COMMENTS
Of
National Consumer Law Center
On behalf of its low income clients, and

Consumer Federation of America
Consumers Union
Electronic Privacy Information Center
National Association of Consumer Advocates
Privacy Rights Clearinghouse
U.S. Public Interest Research Group

To the

Board of Governors of the Federal Reserve System Regarding the Request for Information for the Study on Investigations of Disputed Consumer Information Reported to Consumer Reporting Agencies
Docket No. OP-1209

September 17, 2004

Introduction

The National Consumer Law Center on behalf of its low income clients,[1] Consumer Federation of America,[2] Consumers Union,[3] Electronic Privacy Information

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[1] **The National Consumer Law Center** is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit transactions to determine appropriate claims and defenses their clients might have. As a result of our daily contact with these practicing attorneys, we have seen numerous examples of invasions of privacy, embarrassment, loss of credit opportunity, employment and other harms that have hurt individual consumers as the result of violations of the Fair Credit Reporting Act. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. *Fair Credit Reporting* (5th ed. 2002) and *Credit Discrimination* (3rd ed. 2002) are two of the eighteen practice treatises that NCLC publishes and annually supplements. These comments were written by Anthony Rodriguez and Carolyn Carter, NCLC staff attorneys.

[2] The **Consumer Federation of America** is a nonprofit association of some 300 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

[3] **Consumers Union**, the nonprofit publisher of Consumer Reports magazine, is an organization created to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications. And noncommercial contributions, grants and fees. Consumers Union's publications carry no advertising and receive no commercial support.

Center,[4] National Association of Consumer Advocates,[5] Privacy Rights Clearinghouse,[6] and the U.S. Public Interest Research Group,[7] submit these comments regarding the study on investigations of disputed consumer information reported to consumer reporting agencies.

I. Half Measures Will Not Improve the Fundamentally Flawed Reinvestigation System.

The reinvestigation system in its current form is fundamentally flawed. Credit reporting agencies (CRA's) and creditors has developed a highly automated, computer-driven system that precludes any meaningful reinvestigation. Typically, CRA's do not even provide furnishers with the documentation of the error that the consumer sent to them. Nor does the CRA itself review that documentation. Creditors' reinvestigation of disputed information typically involves merely verifying that their own records show that a debt exists. Details and documentation of these problems are provided in these comments.

The continued result of this lackadaisical reinvestigation system is that consumers find it extremely difficult, frustrating, and expensive to correct errors. Moreover, there is no reason to believe that recent changes to the Fair Credit Reporting Act made by the FACT Act[8] are likely to improve this system in the near future.

Furnishers and the CRA's are likely to propose standards for reinvestigations that allow a perfunctory, meaningless reverification to substitute for an actual, bona fide reinvestigation of disputed information. Some may propose half measures that make only minor improvements. We urge the Board and the FTC to resist these suggestions.

The reinvestigation system is broken. Tweaking it with little improvements while allowing its fundamental flaws to persist, would be counterproductive: it would simply provide an official imprimatur to the current, defective system.

If a fundamental restructuring of the reinvestigation system is not possible, it would be better to leave development of the standards for reinvestigation to the courts

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[4] The **Electronic Policy Information Center** (EPIC) is a public interest research center in Washington, D.C. It was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values.

[5] The **National Association of Consumer Advocates (NACA)** is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

[6] The **Privacy Rights Clearinghouse** is a nonprofit consumer information and advocacy organization based in San Diego, CA, and established in 1992. The PRC advises consumers on a variety of informational privacy issues, including financial privacy. It represents consumers' interests in legislative and regulatory proceedings on the state and federal levels. www.privacyrights.org.

7 The **U.S. Public Interest Research Group** is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

[8] Pub. L. No. 108-159, 117 Stat. 1952 (2003).

and the agencies on a case-by-case basis. The FCRA imposes a broad standard of reasonableness on the reinvestigation process.[9] This is a familiar standard, and one that courts have often been called upon to apply in other contexts.[10] Courts and the FTC are familiar with persistent flaws in reinvestigations conducted by CRA's and furnishers[11] and have successfully applied this standard in FCRA cases.[12] The Board and the FTC should not interrupt this judicial development of standards by adopting half-measures that merely tweak the system and would only provide cover for its severe problems.

II. Responses to Specific Questions in the Board's Request for comments.

The Board has asked several questions relating to the dispute reinvestigation process. Many of these questions are addressed to industry or request information that is not available from consumers or their advocates. Answers to questions for which consumers and their advocates have information are provided below.

A. Disputes Communicated by Consumers Directly to Furnishers.

No. 4: *What are consumers' experiences in resolving disputes where the furnisher provided an address? What are the experiences locating and using this address to resolve their dispute?*

Answer:

We know that consumers lodge disputes directly with furnishers through billing error departments or, in some cases, through whatever address furnishers provide for such disputes. Generally consumer attorneys recommend that consumers dispute information simultaneously with CRA's and the furnisher.

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[9] Johnson v. MBNA, 357 F. 3d 426 (4th Cir. 2004); Bruce v. First U.S.A. Bank, N.A., 103 F. Supp. 2d 1135 (E.D. Mo. 2000).

[10] For example, many sections of the Uniform Commercial Code use reasonableness as the standard, with the expectation that the courts will give specific meaning to the term on a case-by-case basis.

[11] Cushman v. Trans Union Corp., 115 F.3d 220, 224-25 (3d Cir. 1997) (perfunctory investigation improper once a claimed inaccuracy is pinpointed); Henson v. CSC Credit Services, 29 F.3d 280, 286-87 (7th Cir. 1994) (must verify accuracy of initial information); Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151, 1160 (11th Cir. 1991) (whether error could have been remedied by uncovering additional facts); Dynes v. TRW Credit Data, 652 F.2d 35-36 (9th Cir. 1981)(single effort to investigate inadequate); Bryant v. TRW, Inc., 689 F.2d 72, 79 (6th Cir. 1982) (two phone calls to the creditors insufficient; Swoager v. Credit Bureau, 608 F. Supp. 972, 976 (D.C. Fla. 1985) (merely reporting whatever information a creditor furnished not reasonable; In re MIB, Inc., 101 FTC 415, 423 (1983) (FTC ordered the CRA to include as part of such reinvestigation a reasonable effort to contact original sources); In re Credit Data Northwest, 86 FTC 389, 396 (1975) (FTC ordered a credit reporting agency to "request[] examination by the creditor, where relevant, of any original documentation relating to the dispute in addition to its own records). These cases predate the 1996 amendments to the FCRA.

[12] Johnson v. MBNA, 357 F. 3d 426 (4th Cir. 2004); Bruce v. First U.S.A. Bank, N.A., 103 F. Supp. 2d 1135 (E.D. Mo. 2000). *See also* United States of America v. Performance Capital Management, Inc. (C. D. Cal. Aug. 2000), *reprinted at* http://www.ftc.gov/os/2000/08/performconsent.htm; http.

As is there is no private right of action when the dispute is submitted directly to the furnisher, there is a lack of reported information about the furnishers' dispute process when it is not linked to the CRA. However, consumer advocates repeatedly confirm that regardless of where the dispute is made (directly with the furnisher or through a CRA), furnishers are simply *not* conducting meaningful reinvestigations; they do *not* train their employees on effective reinvestigation procedures,[13] and they repeatedly default simply to verifying the existence of an account. Rarely do furnishers actually research the underlying dispute, rarely are documents reviewed and too often there is no analysis of the furnishers' own data for inconsistencies and errors. While a study on the effectiveness of having a separate address for disputes may be beneficial, the underlying problem with the reinvestigation process is the failure by furnishers to conduct a *bona fide* "investigation," as required by the 1996 amendments to the FCRA.

No. 5: *What are the consumers' experiences in resolving disputes where the furnisher does not provide an address? How are the disputes resolved and what entity or person (e.g., furnisher, consumer reporting agency, credit repair entity, legal representative, etc.,) was instrumental in resolving the dispute?*

Answer:

Consumer advocates typically advise consumers to file disputes of inaccurate or incomplete information simultaneously with CRA's and directly with the furnisher, regardless of whether the furnisher has a specified address for such disputes and requests for reinvestigations. As stated in response to question 4, advocates repeatedly find that disputes are simply not resolved through the reinvestigation process because inadequate reinvestigations are conducted both by CRA's and the furnishers of information.

These problems are illustrated by a recent case from Louisiana. The consumer disputed inaccurate information with Experian, was unable to obtain any relief, and then went to the furnisher, but matters only became worse. After the dispute process with Experian lasted for more than six months, the consumer wrote directly to the furnisher regarding the inaccurate information. The furnisher simply denied the inaccuracies and threatened repeatedly to insure that the credit report would contain the inaccurate information "indefinitely." The furnisher continued to reinsert disputed data into the consumer's credit reports, until consumer sought judicial relief.[14]

B. Other Furnisher Duties

No. 6: *What are consumers' experience with communicating with furnishers, with the timing of the notice of dispute appearing on the credit report, or any other matter relating to having the notice of dispute placed on the credit report when disputed information continues to be reported but with a notice of dispute?*

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[13] See Deposition of Gino Archer, witness on behalf of Calvalry Investments, LLC, Rosenberg v. Calvary Investments, LLC, U.S. Dist. Ct. D. Conn., Case No. 03-cv1087, p. 8.

[14] Carriere, II v. Proponent Federal Credit Union, 2004 WL 1638250 (W.D. La. July 12, 2004).

Answer:

The problem is not so much with the timing of the dispute and reinvestigation. The problem is with whether the substance of the dispute is adequately conveyed and communicated to the furnisher by the CRA, and the quality of the reinvestigation conducted by both the CRA and the furnisher. Consumers and their advocates are less concerned with problems relating to the timing of the reinvestigations since they are usually done very quickly through the automated dispute verification process. As described repeatedly in these comments, the concerns rest with the failure by both the CRA's and furnishers to conduct any meaningful reinvestigation.

C. Disputes Communicated by Consumers to Consumer Reporting Agencies

No. 4*: Is sufficient relevant information provided to the furnisher by the consumer through the consumer reporting agency? Is all relevant information from a consumer provided to the furnisher through the consumer reporting agency? If not, what relevant information is often missing, and why? If relevant information is lacking, how does the furnisher resolve the dispute?*

Answer:

Consumers often provide whatever information is requested of them by CRA's and furnishers. Regardless of the fact that sufficient information and documentation of the disputed inaccuracy has been provided, the documentation is routinely not passed on to the furnisher. Typically underlying – essential – documentation of inaccuracies such as account applications, billing statements, letters, and the like, are left out of the reinvestigation process while both the CRA and furnishers rely on the automated dispute process and its coding of information. As reflected in the examples below, the policies and practices of CRA's is to *not* forward documents and other information to furnishers that would allow the furnisher to evaluate the truthfulness and completeness of the disputed information. This practice raises the obvious question: How can a furnisher or CRA reinvestigate the accuracy of information if they fail to review and consider documents pertaining to the disputed debt or tradeline?

III. Documented Fundamental Deficiencies in the Reinvestigation System.

The flaws in the reinvestigation system are well documented and can be found in testimony before Congress,[15] reported cases in federal and state courts, deposition testimony by employees of CRA's and furnishers regarding the policies and practices purportedly used for reinvestigations, the voluminous disputes lodged with CRA's and

[15] *See* Testimony of Anthony Rodriguez before the Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit (2003); Testimony of Len Bennett before the Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit (June 3 2003).

furnishers,[16] and the FTC's own database of complaints. All of these sources point to these ongoing flaws in the current reinvestigation system:

- **CRA's refuse to forward documentation of disputes to furnishers**.

  This problem is repeatedly evidenced to consumer advocates. In just one reported example, an employee of Trans Union actually testified that it is Trans Union's policy to send consumer dispute verification forms *without* ever including the underlying documents.[17]

- **Furnishers ignore documentation of inaccuracies**.

  Advocates also know from recurring cases that the standard response of furnishers is to ignore documentation even once the consumer is successful in getting it into their hands. In a recent case in a federal appellate court, MBNA employees testified that it is their practice to merely confirm the name and address of consumers in their computers, and note from the applicable codes that the account actually belongs to the consumer. These employees testified that they *never* consult underlying documents such as account applications to determine accuracy of disputed information.[18] Consumer advocates know that this is a chronic problem with reinvestigations.

- **CRA's' reinvestigations consist of merely "parroting" information received from other sources without independently investigating the accuracy and completeness such information, as required by the FCRA**.

  Again, these problems are repeatedly seen by consumer advocates across the country. Just one illustration of the problem is a case in which a Trans Union employee testified that – as a matter of policy – Trans Union reports whatever information creditors "verify" without independently investigating whether the information was accurate. [19]

  In another case, a consumer disputed information in her Equifax credit report and the furnisher was sent a Consumer Dispute Verification (CDV) form from Equifax. The creditor simply confirmed the debt, even though the consumer had already won a court decision that she did not owe the debt. When the consumer again disputed the entry with Equifax, the creditor again confirmed the debt, plus it increased the amount owed from $488.00 to $829.00. Yet, the creditor asserted that it could rely on a state

[16] Representatives of CRA's testified in depositions that CRA's can receive a range of 5,000 to 25,000 consumer disputes per day, with 7,000-10,000 being typical. *See* "Credit Scores & Credit Reports," p. 141, Evan Hendricks (2004).
[17] Crane v. Trans Union, LLC, 282 F. Supp. 2d 311, 316 (E.D. Pa. 2003).
[18] Johnson v. MBNA, 357 F. 3d 426 (4th Cir. 2004)
[19] Crane v. Trans Union, LLC, 282 F. Supp. 2d 311, 316 (E.D. Pa. 2003).

department of licensing report and that it had no further duty to investigate the accuracy of the information.[20]

- **CRA's ignore proof of inaccuracies provided by consumers**.

  Advocates confirm that this problem is repeatedly reported by consumers. One example of the problem is a case in which consumers provided Trans Union with proof issued by the IRS of extinguished tax liens, but Trans Union refused to perform a reinvestigation.[21]

- **Automated dispute verification programs only convey generic descriptions of disputes without substantive details of why consumers have disputed the accuracy or completeness of the information.**

  Consumer advocates point to this as a constant problem with the current reinvestigation system. Indeed an employee of Trans Union, Regina Sorenson, testified in one case that Trans Union's investigation is limited to sending the dispute verification forms. An excerpt from her deposition testimony reveals that the agency performs no meaningful investigation:

  Attorney: Now you sent [Capital One] a CDV and response came back verified to the name and the Social Security number, is that true?

  Ms. Sorenson: Verified means the account information was accurately reported and they also verified name and Social Security number.

  Attorney: And as a result, you all completed your investigation by updating it to show it had been verified by Capital One and leaving Capital One on Ms. Fleischer's credit report, is that true?

  Ms. Sorenson: Yes, it is.

  Attorney: Other than sending the CDV to the six furnishers, what else did Trans Union do to investigate Ms. Fleischer's complaints?

  Ms. Sorenson: **Nothing else**.[22]

Employees of furnishers have provided similar testimony regarding their lack of follow up and reinvestigation of the accuracy and completeness of disputed

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[20] Betts v. Equifax Credit Information Services, 245 F. Supp. 2d 1130 (W.D. Wa. 2003).
[21] Soghomonian v. U.S.A., 278 F. Supp. 2d 1151 (E.D. Cal. 2003).
[22] Deposition of Regina Sorenson, Fleischer v. Trans Union, U.S. Dist. Court for the Eastern District of Michigan, Southern Div., No. CV-02-71301. *See also,* "Credit Scores & Credit Reports," Evan Hendricks, March 2004.

information.[23] This is a problem that is often discovered by attorneys representing consumers.

- **Furnishers claim that no standards at all apply to their reinvestigations.**

  It may be hard to believe that furnishers actually stand up in court and claim that there are no legal standards applicable to their investigations, and that therefore their meaningless procedure is legally justified. However, this is exactly what they routinely claim. Indeed in a recent case, a federal appellate court found that MBNA's interpretation of the FCRA reinvestigation provision does not contain "any qualitative component that would allow courts or juries to access whether the creditor's investigation was reasonable."[24]

- **Furnishers' reinvestigations ignore evidence of fraud.**

  Unfortunately, advocates find that ignoring evidence of fraud is typical of furnishers. Indeed in a First USA Bank's reinvestigation of a consumer's claim that his wife fraudulently opened accounts in the consumer's name, the court found that the bank ignored evidence that signatures on credit card applications did not match the consumer's signature on his driver's license.[25]

- **Consumers have the impossible burden of proving negative information to both furnishers and CRA's.**

  The current system requires that consumers prove a negative – an impossible task which is rarely accomplished without intervention by the courts.

  One recent example of this problem is in a case from Texas. The consumer complained to Verizon of erroneous Verizon tradelines in the credit report. Verizon employees stated that Verizon had no account with the consumer's name or social security number and advised the consumer to go to Trans Union. The consumer disputed the tradelines with Trans Union but received a post-reinvestigation report still containing the erroneous information. The consumer completed a fraud affidavit, but still

[23] *See* Testimony of Pamela Tuskey, Fleischer v. Trans Union, U.S. Dist. Ct. E.D. Mi, Civ. No. CV 02-71301; Testimony of Tricia Furr, MBNA credit reporting specialist, Johnson v. MBNA, Slip. Op. No. 3:02 cv 523, U.S. Dist. Ct. E.D. Va. (2003).
[24] Johnson v. MBNA, 357 F. 3d 426 (4th Cir. 2004)
[25] Bruce v. First U.S.A. Bank, N.A., 103 F. Supp. 2d 1135 (E.D. Mo. 2000) (No one from First USA's investigation unit spoke with the consumer or his former wife about the fraudulent accounts).

> got no relief. He subsequently received debt collection demands and was routinely denied credit despite his efforts to have his report corrected over several months.[26]

These examples are only representative illustrations of chronic flaws in the reinvestigation system that prevents consumers from clearing their inaccurate and incomplete credit reports.

IV. Recommendations to Ensure Meaningful Reinvestigations and Accuracy in the Credit Reporting System

The current reinvestigation system is fundamentally flawed and needs to be overhauled from the ground up. At present, CRAs and furnishers treat requests for reinvestigations as nuisances. They go through motions of an activity that pantomimes what they believe the law requires of a reinvestigation without actually reexamining the substance of the information.

The underlying problem is that there appears to be little economic incentive to conduct true reinvestigations. *As there is almost always no economic cost to failing to conduct a real investigation, it is more financially rewarding to do little or nothing. Until the failure to conduct a real investigation becomes more expensive than not conducting a real investigation, the current system will remain broken.*

Furnishers have the same economic incentive against conducting meaningful reinvestigations – because real effort costs money, and there is no cost to *not* expending that effort. In addition, the furnishers actually do have an economic incentive for keeping negative information on a consumer's credit record – even if it is inaccurate. This is because the negative information limits the consumer's options to obtain other, less expensive debt, and is often the impetus to force a consumer to pay the furnisher even on an unjust claim. The risk of an occasional FCRA lawsuit appears not to have overcome these other economic disincentives. The result is persistent inaccuracies in credit reports, which harm both consumers and creditors.

In the upcoming study, the Board and the FTC should not focus on adjustments to the existing reinvestigation system but should instead focus on the underlying dynamics and the reasons that the system is so deeply flawed. The Board and the FTC should study what can be done to shift or counter these economic incentives. Perhaps insertion of an independent third-party review into the process would be helpful. Perhaps a role for lay advocates could be crafted that would reform the reinvestigation system. Perhaps if statutory damages were more readily available for sham reinvestigations the CRAs and furnishers would take these duties seriously. We urge the Board and the FTC to evaluate these central issues as part of the study.

Another approach to the underlying problems is to increase – to a significant degree – the duties upon furnishers. Furnishers should be required to rebut the

[26] Carlson v. Trans Union, LLC, 259 F. Supp. 2d 517 (N.D. Tx. 2003).

consumer's specific disputes by providing documentation to the CRA that shows that the information furnished is correct. Furnishers should not be allowed simply to tell the CRA that the consumer is wrong and the original information was correct, and CRAs should not be allowed to accept such a report. Instead, the furnisher should be required to give the CRA the underlying information - copies of documents with original signatures to rebut a forgery claim, for example, or copies of the payment record to demonstrate that the claimed balance is correct. Then the CRA should be required to evaluate this data and reach its own conclusion.

If, despite the fundamental flaws in the reinvestigation system, the Board and the FTC decide that merely setting standards for reinvestigations is sufficient, the standards should involve at least the following features:

- The standards must explicitly state that the scope of a reasonable reinvestigation varies from case to case and depends on the nature of the dispute. Setting blanket standards will only invite perfunctory reinvestigations.
- The standards should identify some reinvestigation practices that are *per se* unreasonable.
- CRAs must be required to convey to furnishers the actual documents that support the consumer's dispute, and failure to do so should be *per se* unreasonable.
- Furnishers must be required to investigate the dispute rather than merely verifying that the information appears in their own records. At a minimum the furnisher's reinvestigation must involve reviewing the actual documents provided by the consumer. Depending on the nature of the dispute, the furnisher may also have to review documents in its own possession or in the possession of an earlier holder of the debt, and may have to contact third parties.
- The furnisher must be required to respond specifically and in detail to the consumer's dispute, and must be required to include enough material so that the CRA can evaluate the response and reach an independent conclusion.
- The CRA must be required to review and evaluate the response from the furnisher, rather than merely parroting it.
- The CRAs should be required to set up an appeal procedure that the consumer can invoke, that involves a telephone conference with a CRA employee who has the consumer's dispute and all the documentation provided by the furnisher and the consumer.