safe harbor from litigation. **The Taskforce should recommend that Congress create a safe harbor disclosure form for employment uses of consumer reports by directing the CFPB to engage in rulemaking to develop model forms.**

Placement Process for Protected Consumer Security Freeze (Question 8)

The FCRA provides for free security freezes intended to restrict access to consumers’ credit files, making it harder for fraudulent accounts to be opened using a consumer’s credit.⁴³ The FCRA allows a representative to request a freeze for a consumer under the age of 16 or an incapacitated or protected consumer for whom a guardian or conservator has been appointed (a “protected consumer”).⁴⁴ In the event a representative requests a security freeze for a protected consumer, the representative must provide sufficient proof of identification (a defined term under the FCRA⁴⁵) and sufficient proof of authority (a defined term under the FCRA⁴⁶) to the CRA. If the request is received by mail, the CRA has three business days after receiving the request to place the freeze.⁴⁷ If, however, a protected consumer

insufficient guidance in the statutory text. See *Luna v. Hansen & Adkins Auto Transport, Inc.*, No. 18-55804 (9th Cir. April 24, 2020); *Just v. Target Corp.*, 2016 U.S. Dist. LEXIS 63126 (D. Minn. May 12, 2016); *Syed v. M-I, LLC*, 2014 U.S. Dist. LEXIS (E.D. Cal. Aug. 28, 2014).

⁴⁰ *Gilberg v. California Check Cashing Stores, LLC*, 913 F.3d 1169, 1175 (9th Cir. 2019) (holding disclosure form did not consist “solely” of the disclosure because it contained additional information, including state law disclosures).

⁴¹ 3:14-cv-00720, (M.D. Tenn. Oct. 17, 2014).

⁴² 15 U.S.C. § 1681b(b)(2).

⁴³ See 15 U.S.C. §§ 1681c-1(i)-(j).

⁴⁴ 15 U.S.C. § 1681c-1(j).

⁴⁵ 15 U.S.C. § 1681c-1(j)(1)(G).

⁴⁶ 15 U.S.C. § 1681c-1(j)(1)(F).

⁴⁷ 15 U.S.C. § 1681c-1(j)(2)(A)(ii).

request is received by telephone or secure electronic means, the FCRA requires the CRA to place the freeze within one business day.⁴⁸

Regardless of the method by which the representative requests the security freeze, the CRAs must review the proof of identification and authority received from the representative. Unless a request for a security freeze is placed by a consumer themselves, the CRA must not only verify the identity of the person making the request, but also that person's authority to request a freeze on behalf of another consumer, an important protection for the person on whose file the freeze would be placed. Unlike identity verification, however, the CRAs do not have an established source of information against which to verify such authority documents. For this reason, the one-day turnaround time for protected person freeze requests placed by electronic means is not feasible and should be extended to three business days to allow for review and verification of authorization documents. Similarly, the telephone process is infeasible, as the CRAs are unable to place a protected person freeze without receipt and review of the authorization documents. **CDIA recommends that the Taskforce address this issue with a recommendation that Congress amend Section 605A(j) of the FCRA to eliminate the telephone option and to allow the same time period for all security freeze requests made by the representative of a protected consumer. The same recommendation applies to the procedures for removal of a protected consumer's security freeze.**⁴⁹

III. Regulatory & Policy Solutions

The CFPB has enormous regulatory power at its disposal. Given the complexity of the industry in which they operate, our members believe it is more important than ever that regulations be based on empirically sound information rather than anecdote. Moreover, the Bureau does not solely govern industry conduct through formal regulations. It often issues informal guidance documents to set forth Bureau policy which industry looks to in formulating their conduct, but often without affording regulated entities the ability to weigh in before the guidance becomes Bureau policy. A regulatory framework with these features often leads to unintended consequences. Below we make several proposals that track along two common themes: **(1) The CFPB should study ways to ensure the regulatory process is as empirically-based as possible; and (2) The CFPB should use a process that employs public comment or stakeholder input when considering informal guidance.**

Data Accuracy (Questions 8, 23)

A CRA has many duties under the FCRA, principal among these is the responsibility to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.” It is no surprise that in establishing the FCRA, Congress did not impose a strict liability standard, but rather a standard of “maximum possible accuracy,” intending not only to make sure that records not belonging to an applicant are avoided (“false positives”), but also to ensure that records that do belong to the applicant are not missed (“false negatives”). FCRA Section 602(b), 15 U.S.C. § 1681(b), states that “[i]t is the purpose of [the FCRA] to require that consumer reporting agencies adopt reasonable procedures . . . with regard to the confidentiality, accuracy, relevancy, and proper utilization of [consumer report] information in accordance with the requirements

⁴⁸ 15 U.S.C. § 1681c-1(j)(2)(A)(i).

⁴⁹ 15 U.S.C. § 1681c-1(j)(4)(A).

of this title.” Our members engage in this delicate balancing act on a daily basis – aiming to avoid both false positives and false negatives.

Despite significant investment by the industry in the accuracy of consumer reports, and the many Congressional, industry, and regulatory steps that have been focused on accuracy, there has been a push for additional regulatory or Congressional actions related to accuracy, largely fueled by anecdotes related to particular consumers. Despite the adoption of reasonable procedures, errors in consumer reports may still occur, and these errors are significant to the affected consumers given the important role that consumer reports play in our economy. When errors occur, CDIA members seek to promptly investigate and correct those errors. Such anecdotal evidence, however, is not a sufficient basis upon which to make regulatory or legislative changes to the accuracy requirements of the FCRA.

During the December 10, 2019 joint workshop on accuracy in consumer reporting held by the CFPB and FTC, participants discussed the state of research on the accuracy of credit report data and the many Congressional, industry, and regulatory steps that have occurred since those studies were conducted.⁵⁰ As the participants noted, it has been more than eight years since the last comprehensive studies assessing the accuracy of credit reports. The two most important studies on this topic—by the Policy & Economic Research Council (“PERC”)⁵¹ and the FTC⁵²—found that a small percentage of credit reports (0.5% in the PERC study and 2.2% in the FTC study) had material errors.

Since these studies were conducted eight years ago, the regulatory landscape has changed dramatically. The CFPB was created and given the ability to enforce the FCRA, in addition to the FTC. In 2012, the CFPB began supervising the credit reporting industry, and larger participants in the credit reporting market were for the first time subject to examination. Since 2011, the CFPB also has been focused on accuracy. In addition to bringing enforcement cases against CRAs⁵³ and furnishers,⁵⁴ the CFPB has made accuracy a focus in its examination efforts. The CFPB has addressed accuracy in its Supervisory Highlights reports, including a March 2017 special edition on consumer reporting.⁵⁵ In the special edition, the CFPB detailed improvements implemented by CRAs including review of data

⁵⁰ Accuracy in Consumer Reporting: An FTC/CFPB Workshop, Dec. 10, 2019, Transcripts available at: <https://www.ftc.gov/news-events/events-calendar/accuracy-consumer-reporting-workshop>.

⁵¹ Turner, Michael A., Robin Varghese, and Patrick D. Walker, Policy and Research Council (PERC), U.S. Consumer Credit Reports: Measuring Accuracy and Dispute Impacts (2011).

⁵² FTC Report to Congress Under Section 319 of the Fair and Accurate Transactions Act of 2003, page 5 (Dec. 2012), available at: <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>.

⁵³ See, e.g., *In the Matter of General Information Services, Inc., and e-Backgroundchecks.com, Inc.*, File No. 2015-CFPB-0028, 2105-CFPB-0028 (October 29, 2015) (consent order; \$1,250,000 civil money penalty; \$10,500,000 consumer redress); *Bureau of Consumer Financial Protection and the People of the State of New York by Letitia James, Attorney General for the State of New York v. Sterling Jewelers Inc.*, Case No.: 1:19-cv-00448 (S.D.N.Y. 2019) (stipulated final judgment and order; \$10,000,000 civil money penalty to CFPB; \$1,000,000 civil money penalty to NY Attorney General).

⁵⁴ See, e.g., *Bureau of Consumer Financial Protection v. Fair Collections & Outsourcing, Inc. et al.*, Case No.: 8:19-cv-02817 (D. Md. 2019); see also CFPB Enforcement Actions under Fair Credit Reporting Act, available at: <https://www.consumerfinance.gov/policy-compliance/enforcement/>.

⁵⁵ Consumer Financial Protection Bureau, Supervisory Highlights Consumer Reporting Special Edition, Issue 14, Winter 2017, available at https://files.consumerfinance.gov/f/documents/201703_cfpb_Supervisory-Highlights-Consumer-Reporting-Special-Edition.pdf.

governance programs, establishment of quality control programs, enhancement in oversight of third-party public records providers, review of new and existing furnishers and monitoring of furnisher dispute data.⁵⁶ In a more recent issue of Supervisory Highlights, the CFPB included discussion of furnisher reviews and examiner's findings with respect to furnisher compliance with FCRA accuracy and dispute investigation requirements.⁵⁷ The CFPB has also issued supervisory guidance directed to furnishers of information regarding reporting of accurate information and investigate disputes.⁵⁸ The FTC, which retained its enforcement authority under the FCRA, has brought a number of enforcement actions against CRAs⁵⁹ and furnishers⁶⁰ related to accuracy.

The state attorneys general similarly have been focused on accuracy. In May of 2015 the NCRA reached a settlement with 31 state attorneys general that included an agreement by the nationwide CRAs to make changes to their business practices intended to protect consumers. The settlement included requirements related to accuracy that led to NCRA strengthening standards for data furnishers and the NCRA now require debt collectors to provide the original creditor's name and information about the debt before the debt information can be added to the credit report.⁶¹ Part of the settlement included the nationwide CRAs' launch of the National Consumer Assistance Plan ("NCAP"), an initiative intended to make consumer reports more accurate and make it easier for consumers to correct errors.⁶² The NCAP includes a 180-day waiting period before reporting any medical debt to allow time for insurance payments to be applied, reinforcement of consistent standards for furnishers, a prohibition on

⁵⁶ *Id.* at 5-8.

⁵⁷ Consumer Financial Protection Bureau, Supervisory Highlights, Issue 19, Summer 2019, at 8-11, available at https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf.

⁵⁸ See Consumer Financial Protection Bureau, Bulletin re: furnisher FCRA obligation to have reasonable written policies and procedures (Feb. 3, 2016), available at: <https://www.consumerfinance.gov/policy-compliance/guidance/supervisory-guidance/bulletin-furnisher-accuracy-obligations/>; Bulletin re: FCRA requirement that furnishers conduct investigations of disputed information (Feb. 27, 2014), available at: <https://www.consumerfinance.gov/policy-compliance/guidance/supervisory-guidance/bulletin-fcra-requirement-furnishers-conduct-investigations/>; Bulletin re: the FCRA's requirement to investigate disputes and review "all relevant" information (Sept. 4, 2013), available at: <https://www.consumerfinance.gov/policy-compliance/guidance/supervisory-guidance/bulletin-FCRA-requirement-investigate-disputes/>.

⁵⁹ See, e.g., *FTC v. RealPage, Inc.*, 3:18-cv-02732 (N.D. Tex. 2018) (stipulated judgment; \$3,000,000 civil money penalty); *USA v. Instant Checkmate*, No. 3:14-cv-00675 (S.D. Cal. 2104) (consent order; \$525,000 civil money penalty); *USA v. Infotrack Information Services and Stephen Kaplan*, No. 1:14-cv-02054 (N.D. Ill. 2014) (stipulated judgment; \$1,000,000 civil money penalty); *USA v. Telecheck Services, Inc. and TRS Recovery Services, Inc.*, No. 1:14-cv-00062 (D.D.C.) (stipulated judgment; \$3,500,000 civil money penalty); *USA v. Certegy Check Services, Inc.*, No. 1:13-cv-01247 (D.D.C. 2013) (stipulated judgment; \$3,500,000 civil money penalty); *In the Matter of Filiquarian Publishing, LLC; Choice Level, LLC; and Joshua Linsk* (FTC Order, 2013); *USA v. HireRight Solutions*, No. 1:12-cv-01313 (D.D.C. 2012) (stipulated judgment; \$2,600,000); *USA v. Spokeo, Inc.*, No. 2:12-cv-05001 (C.D. Cal. 2012) (consent decree, \$800,000 civil money penalty); *USA v. First Advantage Saferent, Inc.*, No. 8:10-cv-00090 (D. Md. 2010) (settlement order; \$100,000 civil money penalty); *USA v. Far West Credit, Inc.*, No. 2:06-cv-00041 (D. Utah 2006) (consent decree; \$120,000 civil money penalty); *In the Matter of First American Real Estate Solutions, LLC*, No. C-3849 (FTC 1999) (consent order).

⁶⁰ See, e.g., *USA v. Asset Acceptance, LLC*, No. 8:12-cv-00182 (M.D. Fla. 2012) (consent decree; \$2,500,000 civil money penalty).

⁶¹ News Release: Attorney General DeWine Announces Major National Settlement with Credit Reporting Agencies (May 20, 2015), available at: <https://www.ohioattorneygeneral.gov/Media/News-Releases/May-2015/Attorney-General-DeWine-Announces-Major-National-S->.

⁶² See <http://nationalconsumerassistanceplan.com/>.

furnishers from reporting authorized users without a date of birth, elimination of reporting of debts that did not arise from a contract or agreement by the consumer to pay (e.g., traffic tickets or fines), creation of a working group to regularly review and help ensure consistency and uniformity in the data submitted by furnishers for inclusion in a consumer’s credit report.⁶³

Since the last significant, empirical studies of accuracy, there have been significant legislative, regulatory and enforcement changes designed to improve the accuracy of credit reports. Further, the industry is undergoing rapid technological change, with innovation constantly improving upon and changing the landscape that consumers and businesses face, making it ever more critical for regulators to act with sound information. **Given the importance of up-to-date research in the regulation of this industry, the Taskforce should recommend that the CFPB obtain or conduct up-to-date research on the state of the accuracy of consumer reports before proposing regulation or supporting legislation to amend the FCRA. The Bureau has enormous tools for information gathering at its disposal. It should use these tools to ensure that new regulations and supervisory and enforcement policies are based on the most up-to-date, empirically sound information.**

Alternative Data (Question 5)

Permitting novel and broader uses of data beyond the narrow parameters currently available would be beneficial to consumers. The Bureau has taken positive steps in exploring the usefulness of alternative data in evaluating the credit risk of consumers with little to no credit history. In 2018, the Bureau issued a report and held a symposium on the tens of millions of American adults who are “credit invisible.”⁶⁴ That is, consumers who lack a sufficient credit history that in itself raises barriers for accessing credit or obtaining more credit. In 2019, the Bureau again focused on this topic in its Report on Fair Lending.⁶⁵ The CFPB has found that roughly 20% of the adult population in the United States have no credit records, or such limited credit records that they are unable to fully participate in the marketplace for credit.⁶⁶ The recurring theme in the Bureau’s study of this issue is that more research and data analysis is necessary to understand the credit invisible population.⁶⁷

In December 2019, Director Kraninger signed on to the *Interagency Statement on the Use of Alternative Data in Credit Underwriting*—along with the Federal Reserve Board (“Federal Reserve”), the Federal Deposit Insurance Corporation (“FDIC”), the Office of the Comptroller of the Currency (“OCC”), and the National Credit Union Administration (“NCUA”)—which stated:

The agencies recognize alternative data’s potential to expand access to credit and produce benefits for consumers. To the extent firms are using or contemplating using

⁶³ See News Release, June 9, 2016, available at: <http://nationalconsumerassistanceplan.com/news/news-release/>.

⁶⁴ Consumer Financial Protection Bureau, Building a Bridge to Credit Visibility (July 2019), available at: https://files.consumerfinance.gov/f/documents/cfpb_building-a-bridge-to-credit-visibility_report.pdf.

⁶⁵ Consumer Financial Protection Bureau, Fair Lending Report of the Bureau of Consumer Financial Protection (June 2019), available at: https://files.consumerfinance.gov/f/documents/201906_cfpb_Fair_Lending_Report.pdf.

⁶⁶ Consumer Financial Protection Bureau, Fair Lending Report of the Bureau of Consumer Financial Protection (June 2019), page 8, available at: https://files.consumerfinance.gov/f/documents/201906_cfpb_Fair_Lending_Report.pdf.

⁶⁷ *Id.*

alternative data, the agencies encourage responsible use of such data. In addition, the agencies are aware that the use of certain alternative data may present no greater risks than data traditionally used in the credit evaluation process.⁶⁸

We strongly believe that use of alternative data such as rental payments, utility and telecom payments will expand access to credit and bolster financial inclusion efforts. **The CFPB should continue its studies in this area, focusing on how to encourage more data reporting, including through oversight of entities that are providing financial products (such as installment loans) or are users of credit reports (such as landlords, utilities and telecom providers), but who traditionally do not reciprocate by furnishing their own valuable consumer data. In addition, the CFPB should support legislation designed to remove barriers to reporting and use of rental, utility and telecom data.**

Misuse of Identity Theft Protections by Credit Repair Operators (Question 13)

One of the important tools for consumer recovering from identity theft is the ability to request that information resulting from identity theft be blocked from their consumer reports. The FCRA requires consumer reporting agencies to block information in a consumer's file that is the result of identity theft within 4 business days of the receipt of appropriate identification, an identity theft report (as defined by rule), identification of the information related to the identity theft, and a statement by the consumer that the information does not relate to any transaction by the consumer. Despite its laudable goals in providing consumers with swift remedial action in response to identity theft, the blocking mechanism has become an instrument of unscrupulous credit repair operators.

Although the possibility of misuse by credit repair operators was noted during the FACT Act rulemaking process,⁶⁹ recent years have seen a significant uptick in its misuse. This is largely attributable to changes made in 2016 and 2017 by the FTC to simplify the process for reporting and recovering from identity theft. In 2016, the FTC replaced the FTC Identity Theft Affidavit with an Identity Theft Report. In 2017, the Identity Theft Report replaced the need for a police report in most cases to alleviate the difficulties consumers were having in obtaining such reports in the aftermath of identity theft incidents.

These reforms had unintended consequences. Following FTC's Identity Theft Report reforms, CRAs and furnishers saw a significant increase in the number of block requests. This increase in blocks resulted from Identity Theft Reports submitted by credit repair companies, not victims of identity theft. Data and research of individualized claims have shown significant misuse and abuse of the Identity Theft Report, harming true victims by diminishing confidence in the integrity of reports, diverting resources to investigate fraudulent reports, and removing accurate information (including positive history) from the system. This misuse also harms consumers by making them appear temporarily more creditworthy, potentially qualifying for credit they cannot afford, and allows credit repair operators to show immediate "results" through the removal of such information, even though those results may eventually be unwound as furnishers seek to reinsert accurate information.

⁶⁸ *Interagency Statement on the Use of Alternative Data in Credit Underwriting* (Dec. 2019), page 2, available at: <https://www.ncua.gov/files/press-releases-news/alternative-data-use-credit-underwriting.pdf>.

⁶⁹ See 69 Fed. Reg. at 63928-29 (noting concerns about the use of identity theft reports by illegal credit repair).

Given the significant, negative impact that credit repair can have on the accuracy and integrity of consumer reports, the CFPB should work with the FTC on ways to improve the Identity Theft Report intake process to address abuse by credit repair operators and provide appropriate guidance supporting the efforts by CRAs and furnishers to combat this abuse. **The Taskforce should recommend that the CFPB use its authority under the FCRA to address the misuse of identity theft reports and requests for blocks in the following ways:**

- **The CFPB should define the term “identity theft report” in such a way as to preclude the preparation and submission of identity theft reports by third parties.**
- **The CFPB should issue a regulation—or at least guidance—regarding how to handle fraudulent identity theft reports as they pertain to Section 605b blocks under the FCRA.**

Equal Credit Opportunity Act / Regulation B Reform (Question 13)

Revolving account holders may designate other individuals as “authorized users” on their accounts, permitting those individuals to use the account without being liable to charges to the account. Creditors furnish information on all authorized user accounts, regardless of whether the user is a spouse or not, and without indicating which are spouses and which are not.⁷⁰ This has the effect of requiring that all authorized users receive similar treatment. These features have unintentionally created the potential for misuse.

When an authorized user is the spouse of an account holder, Regulation B imposes two important requirements. The first, Section 1002.6(b)(6)(i), requires creditors, in evaluating an applicant’s creditworthiness, to consider the credit history for accounts where a spouse is the authorized user. The second, Section 1002.6(b)(8) requires a creditor to evaluate married and unmarried applicants by the same standards. These standards were initially put in place to protect women who were otherwise unable to obtain credit because information on accounts held jointly with their husbands was reported to the credit bureaus only in the husband’s name.⁷¹ These requirements were intended to level the playing field in such scenarios, especially given that the payment history was often as much a product of the contribution of the authorized user as it was of the account holder.⁷² In addition to helping authorized user spouses build credit history, granting authorized user status has thus also been used to help younger individuals build credit history.

In recent years, there have been scams where consumers with poor credit histories (and low credit scores) fraudulently “piggy-back” onto other consumers’ good credit histories.⁷³ Under these schemes, companies pay credit card accountholders with good credit histories to fraudulently obtain authorized user status for other consumers on the accountholder’s credit card, knowing that the bogus

⁷⁰ Finance and Economics Discussion Series, Divisions of Research & Statistics and Monetary Affairs, Federal Reserve Board, Credit Where None is Due? Authorized User Account Status and “Piggybacking Credit,” page 1 (2010), available at: <https://www.federalreserve.gov/pubs/feds/2010/201023/201023pap.pdf>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ For example, a recent FTC enforcement action accused a credit repair company of guaranteeing consumers that, in exchange for a fee, they could “piggyback” on unrelated consumers’ good credit, reaping the benefits of that good credit and artificially inflating their own credit scores. See *FTC v. BoostMyScore, LLC*, Civil Action No. 1:20-cv-641 (D. Colo.).

authorized user will not use the card and in fact will not even have access to the accountholder's name or account number. The buyers of the authorized user status then obtain the benefit of that status, namely an increase in their own credit scores. In this way, the brokers of the authorized user status scam facilitate fraud on the credit-granting industry and increase the cost of credit for honest consumers who do not engage in these practices. These scams undermine the integrity of the credit system.

But there have been substantial societal changes since Regulation B was originally promulgated, with spouses no longer having to rely on each other's credit histories in the manner that gave rise to Regulation B's original structure. **We urge the Taskforce to recommend that the CFPB consider reviewing and modernizing Regulation B to close the loophole allowing "piggybacking" practices.⁷⁴**

IV. Guidance & Policy Solutions

There are several areas where the credit reporting industry would benefit from CFPB guidance or policy changes.

Natural and Declared Disasters / Force Majeure Planning (Question 12)

As the COVID-19 crisis has demonstrated, sudden natural or declared disasters can affect the ability of regulated entities to fulfill their legal obligations. For example, furnishers may be unable to reinvestigate consumer disputes within statutory time frames if they are required to reduce staffing in order to implement social distancing. Similarly, consumer reporting agencies may not be able to reinvestigate disputes involving public records if the disaster has resulted in court closures. While the CFPB's April 1, 2020 policy statement helpfully recognizes the need for flexibility in applying traditional FCRA rules considering the challenges CRAs face operating in the current environment, the non-binding nature of the guidance does not provide the consistency and clarity of a rule. **We urge the Taskforce to recommend that, after the current crisis subsides, the CFPB issue a rule addressing its legal expectations during national disasters and emergencies so there exists a consistent framework to follow when a national emergency is declared.**

Data Security (Questions 7, 9, 15)

CDIA members are concerned with a growing landscape of data security expectations. The current regulatory landscape has created a situation where our industry now has two federal regulators for data security – the FTC and CFPB. We urge the Bureau to study ways in which it could help ensure consistency across federal agencies and the states on the topic. **The most sensible outcome would be for the CFPB to enter into a formal Memorandum of Understanding with the FTC stating that the FTC retains its Gramm-Leach-Bliley Act rulemaking and enforcement authority and that the CFPB simply acts as an examiner in the area of bureau data security.**

⁷⁴ CDIA supports the Taskforce's review of consumer financial laws as many contain provisions that have outlived their original purpose or do not align with their original purpose. For example, given the speed in which credit decisions are made, the FCRA's requirement that a consumer reporting agency provide, upon the request of the consumer, a notification of the deletion of disputed information to a creditor following a dispute, 15 U.S.C. § 1681i(d), no longer serves its original purpose.

In addition, most states have enacted laws that afford consumers certain protections in the event of a data breach. There is considerable variation among these laws, including the triggering events for coverage by the law and the requirements and remedies relating to a breach. **We would welcome federal guidance addressing data breach obligations—or even Bureau support of federal data breach legislation to replace the patchwork quilt of state breach laws.**

Enforcement (Questions 21, 22)

Enforcement is an essential tool for the Bureau, but it is not its only tool or even its most effective tool. However, the Bureau has frequently turned to enforcement first to solve problems, using the flexibility of its UDAAP authority to create new legal requirements which the industry is to follow ostensibly by parsing the consent orders from these cases. But this is an ill-advised regulatory scheme. Consent orders inherently relate primarily to how a single entity allegedly violated the law, and do not explain whether different conduct would also violate the law, or if there are different ways to comply with the law. Enforcement is simply too blunt of an instrument to substitute for notice-and-comment rulemaking. In addition, while CDIA's members are prepared to work with a range of regulators, when an issue arises, our members are too often confronted with multiple overlapping requests for information from state and federal regulators, each of which requires a response within a short time frame and a demand for priority. Without sufficient coordination, this results in undue burden for the recipients of these requests. This is not in the public interest. **We urge the Taskforce to (1) recommend that UDAAP authority not be used to create new legal requirements where there is already an existing statute or regulation; and (2) study ways in which the Bureau may better coordinate with state regulators in pursuing joint enforcement efforts.**

* * * * *

CDIA appreciates the opportunity to comment on this request for information, which is of great importance to its members.

Sincerely,



Eric J. Ellman