THE FAIR CREDIT REPORTING ACT AND THE CONSUMER CREDIT INFORMATION SYSTEM: WHY ERRORS PERSIST AND FURNISHERS SHOULD PLAY A GREATER ROLE IN ENSURING ACCURACY

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Table of Contents

INTRODUCTION

The consumer credit reporting system touches the lives of hundreds of millions of Americans.[1] Indeed, it is difficult for an American consumer to avoid becoming the subject of a credit report.[2] Unless consumers are very wealthy, they will need to access credit to buy a house, attend college,[3] or simply finance everyday purchases through a credit card. Any of these transactions will begin to generate a credit history and enter the consumer into the credit information system. Consumers' credit histories then follow them throughout their public and economic lives, affecting the availability of credit and the terms on which it is extended for home loans, car loans, credit cards, and other consumer financial products.[4] Credit history may also impact the availability of employment opportunities,[5] insurance policies, and housing.[6] A negative credit evaluation can cause consumers to be excluded from economic and social opportunities. Specifically, about one in twenty consumers are affected by an error that substantially interferes with their ability to access credit, as will be discussed *infra* in Section I.C. Additionally, while the effects on other consumers might be marginal, they are nevertheless significant, especially when considered in the aggregate.[7] Negative credit histories raise the cost of acquiring money, resulting in greater overall debt burdens for consumers seeking financial products.[8]

These negative impacts are a largely accepted consequence of having

1 *An Overview of the Credit Bureaus and the Fair Credit Reporting Act: Hearing Before the H. Comm. on Banking, Hous. & Urb. Affs.*, 115th Cong. 1 (2018) (statement of Peggy L. Twohig, Assistant Director of Supervision Policy in the Division of Supervision and of Enforcement and Fair Lending, Bureau of Consumer Financial Protection), https://www.banking.senate.gov/hearings/an-overview-of-the-credit-bureaus-and-the-fair-credit-reporting-act (follow "Download Testimony" hyperlink under "Witnesses").

2 Chi Chi Wu, *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports*, 14 N.C. BANKING INST. 139, 180–81 (2010).

3 *Id.*

4 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 12 (2012); BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT 8, 10 (2007).

5 SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: THE IMPLICATIONS OF CREDIT BACKGROUND CHECKS ON THE DECISION TO HIRE OR NOT TO HIRE 2 (2010). The Society of Human Resource Management reported that 60% of employers conducted background checks for some of their candidates in 2010. *Id.*

6 *See, e.g.*, Wu, *supra* note 2, at 139, 155.

7 *See id.*

8 *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 4, at S-5.

a consumer credit reporting system.[9] The purpose of our consumer credit information system is primarily to provide lenders with accurate information about consumers,[10] enabling those lenders to make more informed decisions about to whom to extend credit and on what terms to offer it. Accurately reporting about a consumer, in turn, requires reflecting both the good and the bad in an individual consumer's history. The development and growing application of the consumer credit reporting system have broadly been associated with decreasing costs of consumer credit and increased availability of credit, especially to lower-income consumers.[11]

However, the utility of the consumer credit reporting system relies on the accuracy of the reports. The regulation of consumer credit reporting, therefore, is concerned with accuracy, particularly because derogatory inaccuracies can cause undue harm to a consumer's ability to access credit. In passing the Fair Credit Reporting Act of 1970 (FCRA), Congress was concerned with cases of consumer harm resulting from inaccurate information in their credit reports.[12] Inaccurate negative information, if left uncorrected, has the double effect of undeservedly hurting a consumer's financial prospects and undermining the predictive value of the reports and the integrity of the system. Inaccuracies, taken in the aggregate, result in the misallocation of credit and, ultimately, an increase in the cost of credit.[13] The FCRA creates a role for each actor in the system to draw attention to and

9 It should be acknowledged that Congress has embraced a certain degree of forgiveness for past credit behavior. For instance, under the Fair Credit Reporting Act (FCRA), notices of delinquencies, charge-offs, repossessions, and collection activity must be removed after seven years. Michael E. Staten & Fred H. Cate, Does the Fair Credit Reporting Act Promote Accurate Credit Reporting? 19 (2004). Notices that a consumer has filed for a Chapter 7 bankruptcy must be removed after ten years. Will Dobbie et al., Bad Credit, No Problem? Credit and Labor Market Consequences of Bad Credit Reports 2 (2019). Although not required by statute, the credit reporting agencies (CRAs) also delete notice of filing under Chapter 13 after seven years. *Id.* n.4.

10 It is worth noting first that credit reports may be used for employment decisions and that there is some debate about the predictive value of credit reports for this purpose. *See* Pauline T. Kim & Erika Hanson, *People Analytics and the Regulation of Information Under the Fair Credit Reporting Act*, 61 St. Louis U. L.J. 17 (2016).

11 *See* Michael Staten, Ctr. For Capital Mkts. Competitiveness, Risk-Based Pricing in Consumer Lending 7 (2014).

12 115 Cong. Rec. 2410–15 (1969) (statement of Sen. Proxmire); Elwin Griffith, *The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions*, 25 U. Mem. L. Rev. 37, 38–41 (1994) (arguing that the enactment of the FCRA in the 1970s attempted to remedy abuses of the credit reporting system, including CRAs that circulated false and inaccurate information about consumers and the consumers' inability to challenge those inaccuracies).

13 Fed. Trade Comm'n, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003, 5 (2012) [hereinafter FTC Study].

correct inaccuracies in individual reports. This includes roles for consumers, furnishers of credit information, credit reporting agencies (CRAs), and end-users.[14]

The Federal Trade Commission (FTC) commissioned a study on credit reporting errors and published the results of this study in 2012.[15] The study provided data on the rate of confirmed material errors,[16] among other measures of errors.[17] Confirmed errors are those which were disputed by a consumer and confirmed as inaccurate by the CRA.[18] A material error is defined as "an inaccurate item falling within the categories used to generate a credit score."[19] Confirmed material errors, therefore, are both confirmed by the CRA that reported them and likely to impact a consumer's access to credit.[20] The FTC's study showed that in their sample, 21% of participants had a confirmed material error,[21] and 12.9% of all participants saw a change in their credit score as a result of the dispute.[22] Assuming that the study's findings can be extrapolated to the greater population and taking the figure of approximately 200 million consumers in the system as a baseline,[23] these findings suggest that millions of consumers may be unjustifiably charged higher rates for credit or denied access to credit altogether.[24]

Both the CRAs and the lending institutions that furnish information to the CRAs, known as "furnishers," have duties under the FCRA to prevent and address these errors.[25] CRAs, however, bear a substantially greater risk of liability in this system.[26] This difference in the potential for liability exists primarily because furnishers are shielded from private actions brought by consumers for failing in their duty to ensure accuracy and integrity.[27] The

14 15 U.S.C. §§ 1681e, 1681g, 1681i, 1681m, 1681s-2.

15 FTC STUDY, *supra* note 13.

16 *Id.* at iv.

17 *Id.* at iv–vi.

18 *See id.*

19 *Id.* at 12.

20 *See id.* at 4.

21 *Id.* at 64.

22 *Id.* at v.

23 *Id.* at 2.

24 It should be noted that, because the FTC study relied on consumers to dispute perceived inaccuracies, the study did not capture the rates of errors that would likely benefit the consumers. *Id.* at iii–iv, 64. Consequently, it is likely that the rate of error is substantially undercounted.

25 15 U.S.C. §§ 1681e, 1681s-2.

26 *See infra* Sections I.B.ii, I.B.iii.

27 *See* Perry v. First Nat'l Bank, 459 F.3d 816, 822 (7th Cir. 2006) (stating that the FCRA provides an exemption for private rights of action under Section 1681s-2(a)); Nelson v. Chase Manhattan Mortg. Corp., 282 F.3d 1057, 1060 (9th Cir. 2002) ("Congress limited the enforcement of the duties imposed by § 1681s-2(a) to governmental

difference in the risk of liability, along with the greater organization of duties in the FCRA, effectively places the onus on CRAs and consumers alone to ensure the quality of the information included in credit reports. However, furnishers are likely able to do far more to address errors than they are currently incentivized to do.

Congress's emphasis on CRAs is sensible to a degree. The CRAs are often specialists in credit reporting and are directly responsible for creating consumer credit reports.[28] However, the CRAs do not necessarily have direct experience with consumers regarding their performance on lines of credit[29] and likely do not have the account-level data to support the accuracy of information provided to them by furnishers. The furnishers, on the other hand, as the original authors of information circulated in the consumer credit reporting system, have the best access to the information needed to verify that information and correct errors.[30] By placing greater responsibility on CRAs as opposed to furnishers, the regulatory framework may result in errors that remain undetected and uncorrected or simply raise the total cost of correction by failing to place the burdens of ensuring accuracy on the actors that can do so most efficiently.

From its introduction in the Senate in 1969, the FCRA was intended to be a means to empower consumers to correct inaccuracies and envisioned consumers as the primary enforcers of the FCRA.[31] It enables consumers

bodies."); Lang v. TCF Nat'l Bank, No. 06-C-1058, 2008 WL 5111223, at *3 (N.D. Ill. Dec. 1, 2008) ("No private right of action exists, however, for violations of section 1681s-2(a)."); Rollins v. Peoples Gas Light & Coke Co., 379 F. Supp. 2d 964, 967 (N.D. Ill. 2005) ("It is undisputed that there is no private right of action under § 1681s2(a)."); Carney v. Experian Info. Sols., Inc., 57 F. Supp. 2d 496, 502 (W.D. Tenn. 1999) ("The FCRA limits enforcement of subsection (a) of § 1681s-2 governing supplying accurate information exclusively to certain federal and/or state officers."); *see also* 15 U.S.C. § 1681s-2(c)–(d) (limiting the enforcement of claims asserted under § 1681s-2(a) to "[f]ederal agencies and officials and the State officials identified in section 1681s of this title").

28 FTC Study, *supra* note 13, at 2.

29 *Id.* at 8.

30 *See* Seamans v. Temple Univ., 744 F.3d 853, 867 n.11 (3d Cir. 2014) ("[T]he furnisher, not the CRA, is in the best position to determine whether [a] dispute is bona fide.").

31 115 Cong. Rec. 2411–12 (1969) (statement of Sen. Proxmire); Meredith Schramm-Strosser, Comment, *The "Not So" Fair Credit Reporting Act: Federal Preemption, Injunctive Relief, and the Need to Return Remedies for Common Law Defamation to the States*, 14 Duq. Bus. L.J. 165, 183 (2012) ("[T]he agency's position is that private litigation best enforces the FCRA."); G. Allan Van Fleet, Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability*, 76 Colum. L. Rev. 458, 506 (1976) (noting the FTC argued consumers should serve the role of private attorneys general and contended success of the FCRA depends on private litigation to ensure compliance).

to request a free credit report from each of the CRAs once per year.[32] It requires furnishers to provide notice to consumers when furnishing negative information about them to a CRA.[33] Creditors who decline to extend credit based on a consumer's credit report must also notify the consumer of the reasons why.[34] These rights help consumers discover inaccuracies included in their reports, especially derogatory errors and, in principle, to act on such errors by raising a dispute with a CRA or a furnisher.[35]

Empowering consumers to police the accuracy of their own credit reports is helpful, but consumer disputes alone are insufficient. An individual consumer may have substantial knowledge about their financial affairs and recognize inaccurate information on a report. Often, however, the ability to initiate a consumer dispute is useless. Many consumers are unaware of the contents of their own credit reports, and most do not check these reports regularly.[36] Further, even if a consumer learns of an inaccuracy, they may not understand its significance. Finally, the steps required to correct an inaccuracy may deter consumers who are not incentivized to address the error. Consequently, the FCRA's enforcement model of providing for consumer disputes likely does little to ensure accuracy.

Ultimately, the FCRA's emphasis on the regulation of CRAs over furnishers and the reliance on consumer disputes present significant regulatory gaps. This article explores why these regulatory gaps are likely to contribute to the persistence of errors in the consumer credit reporting system and how they might be addressed through relatively modest reforms. Part I provides background on the consumer credit reporting system, explores the FCRA's regulatory framework, and discusses the various actors in the consumer credit reporting system and the burdens imposed on each by the FCRA. In addition, Part I reviews the types and prevalence of errors in credit reports. Part II evaluates the FCRA framework by pointing out the limitations of consumer disputes to correct inaccuracies in the system and discusses the FCRA's simultaneous over-emphasis on CRAs and under-emphasis on furnishers. Part III makes the case for amending the FCRA to place greater responsibility on furnishers for ensuring the quality of the information in the consumer credit reporting system. Part III also suggests

32 15 U.S.C. §§ 1681g, 1681j.

33 *Id.* § 1681s-2(a)(7).

34 *Id.* § 1681m(b).

35 Consumers have the right to dispute information to a CRA, *id.* § 1681i(a)(1), or with the furnisher of the disputed information directly, *id.* § 1681s-2(a)(8). *See also id.* § 1681s-2(b) (concerning disputes forwarded from a CRA to a furnisher).

36 NAT'L FOUND. FOR CREDIT COUNSELING & NETWORK BRANDED PREPAID CARD ASS'N, 2012 CONSUMER FINANCIAL LITERACY SURVEY 3 (2012).

potential policy reforms that could improve the overall quality of credit reporting information while providing consumers with more avenues to seek redress for harms caused by inaccuracies in the credit reporting system.

I. THE INSTITUTIONAL AND REGULATORY CONTEXT OF THE CONSUMER CREDIT REPORTING SYSTEM

A. *The Emergence of the Modern Consumer Credit Reporting System and Its Benefits*

The national consumer credit reporting system developed most of its current features during the late twentieth century. First, consumer credit began to be offered in national markets in the 1960s. The legal architecture emerged in 1970 with the passage of the FCRA, which was amended significantly in 1996.[37] Meanwhile, credit cards were first offered nationally in the mid-1980s.[38] Statistical scoring became the industry standard for credit decisions from the mid-to-late 1980s to the mid-1990s, depending on the financial product.[39]

All of these events characterized the emergence of what commentator Michael Staten has termed "risk-based pricing."[40] Risk-based pricing is the practice, now applied by consumer lenders on a virtually universal level, of making decisions regarding whether or not to extend credit and on what terms to extend credit, based on the risk associated with each consumer-applicant.[41] The primary purpose of the consumer credit reporting system is to enable risk-based pricing. In the 1980s and '90s, the expansion of risk-based pricing and development of the consumer credit reporting system was associated with a dramatic increase in the availability of consumer loans, especially general-purpose credit cards, to the lower half of the income distribution.[42] By tying the cost of credit to the risk of default and delinquency posed by individual borrowers, risk-based pricing lowers the cost of credit for the majority of borrowers while also expanding credit availability to higher-risk borrowers and is associated with an increase in the availability of credit to all income groups.[43]

The development of the consumer credit reporting system and CRAs occurred throughout the twentieth century and was associated with

37 Fair Credit Reporting Act of 1970, Pub. L. No. 91-508, §§ 601–22, 84 Stat. 1127 (codified at 15 U.S.C. §§ 1681–1681t); MICHAEL E. STATEN & FRED H. CATE, THE IMPACT OF NATIONAL CREDIT REPORTING UNDER THE FAIR CREDIT REPORTING ACT: THE RISK OF NEW RESTRICTIONS AND STATE REGULATION 2 (2003).

38 STATEN, *supra* note 11, at 15.

39 *Id.* at 13–14.

40 *Id.* at 4.

41 *Id.*

42 *Id.* at 5, 9.

43 *Id.* at 7.

increasing demand for consumer loans following World War II.[44] Prior to the passage of the FCRA, credit bureaus compiled reports from information collected by the bureaus' investigators and provided by creditors.[45] Creditors supplied information voluntarily based on reciprocal arrangements, which enabled creditors to receive information from the bureaus to determine whether to grant credit to consumer-applicants.[46] The investigators often inquired into the consumer-subject's personal reputation, presenting significant privacy concerns and producing unreliable reports.[47]

Until the passage of the FCRA, there was no federal statute regulating credit reports and only one state statute doing so.[48] Senator William Proxmire, who introduced the bill that later became the FCRA, argued for the bill on the Senate floor in 1969 based on the need for Congress to address three issues: "inaccurate or misleading information[,] irrelevant information[, and] confidentiality."[49] While identifying the most serious problem as inaccurate or misleading information, Proxmire conceded that "it is unrealistic to expect 100 percent accuracy."[50] Nevertheless, he concluded that the prevailing level of inaccuracy in the system was intolerable.[51] With the passage of the FCRA in 1970, Congress created substantial legal duties for the CRAs in the Act to ensure the accuracy of the information they include in the report[52] and to adopt procedures for addressing consumer disputes.[53] The FCRA also sought to remedy the privacy concerns associated with consumer credit reporting by restricting who may access a consumer's credit report and the purposes for which a credit report could be used.[54]

The credit reporting industry in the U.S. currently "consists primarily of three national CRAs that maintain a wide range of information on approximately 200 million consumers."[55] Each CRA is individually responsible for collecting and organizing information about consumers and presenting this information in a report.[56] Acting collectively through the

44 Staten & Cate, *supra* note 9, at 4–5.
45 *Id.* at 5.
46 *Id.*
47 *Id.* at 5–6.
48 *Id.* at 4–5, 8. Five states also adopted legislation contemporaneously with the FCRA. *See* Robert M. McNamara, Jr., *The Fair Credit Reporting Act: A Legislative Overview*, 22 J. Pub. L. 67, 72 n.24 (1973).
49 115 Cong. Rec. 2410–15 (1969) (statement of Sen. Proxmire).
50 *Id.*
51 *Id.*
52 15 U.S.C. § 1681e(b).
53 *Id.* § 1681i.
54 *Id.* § 1681b.
55 FTC Study, *supra* note 13, at 2.
56 15 U.S.C. § 1681a(p).

Consumer Data Industry Association (CDIA), the CRAs also regulate the language used when furnishing information.[57] The CRAs sell information to their customers on a subscription basis.[58] Subscribers may be the final users of consumer reports, or they may resell the information to another user.[59] Further, "these subscribers may or may not provide information about their own consumers to the CRAs."[60] Almost all "large banks and finance companies furnish information about their credit accounts to all three of the national CRAs."[61]

In the mid-1970s, the CDIA, then known as Associated Credit Bureaus, created the Metro format.[62] Metro, and its successor Metro 2, are standardized formats for furnishers to use when providing information to the CRAs.[63] The purpose of these reporting languages has been "to facilitate the routine provision of accurate and complete information" using automated systems.[64] The industry's adoption of a standardized reporting language, in turn, enabled the use of statistical scoring, and by the early to mid-1990s, the use of statistical scoring based on the contents of consumer credit reports became the norm across consumer financial products.[65]

Congress amended the FCRA in 1996.[66] The purpose of these reforms was to create additional means for consumers to correct inaccuracies in their reports and to better regulate both CRAs and furnishers under a unified national scheme.[67] This amendment extended liability under the

57 *See* Chi Chi Wu & Richard Rubin, *The Latest on Metro 2: A Key Determinant as to What Goes into Consumer Reports*, NAT'L CONSUMER L. CTR. (Oct. 17, 2018), https://library.nclc.org/latest-metro-2-key-determinant-what-goes-consumer-reports.

58 FTC STUDY, *supra* note 13, at 3.

59 *Id.*

60 *Id.*

61 *Id.*

62 *About CDIA*, CONSUMER DATA INDUS. ASS'N, https://www.cdiaonline.org/about/about-cdia/ (under "History") (last visited Feb. 3, 2021).

63 *Id.*

64 Wu & Rubin, *supra* note 57.

65 *See* STATEN, *supra* note 11, at 11, 13, 13 n.9.

66 Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 2401, 110 Stat. 3009–426 (1996).

67 *See* 141 CONG. REC. S5449–50 (daily ed. Apr. 6, 1995); 15 U.S.C. § 1681t(b) (prohibiting states from regulating the time to complete reinvestigations and the responsibilities of furnishers, among other subjects); Brief of the Federal Trade Commission as Amicus Curiae Supporting Appellant and Urging Reversal, Nelson v. Chase Manhattan Mortg. Corp., 282 F.3d 1057, 2000 WL 33980550, at *15 (arguing that the 1996 FCRA amendments "clearly evince[] a congressional intent to make furnishers liable to consumers for specified FCRA violations").

FCRA to furnishers,[68] enabled state attorneys general to enforce the FCRA,[69] and preempted state regulation of the consumer credit reporting industry in key areas to provide for uniform national regulation.[70]

By the mid-1990s, the consumer credit reporting system began to have the essential features it does today. The system and its regulation were predominantly national in scope, it utilized a standard reporting format, and it was highly automated. Information in the system was used to develop statistical scoring models (the most prominent being FICO's scoring model) to categorize consumers on a uniform basis for risk assessment. At this point, the CRAs had developed what economist Daniel Klein characterized as "the most standardized and most extensive reputational system humankind has ever known."[71]

The development of risk-based pricing effectively ended the industry practice of pricing credit cards at one or two interest rates, which had effectively treated consumers as though they all posed the same risk of default.[72] A 2003 report sent from the Federal Reserve Bank of Philadelphia noted:

> the discount that lower risk customers receive on their APR has increased significantly since the early days of risk-indifferent pricing. The lowest risk customers, who once paid the same price as high-risk customers, now enjoy rate discounts that can reach more than 800 basis points. At the other end of the risk spectrum, these strategies have enabled issuers to grant more people (e.g., immigrants, lower income consumers, those without any credit experience) access to credit, albeit at higher prices.[73]

During the 1980s and 1990s, households in the lower half of the income distribution saw a 200–300% increase in access to general-purpose

68 *See* Brief of the Federal Trade Commission as Amicus Curiae Supporting Appellant and Urging Reversal, *Nelson*, 2000 WL 33980550, at *15 ("Before those amendments, the FCRA imposed no specific duties on furnishers of information.").

69 15 U.S.C. § 1681s(c)(1) (authorizing state enforcement of the FCRA). Despite this amendment, there do not appear to be any examples of state attorneys general initiating enforcement actions against furnishers.

70 *Id.* § 1681t.

71 Daniel B. Klein, *Promise Keeping in the Great Society: A Model of Credit Information Sharing*, 4 Econ. & Pol. 117, 121 (1992).

72 Mark Furletti, Credit Card Pricing Developments and Their Disclosure, Discussion Paper 6 (2003), https://www.philadelphiafed.org/-/media/frbp/assets/consumer-finance/discussion-papers/creditcardpricing_012003.pdf?la=en&hash=C681C5E95BF6626D8C0FDB0EFFBE0521.

73 *Id.* at 6–7 (footnote omitted).

credit cards[74] and a 30–70% increase in access to other types of consumer loans.[75] All told, the cost of consumer credit, in general, declined dramatically during this period while lower-income households, in particular, gained access to consumer credit products that had previously been unavailable.

B. *Principal Actors and Their Rights and Obligations Under the FCRA*

The consumer credit reporting system is essentially comprised of four actors, each of whom plays a role in generating, disseminating, and using consumer credit information. First, consumers of credit borrow credit and engage in other behaviors deemed relevant by CRAs and furnishers. Second, data furnishers, such as creditors, collection agencies, and public sources, record the financial behaviors of their consumer borrowers and send this information to the CRAs.[76] Third, the CRAs receive such information from furnishers and compile credit reports to sell to users. Finally, users rely on credit reports to make decisions about whether or not to extend credit, offer insurance, or offer employment.[77] The FCRA defines the legal relationships among these actors and assigns different duties and rights to each of the actors, creating a role for each actor in ensuring that the information circulated in the system accurately reflects the behavior and creditworthiness of consumers. Together, the interplay of these relationships forms the legal ecosystem of the consumer credit reporting system.

74 THOMAS A. DURKIN ET AL., CONSUMER CREDIT AND THE AMERICAN ECONOMY 302–04 (2014).

75 STATEN, *supra* note 11, at 5.

76 FTC STUDY, *supra* note 13, at 2–3.

77 Permissible purposes for disclosing a consumer report include the consideration of an intended credit transaction, employment purposes, underwriting of insurance involving the consumer, issuance of a government license or other benefit, evaluating the credit risk of an existing credit obligation, and other legitimate business purposes related to a transaction initiated by the consumer or an open account held by the consumer. 15 U.S.C. § 1681b(a)(3).

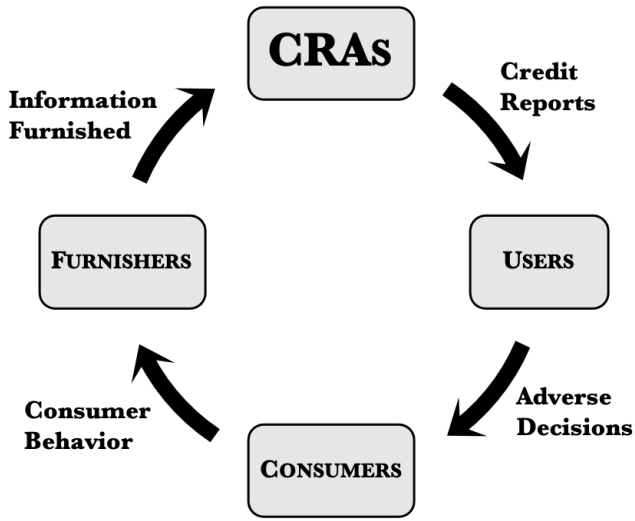

Figure 1: Consumer Credit Information Circle

i. Consumers

The first actor in the consumer credit reporting process is the consumer, the individual subject of a credit report. Each individual consumer's behavior on credit lines and personal information forms the basis of the consumer credit information system. Consumers have the greatest personal interest in maintaining the integrity of their individual reports and are proximate to much of the important underlying information which the reports seek to reflect. For these reasons, many argue that consumers are in the best position to ensure the accuracy of their reports, although I will address in Section II.A why this is not necessarily the case.[78] Accordingly, quality control under the FCRA is primarily driven by consumer disputes,[79] and the FCRA provides for attorney's fees upon successful enforcement of consumer rights under the Act.[80] This policy assumes individual consumers' familiarity with the information reported about their credit history and then relies on consumer disputes and, if needed, litigation as the primary mechanism for protecting the integrity of the credit reporting system.[81]

The FCRA attempts to ensure consumers are well-informed about the contents of their credit reports. First, the FCRA requires that each CRA

78 *See, e.g.*, STATEN & CATE, *supra* note 9, at 20.
79 *Id.* at 21–22.
80 15 U.S.C. §§ 1681n(a)(3), 1681o(a)(2).
81 STATEN & CATE, *supra* note 9, at 12, 15, 21–22.

provide one free credit report per year to any consumer upon request.[82] Second, furnishers are obligated to notify consumers when furnishing "negative information" about them to a CRA.[83] Negative information is defined as "information concerning a customer's delinquencies, late payments, insolvency, or any form of default."[84] Critically, however, the FCRA fails to give consumers a cause of action against furnishers for failure to uphold this duty.[85] Third, in the event that a user of a credit report makes an adverse decision (e.g., a denial of credit) based on the contents of a consumer's credit report, the FCRA obligates the user to provide the consumer with a notice,[86] which must include the consumer's credit report, score, and the key factors impacting the score.[87] This process aims to make consumers aware of factors preventing them from accessing credit, insurance, or employment. However, because the notice requirement is only triggered when there is an adverse decision, the consumer may never be notified of negative items that do not result in a denial of credit but do result in a higher interest rate.[88] These three vehicles—the free credit report, the notice of furnishing negative information, and the user's automatic notice of adverse decision—are the means the FCRA provides to consumers to discover damaging inaccuracies in their credit reports and demonstrate the underlying policy of having consumers police the accuracy of their own reports.

Upon discovering such information, the consumer has two options for lodging a dispute.[89] However, only one of these gives rise to a private right of action.[90] To pursue the enforceable path, first, the consumer must dispute the alleged error with the CRA that issued the report containing the inaccuracy.[91] The CRA is then under a duty to conduct a reasonable

82 15 U.S.C. §§ 1681g, 1681j.
83 *Id.* § 1681s-2(a)(7).
84 *Id.* § 1681(a)(7)(G)(i).
85 *See id.* § 1681s-2(c).
86 *Id.* § 1681m(a).
87 *Id.* §§ 1681m(a), 1681g(f).
88 *Id.* § 1681m(a); STATEN & CATE, *supra* note 9, at 45.
89 Consumers have the right to dispute information to a CRA, 15 U.S.C. § 1681i(a)(1), or, under certain circumstances, with the furnisher of the disputed information directly, *id.* § 1681s-2(a)(8); 12 C.F.R. § 1022.43 (2020); *see also* 15 U.S.C. § 1681s-2(b) (concerning disputes forwarded from a CRA to a furnisher).
90 *Compare* 15 U.S.C. § 1681s-2(a)(8) (providing consumers with the right to dispute information directly with the furnisher), *and id.* § 1681s-2(c) (exempting furnishers from private action for noncompliance with any provision under 15 U.S.C. § 1681s-2(a)), *with id.* § 1681i (no exemption from private liability in the CRA duties), *and id.* § 1681s-2(b) (no exemption from private liability for disputes received from CRAs).
91 *Id.* § 1681i(a)(1)(A).

investigation.[92] Unless the CRA determines the dispute is frivolous or irrelevant,[93] the CRA must send the dispute on to the original furnisher of the information.[94] The furnisher then bears a duty to investigate the dispute.[95] The furnisher may then confirm the accuracy of the information furnished, correct the disputed information, or report that it is unable to confirm the accuracy of an item of information.[96] In the event a furnisher cannot confirm the accuracy of an item or does not respond to a request, then the item must be deleted or modified by the CRA.[97] The consumer's second option for lodging a dispute is to do so directly with the furnisher, but doing so does not create a duty that can be enforced by a private right of action.[98] Consequently, if a furnisher fails to investigate a dispute that is lodged directly with it, the consumer is left without legal recourse.

The options available to the consumer are modeled in *Figure 2*. This diagram expands on *Figure 1* and the general flow of information through the consumer credit reporting system by showing the points at which the consumer may intervene by lodging a dispute and whether these disputes are enforceable by private right of action.

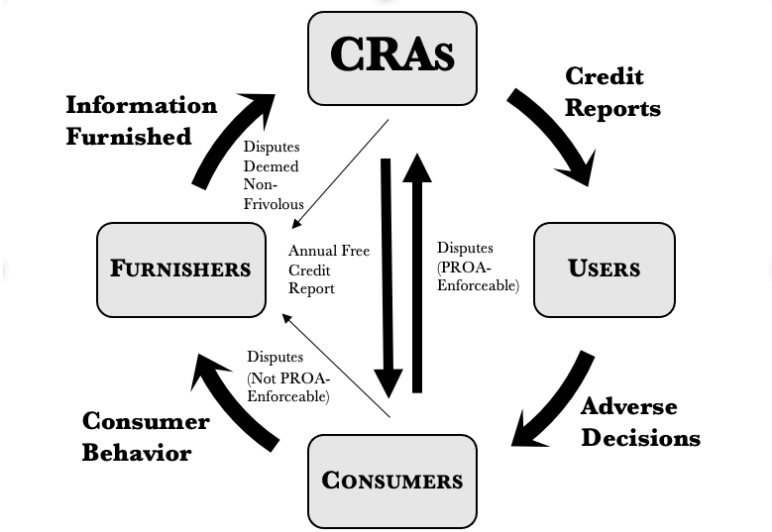

Figure 2: Consumer Credit Information Complex Circle

92 *Id.*
93 *Id.* § 1681i(a)(3)(A).
94 *Id.* § 1681i(a)(2)(A).
95 *Id.* § 1681s-2(b)(1).
96 *Id.* § 1681s-2(b)(1)(C)–(E).
97 *See id.* §§ 1681i(a)(5)(A), 1681s-2(b)(1)(E).
98 *Id.* §§ 1681s-2(a)(8), 1681s-2(c).

ii. Furnishers

The second actor is the furnisher. Anyone who provides information about a consumer to a CRA is a furnisher under the FCRA.[99] Furnishers are often, though not necessarily, creditors, and they provide information about credit transactions with their customers to CRAs.[100] As the original authors of information, creditor-furnishers have the ability to consult and retain the supporting documentation.[101] Furnishers do not bear the costs of inaccuracies, at least insofar as they are acting as furnishers. Although CRAs are likely to care whether the information provided by the furnisher is accurate, without access to the furnisher's underlying account level information, CRAs do not have the ability to verify accuracy. Consequently, creditor-furnishers could satisfy their obligations under a reciprocal agreement so long as they provide information that doesn't appear obviously flawed to the CRA.

Furnishers, like CRAs, are required to refrain from submitting information they know or have reason to believe may be inaccurate.[102] However, the furnisher's requirement does not apply if an address where consumers may submit disputes is posted.[103] Beyond this simple prohibition, the FCRA requires that furnishers[104] and CRAs implement reasonable procedures to ensure the accuracy of information.[105] The regulations pertaining to furnishers require information to be furnished with both accuracy and integrity,[106] meaning that furnished information must be accompanied with sufficient context to ensure it is interpreted correctly.[107]

Beyond prohibiting furnishers from knowingly furnishing

99 *See id.* § 1681s-2.

100 *Overview – For Furnishers of Data*, CONSUMER DATA INDUS. ASS'N, https://www.cdiaonline.org/resources/furnishers-of-data-overview/ (last visited Mar. 12, 2021) ("A data furnisher is an entity that reports information about consumers to consumer reporting agencies (CRAs), which may include credit bureaus, tenant screening companies, check verification services, medical information services, etc."); Wu, *supra* note 2, at 142 ("Furnishers include banks, credit card companies, auto lenders, collection agencies or other businesses.").

101 Certain furnishers, however, lack the underlying information to support the information they furnish. This situation may arise either because the furnisher has failed to retain the information or because the furnisher is reporting an account which they have acquired from another firm, as would be the case with a debt collector. Wu, *supra* note 2, at 152.

102 *See* 15 U.S.C. §§ 1681e(b), 1681s-2(a)(1)(A).

103 *Id.* § 1681s-2(a)(1)(C).

104 *Id.* § 1681s-2(e)(1)(b).

105 *Id.* § 1681e(b).

106 *Id.* § 1681s-2(e)(1).

107 12 C.F.R. § 1022.41(d) (2020).

inaccurate information, the FCRA specifically mandates the development of furnisher regulations addressing the accuracy and integrity of furnished information.[108] The regulations define "accuracy" to mean that information a furnisher provides to a consumer reporting agency must, among other things, correctly "[r]eflect[] the consumer's performance and other conduct with respect to the account or other relationship."[109] "Integrity" is defined as information that is, among other things, "furnished in a form and manner that is designed to minimize the likelihood that the information may be incorrectly reflected in a consumer report."[110]

Appendix E to Regulation V instructs furnishers on guidelines they should follow when establishing their policies and procedures regarding accuracy and integrity.[111] Among these is a requirement that the furnisher "[i]dentify [its] practices or activities . . . that can compromise the accuracy or integrity of information furnished to consumer reporting agencies[,]" including by "[c]onsidering any feedback received from [CRAs], consumers, or other appropriate parties."[112] While furnishers are not under a duty to survey for such information, the agencies which promulgated Regulation V do expect furnishers to review any such information actually in their possession.[113] Furnishers have a duty to update these policies and procedures "as necessary to ensure their continued effectiveness."[114] In particular, the agencies which promulgated Part 1022 expect furnishers to review and update their policies and procedures when they have identified significant deficiencies.[115] Finally, the furnishers should consider the impact their policies and procedures have on consumers when implementing them.[116]

However, the furnisher's duties to ensure accuracy and integrity are exempted from the civil liability provision for negligent or willful noncompliance and therefore are not enforceable by a private right of

108 15 U.S.C. § 1681s-2(e).
109 12 C.F.R. § 1022.41(a) (2020).
110 *Id.* § 1022.41(d).
111 *Id.* § 1022 app. E(II).
112 *Id.* § 1022 app. E(II)(a)(3).
113 Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act, 74 Fed. Reg. 31,484, 31,495 (July 1, 2009) (to be codified at 12 C.F.R. pt. 222).
114 12 C.F.R. § 1022.42(c) (2020).
115 Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act, 74 Fed. Reg. at 31,493.
116 12 C.F.R. § 1022 app. E(II)(a)(5) (2020).

action.[117] Further, states are preempted from creating a private right of action for their residents to act upon.[118] Finally, other duties created by common law or statute are largely precluded from application to the credit reporting field by the FCRA.[119]

The exemption does leave a private right of action available for noncompliance with the furnisher's investigation duty upon notice of a dispute received from a CRA.[120] While many courts hold that a plaintiff must first prove that disputed information is inaccurate in order to hold furnishers liable for a failure to reasonably investigate a dispute,[121] the fact that an investigation incorrectly deems information accurate—despite reasonable investigative procedures—is not sufficient to establish liability.[122] Instead, the furnisher is liable only if there is an uncorrected inaccuracy and the investigation procedures were unreasonable.[123] In other words, a furnisher is only liable for failing to fix a mistake if reasonable procedures would have caught and corrected the issue. Although, if a furnisher determines that disputed information is false or "cannot be verified," the furnisher must notify the CRAs of this result.[124] Further, some circuits have used the details of the notice provided by the CRA to determine what a reasonable investigation requires.[125] Ultimately, the investigation duties do not regulate

117 15 U.S.C. § 1681s-2(c); *see also id.* § 1681s-2(d) (limiting enforcement to actions brought by designated federal and state agencies).

118 *See, e.g.*, Islam v. Option One Mortg. Corp., 432 F. Supp. 2d 181, 188–89 (D. Mass. 2006) (finding that a Massachusetts statute imposing a duty on furnishers resembling that of the FCRA was preempted insofar as it provided a private right of action).

119 *See* 15 U.S.C. § 1681t(b); *see also, e.g.*, Barbieri v. Wells Fargo & Co., No. 09-cv-3196, 2014 U.S. Dist. LEXIS 176835, at *21 (E.D. Pa. Dec. 22, 2014); Grossman v. Trans Union, LLC, 992 F. Supp. 2d 495, 497–99 (E.D. Pa. 2014).

120 15 U.S.C. §§ 1681s-2(b)(1), (c).

121 Pittman v. Experian Info. Sols., Inc., 901 F.3d 619, 629 (6th Cir. 2018).

122 *See* Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1161 (9th Cir. 2009) ("An investigation is not necessarily unreasonable because it results in a substantive conclusion unfavorable to the consumer, even if that conclusion turns out to be inaccurate.").

123 *Id.*

124 15 U.S.C. § 1681s-2(b)(1).

125 Edeh v. Midland Credit Mgmt., 413 F. App'x 925, 926–27 (8th Cir. 2011); *see also* Forgues v. Select Portfolio Servicing, Inc., 690 F. App'x 896, 904 (6th Cir. 2017); Chiang v. Verizon New Eng., Inc., 595 F.3d 26, 38 (1st Cir. 2010). *But see* Humphrey v. Trans Union LLC, 759 F. App'x 484, 491 (7th Cir. 2019) (finding that a reasonable jury could conclude that furnisher's lack of information about the nature of dispute was due to furnisher's "own failure to conduct a reasonable investigation, which should have turned up [consumer]'s letters, documentation about his phone calls, and his rejected applications"); Hinkle v. Midland Credit Mgmt., 827 F.3d 1295, 1306 (11th Cir. 2016) ("[W]e reject the proposition that a furnisher may truncate its investigation simply because the CRA failed to exhaustively describe the dispute in its § 1681i(a)(2) notice.") (citing Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1157 n.11 (9th

the quality of the information but only the quality of the investigations. The investigation duties themselves can vary in strenuousness depending on the jurisdiction.[126]

In the absence of case law stemming from private litigation interpreting the accuracy duties of furnishers, the parallel duties of CRAs, as articulated in case law, are a reasonable and necessary basis for discerning the duties of furnishers. Therefore, we turn to describing the duties of CRAs in order to inform the duties of furnishers.

iii. CRAs

The third actor is the CRA. CRAs receive information from furnishers and organize it into a single report covering each consumer. CRAs have an interest in maintaining the integrity of the system since the accuracy and completeness of the reports they sell is the basis for their business. However, given the high degree of concentration in the market and the large volume of information recorded,[127] competition for accuracy is likely to be both expensive and poorly rewarded. As discussed above, the FCRA requires CRAs to investigate the consumer disputes submitted to them.[128] However, there is reason to believe that these dispute investigations are minimal at best.[129] The FCRA also requires CRAs to implement

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Cir. 2009)).

126 *Compare* Ritchie v. Taylor, 701 F. App'x 45, 48 (2d Cir. 2017) ("Ritchie argues . . . FCRA required them to 'conduct an investigation with respect to the disputed information,' 'review all relevant information provided, and report the results of the investigation to [Experian].' . . . They did all those things. That they did so in as little as two minutes does not mean that they violated the statute."); *with* Hinkle v. Midland Credit Mgmt., Inc., 827 F.3d 1295, 1303 (11th Cir. 2016) ("These definitions support the conclusion that § 1681s-2(b) requires some degree of careful inquiry by furnishers of information. In particular, when a furnisher does not already possess evidence establishing that an item of disputed information is true, § 1681s-2(b) requires the furnisher to seek out and obtain such evidence before reporting the information as 'verified.'"); Johnson v. MBNA Am. Bank, NA, 357 F.3d 426, 430 (4th Cir. 2004) (quoting Am. Heritage Dictionary 920 (4th ed. 2000) ("The key term at issue here, 'investigation,' is defined as '[a] detailed inquiry or systematic examination.'").

127 Fed. Trade Comm'n & the Bd. of Governors of the Fed. Reserve Sys., Report to Congress on the Fair Credit Reporting Act Dispute Process 2–3 (2006) [hereinafter FTC 2006 Report]; Robert B. Avery et al., *An Overview of Consumer Data and Credit Reporting*, 89 Fed. Reserve Bull. 47, 49 (2003).

128 15 U.S.C. § 1681i(a)(1)(A).

129 *See* Wu, *supra* note 2, at 166 ("What these depositions and internal credit bureau documents show is that their employees are no more than data entry clerks in the dispute and investigation process. None of the credit bureaus permit these clerks to consider and exercise discretion over a consumer's dispute.").

reasonable policies and procedures to ensure the "maximum possible accuracy" of information included in their reports in the first place,[130] as discussed further below. Unfortunately, despite their duties to ensure the accuracy of the information, CRAs do not "exercise virtually any quality control over the information initially provided to them by furnishers."[131] The FCRA emphasizes the responsibility of the CRAs by exposing them to private enforcement. Requiring consumers to submit disputes to the CRAs in order to create an enforceable right to a reinvestigation places the CRA in the middle of quality control. Congress likely decided to put CRAs in this position because they are specialists.

The FCRA places duties on CRAs as authors of information circulated in the system. As with furnishers, the FCRA requires CRAs to ensure that information is accurate whether or not a consumer submits a dispute.[132] CRAs also must avoid submitting information they know or have reason to believe may be inaccurate.[133] Like furnishers, CRAs must also implement reasonable procedures to ensure the accuracy of information. The section pertaining to CRAs specifically refers to ensuring "maximum possible accuracy."[134]

In order to hold a CRA liable for inaccuracies in a credit report, a plaintiff must first establish that the information falls below the standard of maximum possible accuracy, either because it is false outright, or because, although technically true, the manner in which it is furnished is likely to mislead users.[135] Second, a plaintiff must establish that the CRA failed to implement reasonable procedures.[136] This can be judged by weighing the seriousness of the information, typically measured by the impact it would have on the consumer's ability to access credit, against the burden of attempting to confirm or clarify the information.[137] Finally, the inaccuracy must have caused the plaintiff's injury.[138] While the loss of economic opportunities caused by an inaccuracy is an obvious means to demonstrate injury, an injury may also be shown by the emotional distress consumers face

130 15 U.S.C. § 1681i(e)(b).

131 Wu, *supra* note 2, at 152.

132 *See* 15 U.S.C. § 1681e(b) (the CRA accuracy rule); *id.* § 1681s-2; 12 C.F.R. § 1022.41 (2020) (the furnisher accuracy and integrity rule).

133 *See* 15 U.S.C. § 1681e(b).

134 *Id.* § 1681e(b).

135 *See, e.g.*, Cortez v. Trans Union, LLC, 617 F.3d 688, 708–09 (3d Cir. 2010).

136 *See* Philbin v. Trans Union Corp., 101 F.3d 957, 963 (3d Cir. 1996), *abrogated on other grounds by Cortez*, 617 F.3d at 721 n.39.

137 Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 40 (D.C. Cir. 1984) (quoting Alexander v. Moore & Assocs., Inc., 553 F. Supp. 948, 952 (D. Haw. 1982)).

138 *Philbin*, 101 F.3d at 963.

in having to repair their reputations.[139] Ultimately, CRAs must implement robust procedures which ensure (1) that the information provided in reports is true and is likely to be correctly interpreted by a user, and (2) that the CRA's procedures must take items of information that have a greater impact on the lives of consumers more seriously than those which have only slight impacts. To understand the meaning of the FCRA's requirements on CRAs in practice, we must consider how the courts have interpreted its provisions.

Most circuits have weighed in on the meaning of the term "maximum possible accuracy," but circuits are split on whether technical accuracy qualifies as maximum possible accuracy. Some distinguish the standard of maximum possible accuracy from simple or technical accuracy.[140] In *Pinner v. Schmidt*, the U.S. Court of Appeals for the Fifth Circuit explained the distinction as the difference between reporting that "a [consumer] was 'involved' in a credit card scam" and reporting that the consumer was "one of the victims of the scam."[141] The approach, borne out of *Pinner v. Schmidt*, requires that CRAs do more than merely report information that is technically accurate; instead, it imposes liability when CRAs report technically accurate information that nevertheless is likely to mislead users and harm consumers.[142] The Third Circuit, in *Cortez v. Trans Union*, defined the meaning of "maximum possible accuracy" by holding that when the information reported, despite being technically accurate, could easily be interpreted to mean something contrary to actual fact and detrimental to the consumer who is the subject of the report, it does not meet the "maximum possible accuracy" standard.[143] In addition, information

139 *Id.* at 962; *Cortez*, 617 F.3d at 701, 719.

140 Pedro v. Equifax, Inc., 868 F.3d 1275, 1281 (11th Cir. 2017); *Cortez*, 617 F.3d at 709; Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1163 (9th Cir. 2009); Dalton v. Capital Associated Indus., Inc., 257 F.3d 409, 415 (4th Cir. 2001); Sepulvado v. CSC Credit Servs., Inc., 158 F.3d 890, 895 (5th Cir. 1998); Pinner v. Schmidt, 805 F.2d 1258, 1261, 1263 (5th Cir. 1986) (quoting Alexander v. Moore & Associates, Inc., 553 F.Supp. 948, 952 (D. Haw. 1982)); Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 40 (D.C. Cir. 1984). *But see* Turner v. Experian Info. Sols., Inc., No. 17-3795, 2018 U.S. App. LEXIS 5395, at *8 (6th Cir. Mar. 1, 2018); Dickens v. Trans Union Corp., 18 F. App'x 315, 318 (6th Cir. 2001) (quoting Cahlin v. Gen. Motors Acceptance Corp., 936 F.2d 1151, 1157 (11th Cir. 1991) (holding that "a credit reporting agency satisfies its duty under section 607(b) if it produces a report that contains factually correct information about a consumer that might nonetheless be misleading or incomplete in some respect")).

141 *Pinner*, 805 F.2d at 1263 (quoting *Alexander*, 553 F.Supp. at 952).

142 *Cortez*, 617 F.3d at 709–10.

143 *Id.* at 709; *see also Dalton.*, 257 F.3d at 415; Schweitzer v. Equifax Info. Sols. LLC, 441 F. App'x 896, 902 (3d Cir. 2011) (quoting Saunders v. Branch Banking & Trust Co., 526 F.3d 142, 148 (4th Cir.2008)) (citing *Dalton*, 257 F.3d at 415); *Sepulvado,* 158 F.3d at 895 ("A credit entry may be 'inaccurate' within the meaning of the statute either because it is patently incorrect, or because it is misleading in such a way and to such an extent

that is arguably technically accurate may be considered to be beneath the standard of "maximum possible accuracy" if the manner in which the information is furnished is inconsistent with standard industry usage and creates a materially misleading impression.[144] Consequently, in most circuits that have defined maximum possible accuracy in their case law, the term is understood to require that information be unlikely to create a misleading impression that would be detrimental to the consumer-subject of the report.

Some circuits, however, have articulated a technical accuracy defense for CRAs under the CRA accuracy rule, holding that a CRA has not violated the maximum possible accuracy rule if the information is technically accurate.[145] In *Dickens v. Trans Union*, Trans Union reported that a loan on the plaintiff's credit report had been discharged in bankruptcy.[146] The Sixth Circuit Court of Appeals held that this report was accurate despite the fact that the plaintiff in *Dickens* had not filed for bankruptcy and was only the cosigner on a loan that was discharged in bankruptcy and later paid off in full.[147] Although the information reported by Trans Union would likely mislead a user of the credit report in a way that would be likely to harm the consumer, the Sixth Circuit found that the information was technically accurate and therefore satisfied the CRA accuracy rule.[148]

In addition to interpreting the accuracy provision, the court has considered the reasonableness of CRAs' procedures to ensure accuracy. The reasonableness of a CRA's procedures may be determined by weighing the seriousness of the inaccuracy at issue against the difficulty presented by correcting or preventing the inaccuracy.[149] Under the *Koropoulos* test, the greater the inaccuracy's potential to mislead and the more readily available the clarifying information is, the higher the CRA's burden to clarify their reporting.[150] Conversely, if the inaccuracy is "relatively insignificant," then the CRA need not undertake a "burdensome task [to] provide clarifying" information.[151]

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that it can be expected to adversely affect credit decisions.").

144 Cassara v. DAC Services, Inc., 276 F.3d 1210 (10th Cir. 2002) (referring to industry usage in attempting to determine how a reported term would be understood, and consequently whether such term would be accurate).

145 *See, e.g.*, *Dickens*, 18 F. App'x at 318.

146 *Id.* at 316.

147 *Id.* at 318.

148 *Id.*

149 *See* Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 42 (D.C. Cir. 1984) (quoting Alexander v. Moore & Assocs., Inc., 553 F. Supp. 948, 952 (D. Haw. 1982); *see also* Pedro v. Equifax, Inc., 868 F.3d 1275, 1283–84 (11th Cir. 2017) (Rosenbaum, J., concurring); Henson v. CSC Credit Servs., 29 F.3d 280, 285–86 (7th Cir. 1994).

150 *Koropoulos*, 734 F.2d at 42 (quoting *Alexander*, 553 F. Supp. at 952).

151 *Id.*

In sum, most circuits, though not all, require CRAs to ensure that the information they report is not likely to be misunderstood in a way that harms the consumers. In both designing and following the procedures required to ensure accuracy, the CRA must weigh the seriousness of the information at hand and its potential to harm the consumer in question against the difficulty of trying to confirm or correct the information. The interpretation of CRAs' duties under the FCRA provides a useful model for the legal duties of furnishers following possible reforms placing greater responsibility on them, which will be discussed *infra* in Part III.

iv. Users

The final actor in the consumer credit reporting system is the user, who receives a consumer's report upon request and uses it for one of the statutorily sanctioned purposes.[152] Users have a substantial interest in the accuracy of the credit reporting system; however, they normally lack access to the supporting information behind the reports and therefore can only play a limited role in ensuring the accuracy of reports.[153] Accordingly, the FCRA only requires users to provide adverse decision notices to consumers.[154]

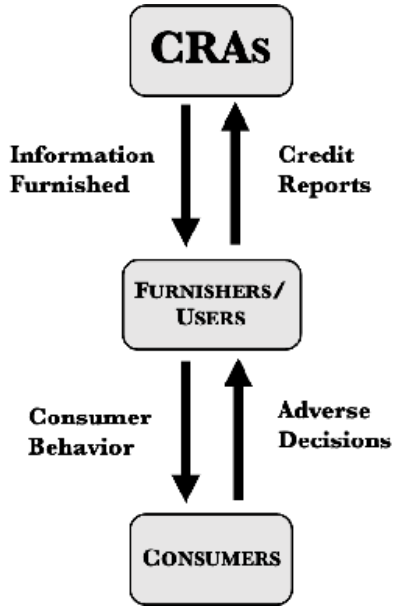

Figure 3: Consumer Credit Information Ladder

Critically, the primary use that credit reports are designed for is to support risk-based pricing of credit.[155] Bearing in mind that the primary users of credit reports are creditors,[156] and given that furnishers are also predominantly creditors of one kind or another,[157] it is apparent

152 *See* 15 U.S.C. § 1681b(a)(3) (including the extension of credit, employment purposes, determining eligibility for government licenses or other purposes, assessing the risk associated with a current credit obligation, and other legitimate business needs related to transactions which the consumer has initiated).

153 *See* STATEN, *supra* note 11, at 10.

154 15 U.S.C. § 1681m(a).

155 *See* STATEN, *supra* note 11, at 10–11.

156 *Id.*

157 *See* FTC 2006 REPORT, *supra* note 127, at 4 ("Examples of furnishers include banks,

that the furnisher and the user are often very similar firms. As such, we can reconceive the system as a ladder rather than as a circle, with furnisher-users positioned in the middle and communicating directly with both the consumers and the CRAs. This dynamic points to the possibility that by increasing the responsibility of furnishers for ensuring the accuracy of information, furnishers, in their capacities as users, would actually benefit from increased accuracy, even if their compliance costs increase. This will be discussed in Part III.

Ultimately, the FCRA creates a network of responsibilities among the principal actors within the consumer credit information system. The Act places primary responsibility for ensuring the quality of information on the consumers themselves and on the CRAs while leaving furnishers with a realistic risk of liability only when they fail to properly reinvestigate a disputed item of information.

C. *Types and Prevalence of Credit Report Errors*

Before describing the types of errors, it is first necessary to set out what constitutes an error. The FTC provides two definitions of errors in their 2012 study on credit report errors.[158] The most conservative definition used by the FTC showed that 9.7% of study participants had at least one confirmed material error, while a less conservative definition showed a rate of 21%.[159]

All errors in the consumer reporting system, even small ones, degrade the overall quality of the reports, the confidence lenders can place on them, and the ability to accurately score across large populations. The implementation of risk-based pricing of credit has contributed to the increasing availability and decreasing cost of consumer credit.[160] Therefore, errors in consumer credit reports, especially if widespread, could interfere with these beneficial developments. However, errors vary significantly in the cause, magnitude, and directional impact on the consumer.

As categorized by their causes, errors can be regarded as clerical, systematic, descriptive, or willful. The simplest cause is a clerical error.

thrifts, credit unions, savings and loan institutions, mortgage lenders, credit card issuers, collection agencies, retail installment lenders, and auto finance lenders.").

158 FTC STUDY, *supra* note 13, at ii, iv ("The most conservative definition of a confirmed error is the situation where the consumer disputes an item . . . and the CRA agrees with every element of the consumer dispute and follows all of the consumer's instructions . . . *A less conservative definition*: Defining a consumer with a 'confirmed material error' as someone who identifies, disputes, and has any modification made to a report.").

159 *Id.* at iv.

160 STATEN, *supra* note 11, at 4.

Errors caused purely by accident are likely, though not guaranteed, to be isolated incidents and, if discovered, to be correctable. However, clerical errors are unlikely to be detected by consumers, and in a correction system driven by consumer disputes, none of the other actors are likely to detect or correct such an error on their own.

Systematic errors are more complex, involving the implementation of policies and procedures that result in the repeated furnishing or reporting of information in a misleading manner. The Consumer Financial Protection Bureau's (CFPB) suit against student loan servicer Navient provides an example.[161] Navient, as a student loan servicer, was frequently responsible for furnishing information about certain loan discharges[162] that are required when a student loan borrower is totally and permanently disabled. [163] According to the CFPB's complaint, the special comment code (from the Metro 2 reporting language) Navient used to report student loans that were discharged due to a determination of total and permanent disability was misinterpreted by CRAs as an indication of default on the loan.[164] Navient's use of this faulty Metro 2 code for all the student loans that were discharged due to disability had a systematic impact across a broad population of consumers. With systematic errors related to reporting codes, detection by consumers is especially unlikely because a consumer is unlikely to access or understand the coded communication between furnishers and CRAs.

Next, an accuracy error may be caused by the descriptive details, or lack thereof, in the information provided. The error at issue in *Dickens v. Trans Union* is an example of this type of error. In that case, as discussed in Section I.B.iii, a loan on the plaintiff's credit report was reported to have been discharged in bankruptcy when the plaintiff was only the cosigner on a loan that was discharged in bankruptcy, and that loan was later paid off in full by the cosigner.[165]

Unlike the aforementioned errors, some are intentional and intended to harass or coerce a consumer into paying a debt. Debt collectors, in particular, are likely to act or threaten to act as furnishers in order to exact leverage by affecting a consumer's credit report.[166] Such behavior, while potentially significant, has not received significant attention in the

161 *See* Complaint for Permanent Injunction and Other Relief at 3–4, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-00101-RDM, (M.D. Pa. Jan. 18, 2017), 2017 WL 191446 [hereinafter *Navient Complaint*].

162 *Id.* at 31–32.

163 *Total and Permanent Discharge (TPD) 101*, Fed. Student Aid (last visited Feb. 28, 2020), https://www.disabilitydischarge.com/TPD-101.

164 *Navient Complaint*, *supra* note 161, at 31–34.

165 Dickens v. Trans Union Corp., 18 F. App'x 315, 318 (6th Cir. 2001).

166 *See* Wu, *supra* note 2, at 153–55.

scholarship of this area and, unfortunately, is beyond the scope of this article.

Next, we turn to describing errors by their magnitude. A 2012 FTC report which assessed the impact of correcting perceived inaccuracies demonstrates that consumer-detected errors often have a considerable impact on credit scores.[167] Of the study's 1,001 randomly selected participants, 26% found a "potentially material error," and 21% of the participants had a modification to a "credit report[] after the dispute process."[168] Of the reports that experienced a score change, 61% had a score increase of more than ten points, and 29% had a score increase of more than twenty-five points.[169] Another aspect of the report demonstrated that in about one in six reports containing confirmed errors, those errors were significant enough to substantially affect the consumer-subject's access to credit. [170] These substantial errors affect about one in every twenty consumers, substantially and unjustifiably interfering with these consumer's ability to access credit, insurance policies, and employment opportunities.[171]

It is worth noting that while most confirmed errors on credit reports which result in a score change do not result in a change in credit risk classification, the prevalence of inaccurate information and distorted scoring is likely to raise the prevailing cost of credit. Although such errors may have small to non-existent effects on the individual consumer, in the aggregate, these degrade the quality of the reporting system and interfere with the benefits of accurate risk-based pricing, inflating the cost of consumer credit.

Regarding the directional impact of errors, there are three principal types: those which are derogatory, or which hinder an individual consumer's ability to access credit; errors which are beneficial, or which unjustifiably enhance a consumer's ability to access credit; and those which have no impact one way or the other. While this analysis is largely focused on derogatory errors, beneficial errors are likely to cause consumer harm in the aggregate by causing credit to be misallocated and raising the uncertainty in statistical scoring models, both of which can be expected to raise the prevailing cost of credit. Errors that are neither derogatory nor beneficial are not uncommon.[172] While these errors are likely to have smaller impacts, they still raise the possibility of distortionary effects in the aggregate.

167 FTC STUDY, *supra* note 13, at iv–v.

168 *Id.* at i.

169 *Id.* at v.

170 *Id.* at iv–v. The scale of this difference is suggested by FICO's reporting that as of May 2, 2012 "the interest rate for a five year auto loan might be as low as 3.701% for consumers with credit scores in the range 720-850 and as high as 17.292% for consumers with credit scores in the range 500-589." *Id.* at 46 n.83.

171 *See id.* at v.

172 *Id.* at iv–v.

II. Assessing the FCRA Framework: Making the Case for Amendments to the FCRA

The organization of the FCRA has several notable consequences. First, it relies too heavily on consumer disputes, which are insufficient for several reasons, as a means of enforcement. Second, it effectively positions CRAs, who have little control over the accuracy of the information in credit reports, as gatekeepers for consumer disputes, leaving furnishers without a privately enforceable duty to ensure the accuracy of the information they furnish. Finally, the regulatory framework worsens the extant market distortions and fails to incentivize the furnishing of accurate credit report information.

A. *Misplaced Reliance on Consumer Disputes*

While the consumer dispute system leverages an individual consumer's familiarity with their own financial affairs and personal information, the consumer dispute is insufficient to correct inaccuracies in many cases. Consumers are unlikely or completely unable to detect errors and are usually poorly incentivized to correct inaccuracies. The FCRA's positioning of the CRAs as gatekeepers further undermines the efficacy of consumer disputes and likely leads to the dismissal of meritorious disputes.

Despite bearing the greatest interest in ensuring the accuracy of reports, many consumers lack specific knowledge about their credit reports.[173] A 2012 study showed only 38% of respondents had requested a copy of their credit report within the previous twelve months,[174] despite the requirement that CRAs provide each consumer with a credit report for free upon request once every twelve months.[175] It is unlikely that the FCRA's requirement that a consumer is notified of a denial of credit adequately addresses this issue, especially because subtler categories of negative errors that do not lead to a denial of credit, which are likely pervasive, do not trigger this requirement.[176] Further, consumer surveys suggest that more than two-thirds of American consumers do not understand the basic purpose of credit reports,[177] and

173 Angela C. Lyons et al., *What's in a Score? Differences in Consumers' Credit Knowledge Using OLS and Quantile Regressions*, 41 J. Consumer Affs. 223, 225–26 (2007).

174 Nat'l Found. for Credit Counseling & Network Branded Prepaid Card Ass'n, *supra* note 36, at 11.

175 15 U.S.C. §§ 1681g, 1681j(a)(1)(A).

176 *See id.* § 1681m(a).

177 *Consumer Understanding of Credit Scores Improves but Remains Poor*, Consumer Fed'n of Am. (July 10, 2008), https://consumerfed.org/press_release/consumer-understanding-of-credit-scores-improves-but-remains-poor-results-of-cfawamu-credit-score-survey/

many erroneously believe that a credit score is determined by factors such as income or age.[178] This suggests that even if consumers check their reports or are notified of denials of credit, they are unlikely to understand their contents and implications. Even if consumers check and understand the significance of their credit reports, consumers are unlikely to detect systematic errors related to coding in Metro 2 because such coding is not reflected in the resulting report. Although some consumers may check their reports, understand the inaccuracies, and wish to dispute them, consumers are also often ill-informed about their rights to submit disputes.[179] In the unlikely case that a consumer does wish to submit a dispute, consumers face substantial hurdles when seeking to enforce their rights in court and will rarely be sufficiently incentivized to do so.[180] Consumers are likely to ignore rather than dispute low-impact errors, judging that the effort involved in filing a dispute is not worth the benefit of correction. Finally, consumer disputes are unlikely to address inaccuracies that benefit consumers because they are unlikely to correct such errors out of self-interest.

In addition to these factors inhibiting the efficacy of consumer disputes, even the consumer disputes that are lodged are unlikely to result in the correction of a furnisher's systematic error. Although the consumer dispute may benefit that individual consumer, there is no private mechanism available to require the furnisher to correct other accounts affected by the same systematic mistake.

The ability of consumer disputes to effectively correct inaccuracies is further diminished by the CRA's role as a gatekeeper under the FCRA. As discussed above, the FCRA lays out a path for consumer disputes which must be followed in order for consumers to enforce their rights.[181] This path requires consumers to send disputes to the CRA issuing the report

("Less than [one-third] of Americans (31%), for example, understand that credit scores indicate risk of not repaying a loan, rather than factors like knowledge of, or attitude toward, consumer credit.").

178 *Id.* ("Significant percentages erroneously believe that credit scores are influenced by income (74%), age (40%), marital status (38%), the state in which they live (29%), level of education (29%), and ethnicity (15%).").

179 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-223, CREDIT REPORTING LITERACY: CONSUMERS UNDERSTOOD THE BASICS BUT COULD BENEFIT FROM TARGETED EDUCATIONAL EFFORTS, 10–11 (2005).

180 Jeffrey Bils, *Fighting Unfair Credit Reports: A Proposal to Give Consumers More Power to Enforce the Fair Credit Reporting Act*, 61 UCLA. L. REV. DISCOURSE 226, 234–37 (2013). These include difficult pleading requirements often calling for facts consumers cannot access and inconsistent interpretations of CRA and furnisher duties in different jurisdictions. *Id.*

181 *See supra* Section I.B.iii.

containing the disputed information.[182] The CRA then has the power to terminate a dispute upon deciding that it is frivolous or irrelevant,[183] and if the CRA determines the dispute may have merit, it must then provide notice to the furnisher of the dispute.[184]

The CRA's notice of the dispute necessarily frames the dispute and informs the furnisher's reasonable investigation.[185] Courts in some jurisdictions have held that the reasonableness of a furnisher's investigation hinges on "what is contained in the CRA's dispute notice as to the nature of the dispute."[186] Therefore, the CRAs must be relied upon not only to correctly diagnose a dispute as frivolous or non-frivolous, and at least in those aforementioned jurisdictions, to accurately convey the dispute to the furnisher. Even in jurisdictions where courts may, depending on the circumstances, expect furnishers to investigate beyond the mere contents of the notice,[187] the CRA's notice still provides the essential context of the investigation. The CRAs are not necessarily reliable partners in advancing disputes, sometimes sending notices to furnishers containing only vague or cursory information.[188] Consequently, especially in those jurisdictions which

182 15 U.S.C. § 1681i(a)(1)(A).

183 *Id.* § 1681i(a)(3).

184 *Id.* § 1681i(a)(2).

185 *See, e.g.*, Forgues v. Select Portfolio Servicing, Inc., 690 F. App'x 896, 904 (6th Cir. 2017); Boggio v. USAA Fed. Sav. Bank, 696 F.3d 611, 617 (6th Cir. 2012) ("In *Johnson*, the Fourth Circuit held that electronically confirming only a name and address—as opposed to 'consult[ing] underlying documents such as account applications'—was unreasonable when the furnisher had received information from the CRA explaining that its consumer was disputing her status as a co-obligor on her husband's debt. . . . By contrast, the Seventh Circuit held that a similarly cursory review of internal, electronic documents was reasonable because the CRA provided only 'scant information . . . regarding the nature of [the consumer's] dispute.'") (citations omitted); Gorman v. Wolpoff Abramson, LLP, 584 F.3d 1157, 1160 (9th Cir. 2009) (citing Johnson v. MBNA Am. Bank, NA, 357 F.3d 426, 431 (4th Cir. 2004)).

186 Edeh v. Midland Credit Mgmt., 413 F. App'x 925, 926–27 (8th Cir. 2011); *see also* Forgues v. Select Portfolio Servicing, Inc., 690 F. App'x 896, 904 (6th Cir. 2017); Chiang v. Verizon New Eng., Inc., 595 F.3d 26, 38 (1st Cir. 2010). *But see* Humphrey v. Trans Union LLC, 759 F. App'x 484, 491 (7th Cir. 2019); Hinkle v. Midland Credit Mgmt., 827 F.3d 1295, 1306 (11th Cir. 2016).

187 *See, e.g.*, Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1160 (9th Cir. 2009) (citing Johnson v. MBNA Am. Bank, NA, 357 F.3d 426, 431 (4th Cir. 2004)).

188 *See, e.g.*, Hinkle v. Midland Credit Mgmt., 827 F.3d 1295, 1306 (11th Cir. 2016) ("Midland also argues that its investigative burden was less extensive because the notice of dispute it received from the CRAs stated only that the GE/Meijer and T-Mobile accounts were '[n]ot his/hers.'"); Edeh v. Midland Credit Mgmt., 413 F. App'x 925, 926 (8th Cir. 2011); Chiang v. Verizon New Eng. Inc., 595 F.3d 26, 38 (1st Cir. 2010) ("[A] more limited investigation may be appropriate when CRAs provide the furnisher with vague or cursory information about a consumer's dispute.").

allow furnishers to limit their investigation based on the notices they receive, the position of CRAs as gatekeepers likely causes some meritorious disputes to go unaddressed.

All told, these issues suggest that broad categories of errors remain unaddressed by the consumer dispute system. Since the consumer dispute regime envisioned by the FCRA can only be an effective protection where consumers check their reports, recognize and understand an inaccuracy when they see one, and take action to dispute it with the CRAs, the realities of consumer knowledge and behavior substantially limit the validity of relying on consumer claims to police inaccuracies in the credit reporting system. In order to achieve the FCRA's goals of fostering a reliable consumer credit reporting system that protects the interests of consumers, a mechanism beyond the consumer dispute framework is needed.

B. *Misguided Emphasis on CRAs Rather than Furnishers*

Furnishers are in an equally good, if not better, position than consumers and CRAs to ensure the accuracy of the information they furnish to CRAs. Furnishers are likely to be in control of their own document retention policies and information practices, giving them control over the documentary support for their information. Given that furnishers are often sophisticated lending institutions with access to and expertise in the Metro formats used to communicate within the system,[189] furnishers should be expected to handle supporting the accuracy of the information they produce. Instead of holding furnishers responsible for the accuracy of the information they produce, however, the FCRA focuses on CRAs, which are generally not responsible for or able to rectify errors.

While the duties of CRAs and furnishers are comparable,[190] the absence of a private right of action to enforce furnishers' duties dilutes the importance of furnisher requirements under the FCRA. The similarities between the duties of furnishers and CRAs under both the FCRA and corresponding regulations[191] demonstrate that the law is concerned both with prohibiting outright falsehood and with preventing technically accurate but misleading information from being circulated. The failure of the FCRA to create a private right of action to enforce the furnishers' duties, however, makes these duties very different in practice from those applicable to the CRAs. Since government enforcement of furnisher deficiencies in any given transaction is unlikely, the system effectively operates without furnishers

189 *See supra* Section I.B.ii.

190 *See supra* Sections I.B.ii, I.B.iii.

191 *See supra* Sections I.B.ii, I.B.iii.

needing to worry about the accuracy of the information they furnish until after the information is disputed, which is a relatively rare occurrence.[192] Absent market-driven incentives or a real possibility of liability, it is unlikely that furnishers will devote additional resources to ensuring the accuracy and integrity of their information.

The FCRA's positioning of the CRA as a gatekeeper of consumer disputes also undermines the FCRA's ability to address issues originating with the furnisher, as previously discussed *supra* at Section II.A. This gatekeeping means that a furnisher, who may be the cause of the error, may never even be made aware of the existence of a dispute.

Congress likely decided to put CRAs in this position because they are specialists in the consumer credit information system. However, the emphasis on CRAs, who normally do not have access to underlying information about a disputed trade line, comes at the cost of leaving furnishers, who do have access to underlying information, without much effective responsibility for maintaining the accuracy of information.

C. *Distorted Incentives Leading to Errors*

Under the current system, there are incentives, both those inherent in the credit reporting market and those created by the FCRA, that are likely to lead to errors. We consider each kind in turn.

The market incentives that apply to furnishers are very weak. First, furnishers do not bear the costs of their own inaccuracies. Even if furnishers are also users of credit reports and therefore bear an interest in the overall integrity of the consumer credit information system, furnishers acting individually do not bear the costs of furnishing inaccurate information, so long as they satisfy their obligations under their information-sharing agreements with CRAs. However, CRAs may not set a high bar for scrutiny in this area. According to consumer advocate Chi Chi Wu, "[a]ny error sent by the furnisher in its computer file automatically appears in the consumer's credit report, even if the information patently contradicts information

192 Wu, *supra* note 2, at 140, 145 ("Indeed, many consumers with errors in their reports do not send disputes because of barriers such as lack of time or resources, educational barriers, and not knowing their rights. In the FTC study discussed above, only one of the consumers who definitely had a major error in her credit report was successfully able to dispute it, despite the assistance of the FTC's consultant. Another consumer filed a dispute on-line and the credit bureau did not respond. The third consumer explained that she did not file a dispute because 'she was a single mother with twins and could not muster the time to file a dispute.' The consultant mused that '[w]e expected that participants would be motivated to have any errors in their credit reports corrected promptly. This did not generally occur.").

appearing in other parts of the credit report."[193] Further, furnishers may be incentivized to provide derogatory information about consumers insofar as this gives them leverage to collect a debt from a consumer. For instance, this occurs when a debt collector "re-ages" a debt, purposefully misrepresenting the date of delinquency so that it falls within the seven-year period wherein it can be reported.[194] This allows the debt collector to use inaccurate negative information to effectively withhold the consumer's access to additional sources of credit. Altogether, because furnishers do not bear the costs of inaccuracy as individual firms, we should expect them to maintain practices that are as cheap as possible to avoid attracting scrutiny from regulators, and under certain circumstances, to manufacture negative information.

Certain errors in credit reports emerge from the concentrated nature of the CRA market. The value of the product CRAs sell—credit reports—depends on the reliability and sufficiency of the reports. Ordinarily, this competitive pressure in the industry would produce a strong incentive to ensure accuracy. However, the CRA market consists primarily of three national CRAs, and just thirty companies make up 94% of the entire market.[195] Therefore, competitive pressures are likely weak in such a concentrated market.

Insofar as competitive pressures do exist, the incentive for accuracy competes with an inherent incentive for CRAs to retain derogatory information. While making lending decisions, a creditor's costs from providing credit to the "wrong" person generally exceed the costs incurred from denying credit to the "right" person.[196] In other words, a creditor is likely to lose more money making a bad loan, that is, if a borrower defaults, than they stand to gain from making a good loan, that is, from interest payments from a non-defaulting borrower. Consequently, lenders are likely

193 Wu, *supra* note 2, at 152.

194 *Id.* at 153.

195 FTC STUDY, *supra* note 13, at 2; *An Overview of Credit Bureaus and the Fair Credit Reporting Act: Hearing Before the H. Comm. on Banking, Hous., & Urb. Affs.*, 115th Cong. 1 (2018) (statement of Peggy L. Twohig, Assistant Director of Supervision Policy in the Division of Supervision, Enforcement and Fair Lending, Bureau of Consumer Financial Protection), https://www.banking.senate.gov/hearings/an-overview-of-the-credit-bureaus-and-the-fair-credit-reporting-act (follow "Download Testimony" hyperlink under "Witnesses").

196 FED. TRADE COMM'N, REPORT TO CONGRESS UNDER SECTIONS 318 AND 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003, at 47 (2004), www.ftc.gov/reports/facta/041209factarpt.pdf ("For many lenders, the loss incurred when a borrower defaults is much larger than the profit earned when a borrower repays a loan. Because of this, lenders may prefer to see all potentially derogatory information about a potential borrower, even if it cannot all be matched to the borrower with certainty."); STATEN & CATE, *supra* note 9, at 7.

to value even poorly supported negative information if it helps them avoid making a bad loan. Consequently, the CRAs have a market incentive to retain negative information even if there is a significant possibility of inaccuracy. As the FTC noted in a 2004 report, "lenders may prefer to see all potentially derogatory information about a potential borrower, even if it cannot all be matched to the borrower with certainty. This preference could give the credit bureaus an incentive to design algorithms that are tolerant of mixed files."[197] In addition, while ensuring the accuracy of reported information is likely expensive in many instances, retaining derogatory information, absent a consumer dispute, is cheap.

In addition to the inherent conditions of the consumer credit information industry, the regulatory environment under the FCRA creates perverse incentives for furnishers. Critics of the regulatory regime point out that, because of the liability imposed on furnishers related to their duties to reasonably reinvestigate furnished information, furnishers can minimize their compliance costs by simply deleting any information that is disputed.[198] This is because even if the furnisher did not conduct an investigation of the disputed item's accuracy, the consumer would have no damages to claim for a violation of the furnisher's investigation duty. Therefore, the furnisher could avoid liability, the expense of litigation, and the costs of conducting investigations by simply deleting disputed items. Therefore, if not designed correctly, increased liability for furnishers and CRAs could theoretically move the consumer credit information system to one in which only positive information, which a consumer will not be likely to dispute, is reported.[199] Because the credit report's greatest value to creditors lies in the negative items of information, positive-only reports would have "sharply reduced predictive power."[200] Although there would be short-term gains for individual consumers, the consequence of this reduction of predictive power would be a concomitant rise in the cost of consumer credit.

For these reasons, amending the FCRA to shift the incentives of furnishers and CRAs would result in an overall improvement in the quality of credit report information. This shift could be achieved by removing the shield on private enforcement of the furnishers' accuracy and integrity duties.

197 Fed. Trade Comm'n, *supra* note 196, at 47.
198 Staten & Cate, *supra* note 9, at 50.
199 *See id.*
200 *See id.* at 51.

D. *Note on the Impact of the COVID-19 Pandemic on the Consumer Credit Reporting System*

The COVID-19 pandemic dramatically impacted the financial resources of American consumers, causing many to delay or diminish payments on their financial obligations.[201] The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) requires certain creditors "to provide forbearance, loan extensions, a reduction in interest rates," or offer other options for repayment.[202] The CFPB has also generally encouraged lenders to "work constructively with borrowers and other customers affected by COVID-19 to meet their financial needs."[203] Such modifications are referred to in the CARES Act as "accommodations."[204] The CARES Act requires that any line of credit affected by such an accommodation, for example, by receiving forbearance, continue to be reported by the lender-furnisher with the status it had prior to the accommodation.[205] The CFPB issued guidance to furnishers on how to comply with the new requirements under the CARES Act and to outline their supervision and enforcement policies.[206] Following this guidance, the CDIA likewise issued guidance to their members on the use of Metro-2 in light of the CFPB's guidance and the CARES Act.[207]

201 TRANSUNION, THE COVID-19 PANDEMIC'S FINANCIAL IMPACT ON U.S. CONSUMERS, 1, 3–4 (2020), https://www.transunion.com/financial-hardship-study.

202 Liane Fiano, *Protecting Your Credit During the Coronavirus Pandemic*, CONSUMER FIN. PROT. BUREAU (July 29, 2020), https://www.consumerfinance.gov/about-us/blog/protecting-your-credit-during-coronavirus-pandemic/.

203 CONSUMER FIN. PROT. BUREAU, STATEMENT ON SUPERVISORY AND ENFORCEMENT PRACTICES REGARDING THE FAIR CREDIT REPORTING ACT AND REGULATION V IN LIGHT OF THE CARES ACT 2 (2020), https://files.consumerfinance.gov/f/documents/cfpb_credit-reporting-policy-statement_cares-act_2020-04.pdf.

204 Fiano, *supra* note 202.

205 Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 4021, 134 Stat. 281, 489 (2020) (stating that, with certain exceptions, "if a furnisher makes an accommodation with respect to 1 or more payments on a credit obligation or account of a consumer, and the consumer makes the payments or is not required to make 1 or more payments pursuant to the accommodation, the furnisher shall—(I) report the credit obligation or account as current; or (II) if the credit obligation or account was delinquent before the accommodation—(aa) maintain the delinquent status during the period in which the accommodation is in effect; and (bb) if the consumer brings the credit obligation or account current during the period described in item (aa), report the credit obligation or account as current").

206 CONSUMER FIN. PROT. BUREAU, *supra* note 203, at 2.

207 CONSUMER DATA INDUS. ASS'N, METRO 2® FORMAT COVID-19 POST-ACCOMMODATION REPORTING GUIDANCE NOW AVAILABLE!!, (2020), https://cdia-news.s3.amazonaws.com/CARES+Act+Post-Accommodation+Reporting+Guidance.pdf; *see also COVID-19*,

The disruption to many consumers' financial resources caused by the pandemic, especially when combined with the number of required and encouraged accommodations, raises a serious concern that there may be a substantial rise in inaccuracies associated with the pandemic. As with the disability accommodations at issue in the CFPB's case against Navient,[208] furnishers could err in implementing these accommodations and create credit problems for consumers. Fortunately, consumers appear to have paid more attention to monitoring their credit reports in late 2020,[209] showing a possible awareness of the risk of fraud and error during the pandemic. Regardless, the ultimate impact of the pandemic on the accuracy of consumer credit reports will likely only be determinable in the future.

Consumer Data Indus. Ass'n, https://www.cdiaonline.org/covid-19/ (last visited Feb. 22, 2021).

208 *See Navient Complaint*, *supra* note 161, at 3–4.

209 TransUnion, *supra* note 207, at 7.

III. POTENTIAL APPROACHES FOR HEIGHTENED SCRUTINY OF FURNISHERS AND REDUCED RELIANCE ON CONSUMER DISPUTES

While we cannot expect the system to achieve perfect accuracy, the organization of the FCRA appears to have critically misplaced the burdens of ensuring accuracy, resulting in rampant inaccuracy in the credit information system. In this Part, I will explore the reasons why furnishers should bear a greater responsibility and potential approaches to effecting such a policy. Given that consumer disputes are insufficient to correct several categories of errors, the consumer credit reporting system must rely on other means to ensure the accuracy of information. The current system includes three distinct strategies of regulation, regulation by the consumer through the dispute process, regulation by the government through oversight by agencies like the CFPB, and regulation by industry actors through organizations like the CDIA and CRAs. I will review each of these strategies and address why they have failed to prevent the high rates of error we see in the system and suggest potential reforms to improve each. In short, however, the system places insufficient checks on the conduct of furnishers, and these checks must be strengthened if any approach is to succeed.

Because of the complexity of the system, it is difficult to determine how to best reform the system to achieve greater scrutiny of furnishers. Furnishers as a class are composed of any entity that provides information to a CRA about a consumer and, therefore, are a highly diverse group of institutions. Critics of reform efforts have raised the concern that if regulatory scrutiny is attached only to derogatory information, then the reform runs the risk of turning the credit reporting system into a "positive-only 'feel good' system," where furnishers and CRAs simply choose to delete the derogatory information rather than address the underlying causes of inaccuracy in their system.[210] Given the ubiquitous use of credit reports, creditor-furnishers are not likely to opt out of the system entirely, especially because of the prevalence of reciprocal agreements between CRAs, furnishers, and users. However, furnishers may become reticent to furnish derogatory information if they can avoid doing so without violating the terms of any applicable reciprocal agreements with CRAs. As a consequence, regulatory reforms aimed at increasing the scrutiny of furnishers must go beyond correcting individual errors to focus on ensuring that the system as a whole supports the accuracy and quality of information across the diverse array of furnishers.

This note of caution, however, is not a call for complacency. Errors in credit reports are common, and even small errors, taken in the aggregate,

210 STATEN & CATE, *supra* note 9, at 50.

degrade the accuracy of the system as a whole and the confidence lenders can place on reports, thereby raising the prevailing cost of consumer credit. Furnishers are in the best position to bear the cost of accuracy, yet neither the inherent market conditions nor the regulatory framework creates much incentive for furnishers to do so. Further, it is worth reiterating that furnishers as a class likely share an interest in increasing the accuracy of circulated information because the most prominent furnishers are themselves users[211] and, therefore, depend on the accuracy of the information in credit reports for their own lending decisions. Reconceptualizing the consumer credit information system in this manner reveals an opportunity for reform that is in the interest of all stakeholders.

Regardless of what other approaches are considered, more empirical research ought to be done in this area. While at least one good study on the rate and impact of errors has been conducted, there is a gap in information concerning the causes of inaccuracies and the effect of different procedures on the quality of information. Studying these topics would help to effectively design reform, would inform effective enforcement, and would assist furnishers and CRAs alike in designing their own compliance. Beyond the need for additional research, Congress, the CFPB, and the FTC can work together to improve the regulation of the consumer credit information system.

A. *Regulation by the Consumer*

The current system relies largely on consumers to ensure the accuracy of their own reports.[212] As discussed in Section II.A, the ability of consumers to act as an effective check is substantially limited by their lack of familiarity with their own credit reports, their lack of access to underlying data used to produce the reports, and lack of incentives to fix minor errors or errors that benefit them as individuals. In general, consumer disputes are unlikely to be useful except to occasionally correct substantial derogatory errors that are relatively simple. Consumer disputes are especially unlikely to be effective in correcting widespread, systematic issues because furnishers are not obligated to correct other consumers' information that includes the same error as the individual consumer who raised the dispute. Ultimately, however, consumers have a strong incentive to ensure the accuracy of their own reports and, if given more power within the system of regulation, could

211 *See* FTC 2006 Report, *supra* note 127, at 4 ("Examples of furnishers include banks, thrifts, credit unions, savings and loan institutions, mortgage lenders, credit card issuers, collection agencies, retail installment lenders, and auto finance lenders.").

212 Staten & Cate, *supra* note 9, at 22.

shift the balance of incentives to produce much better outcomes for the system as a whole.

To empower consumers and achieve this systematic shift, Congress should consider creating a private right of action to enforce a furnisher's accuracy and integrity duties. This would cause furnishers to face effective liability, meaning liability that is likely to result in a monetary cost, for their original failure to maintain an effective system to ensure the accuracy and integrity of information. Currently, furnishers only face effective liability for failing to correct an inaccurate item of information or delete an unsupported item following a dispute.[213] Consequently, the introduction of a private right of action based on furnishers' accuracy and integrity duties would actually incentivize the furnishers to control information quality before a dispute arises.

Further, by creating an opportunity for potentially profitable suits, such a private right of action would allow the plaintiffs' bar to develop expertise and capacity to complement the executive agencies, which would be especially effective in addressing more complex and widespread issues. Although litigation would only arise in response to derogatory information and would be limited by the same problems applicable to consumer disputes—lack of sufficient understanding or engagement, as well as incentives that are too weak to motivate action—the expanded private right of action is ultimately aimed at incentivizing furnishers to have better systems in the first place. The increased incentive to ensure accuracy should have the additional effect of correcting beneficial errors as well. Finally, tying the private right of action to furnishers' accuracy and integrity duty means that many claims could be litigated regardless of whether the furnisher deletes the data.

B. *Regulation by the Government*

At present, the number of government enforcement actions, especially those taken against furnishers, pales in comparison to the size and complexity of the system and furnishers' role within it.[214] This may be an

213 *See* 15 U.S.C. § 1681s-2(c); *see also id.* § 1681s-2(d) (limiting enforcement to actions brought by designated federal and state agencies); Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1161 (9th Cir. 2009).

214 *See An Overview of Credit Bureaus and the Fair Credit Reporting Act: Hearing Before the H. Comm. on Banking, Hous., & Urb. Affs.*, 115th Cong. 6 (2018) (statement of Maneesha Mithal, Associate Director, Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission), https://www.banking.senate.gov/hearings/an-overview-of-the-credit-bureaus-and-the-fair-credit-reporting-act [hereinafter "Mithal Statement"] (follow "Download Testimony" hyperlink under "Witnesses"); FTC 2006 REPORT, *supra* note 127, at 3 ("The repositories issue more than 1 billion

inevitable consequence of the size of the system and the limited resources available to agencies like the CFPB and the FTC. Currently, these agencies play a critical role in defining the essential terms of the FCRA through regulations.[215] Agencies also have an opportunity to develop substantial internal expertise in dealing with this highly complex system. Therefore, they are well-positioned to provide high-level oversight of the system. Because of their position working on behalf of the public, agencies are also well suited to intervene to correct widespread, systematic errors.

If the private right of action for accuracy and integrity violations were introduced, there would still be a concern that furnishers would simply delete information to placate consumers with potentially meritorious claims even though the claim would not be rendered moot by the deletion. This is where executive agencies could step in and require claims to be registered with a specialized office. Even just requiring notification of a claim to an agency office would enable that agency to aggregate claims and determine trends of alleged errors within the system. Taking a step further and requiring notification both when claims were filed and resolved would enable the agencies to notice trends in both alleged and confirmed errors. This would make it much easier for agencies to notice systematic issues and, therefore, to correct these issues either through direct enforcement actions or by issuing corrective guidance. Further, tracking claims and their resolutions would enable the agency to notice when furnishers are reflexively deleting trade lines and to intervene to prevent that problem from distorting the accuracy of the system as a whole.

The agencies could also go a step further by requiring or allowing claims to be resolved through an administrative review process. Such a process, overseen by a specialized agency office, would provide a cheaper and likely faster means for dispute resolution compared to litigation and would, therefore, reduce the incentive to drop trade lines where the furnisher has reason to believe it is accurate but does not want to incur the expense of litigation. Such a process would also bring the government's attention to individual disputes and make it unlikely that a furnisher would simply delete a disputed trade line to resolve the issue without addressing the merits of the claim.

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consumer reports each year, the vast majority of which go to creditors, employers, and insurers"); Avery et al., *supra* note 128, at 49 ("According to industry sources, each of the three national credit reporting companies receives more than 2 billion items of information each month.").

215 Mithal Statement, *supra* note 220, at 2; *Fair Credit Reporting (Regulation V)*, Consumer Fin. Prot. Bureau, https://www.consumerfinance.gov/rules-policy/final-rules/fair-credit-reporting-regulation-v/ (last visited Mar. 3, 2021).

C. *Regulation by the Industry*

As for the industry-regulation approach, the CDIA has been an effective venue for organizing common standards across the industry, which is made particularly important where communication is based upon the Metro 2 reporting language produced by the CDIA. However, the CDIA is unlikely to have the direct interface with furnishers that would be necessary to address the errors we see persisting in the system as it stands. The CDIA is also unlikely to be able to require furnishers to engage in potentially costly quality control activities.

The CRAs can and arguably are obligated to double-check the information that is furnished to them. However, the CRAs simply do not have access to the account-level information supporting the furnished data, so the extent to which CRAs can check the accuracy of information is limited. Further, CRAs do not have an incentive to conduct regular oversight. The CRAs only have a duty to follow *reasonable procedures* to ensure maximum possible accuracy. Absent information being furnished that is erroneous on its face, it seems highly unlikely that a court would require CRAs to know when they are provided with false information by a furnisher before a dispute is raised. Given that CRAs are not under a duty to oversee furnishers, that they lack the means to do so, and the high volume of data they receive, we should not expect CRAs to act as effective checks on furnishers without the prompting of a consumer dispute or regulatory action.

However, if furnishers are properly incentivized, they could regulate themselves. Furnishers are perfectly capable of retaining their own account-level records and using these to check all of the information they furnish for accuracy. Because of the furnishers' proximity to the underlying information and the sophistication of many creditor-furnishers, it is apparent that self-regulation, within the compliance functions of these firms, would be the most efficient way to control for accuracy in the consumer credit information system. The introduction of a private right of action based on furnishers' accuracy and integrity duties would create a strong incentive to implement robust quality control mechanisms for the information these firms produce. Further, internal compliance systems would not be limited in the same ways that consumers are. First, furnishers themselves should have access to and understanding of all the relevant underlying data. Second, if furnishers are appropriately dissuaded from deleting disputed trade lines, then they would be just as interested in correcting both derogatory and beneficial errors in the information they produce. This is because the only thing that will matter is whether the furnishers can provide appropriate documentation to support the information, not whether it benefits or harms an individual consumer's

access to credit.

CRAs certainly have a role to play in supporting efforts to enhance furnishers' incentives to increase the quality of produced information. In particular, the CRAs can and should use the reciprocal agreements between CRAs and furnishers to sanction the deletion of information without good cause.[216] This would help ensure that it is in the furnishers' interests to ensure that the information they produce is of a quality they can stand behind when and if it is challenged.

216 *See* Staten & Cate, *supra* note 9, at 49 ("One solution to the non-reporting problem would be for the bureaus to tackle the problem by adopting reciprocity codes. That is, they could dictate as part of their subscriber agreements that what a creditor doesn't report, it can't see on any purchased reports. Together with pricing incentives, this could encourage full-file reporting.").

CONCLUSION

The consumer credit reporting system affects the lives and finances of nearly every American. Errors can affect a consumer's ability not only to obtain credit but to qualify to rent housing, receive insurance, or be hired for a job. Less damaging errors, however, still have the aggregate effect of threatening the integrity of the consumer credit system, making everything a consumer buys on credit more expensive by raising the prevailing cost of credit. Empirical research shows that both high and low-impact errors are commonplace and likely affect tens of millions of Americans.

The system we have in place relies largely on consumers, who are often poorly engaged and informed, to police the accuracy of this highly complex system. The other actors in this system are limited in their access to crucial information, poorly incentivized to correct inaccuracies, or both. Given the prevalence of errors, it is clear that this system is failing.

As the original authors of information circulated in the system, furnishers are likely to be responsible for many of the errors. Further, because these firms are the most proximate to the underlying information, they are also in the best position to bear the costs of ensuring accuracy. Yet the current regulatory framework places little to no effective liability on furnishers for failing in their duties to ensure accuracy and integrity. Reform efforts should therefore focus on increasing the effective liability of furnishers related to accuracy and integrity. This can be achieved by empowering consumers to hold furnishers accountable when they fail to appropriately ensure the quality of the information in the first place. Care must be taken to ensure that the increased risk of liability does not produce a system where furnishers are reticent to produce information or will simply delete information whenever disputed. However, if reforms include oversight by third parties such as executive agencies and CRAs, we can effectively prevent such behaviors and focus furnishers on producing high-quality information before disputes arise.

The potential of such reforms is hard to overstate. First, because the prevalence of errors is so high, there is substantial room for improvement. Second, because the predictive value of credit reports depends on their accuracy, any significant improvement in the system's ability to produce accurate information should produce a significant improvement in predictive value. Third, because the development of the credit reporting system and of risk-based pricing of credit was associated with a dramatic decline in the cost of consumer credit and increase in access to consumer credit, especially at the lower end of the income distribution, we should expect that improving the predictive value of reports should enhance both of these

effects. Ultimately, such reforms could produce a system that is both fairer to consumers and more effective for users, who, again, are often furnishers and would likely support the growth of the American economy by making consumer credit more accessible and affordable.