Statement of

Thomas P. Brown

Partner, Paul Hastings LLP

before the

Committee on Financial Services

United States House of Representatives

Who's Keeping Score? Holding Credit Bureaus Accountable and Repairing a Broken System

Washington, D.C.

February 26, 2019

Chairman Waters, Ranking Member McHenry, and members of the Committee, thank you for inviting me to appear before you today to discuss the Fair Credit Reporting Act (the "FCRA"). With this written submission, I intend to (1) provide a brief sketch of the FCRA and identify what makes it such a confounding statute; (2) discuss briefly what appears to be working and not working in the industry that has grown up within its regulatory confines; (3) identify how the marketplace is innovating to solve some of the issues that exist within that industry; and (4) offer some thoughts about possible legislative reform.

It bears stating at the outset that the United States has a consumer credit economy that is the envy of the world. Indeed, a friend and former colleague once described the most visible aspect of the consumer credit economy—the credit card—as one of the great innovations of the 20th Century.[1] Consumer reporting agencies, often called bureaus, are an important pillar of the consumer credit industry. As members of the Committee are well aware, this industry rests on a set of laws that were developed, in most cases, beginning with a bipartisan process launched by President Johnson, and continued under President Nixon, in the late 1960s and early 1970s.

Neither the industry itself, nor the laws that regulate it, is perfect. For instance, millions of people and households in the United States struggle to obtain credit, and millions more struggle with the credit that they do obtain. Like other things that date back to roughly the middle third of the last decade—myself included—those laws are showing their age. The FCRA is, in my view, an excellent place to start.

[1] Timothy J. Muris, *Antitrust in a High-Tech World*, Wall Street Journal (Aug. 10, 2010).

A CRASH COURSE ON THE FCRA

The title of the statute, Fair Credit Reporting Act, seems simple. All four words that are used in the title are fairly common in the English language, and in ordinary use, they are easily understood. The legislation that they label is not easy to parse. As one judge has observed, "the statute is drafted in hyper-technical language and includes a sufficient number of internal cross-references to make even the most dedicated legal practitioner consider a change in career."[2]

Deciphering the statute requires understanding two key definitions, the definitions of "consumer reporting agency" and "consumer report." The FCRA defines "consumer reporting agency" as follows:

> any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practices of assembling or evaluating consumer credit information or other information on consumers **for the purpose of furnishing consumer reports to third parties**, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.[3]

The FCRA defines "credit report" to mean:

> any written, oral, or other **communication of any information by a consumer reporting agency** bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—credit or insurance to be used primarily for personal, family, or household purposes; employment purposes; or any other purpose authorized under [15 U.S.C. § 1681b].[4]

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[2] *Burrell v. DFS Svcs. LLC*, 753 F. Supp. 2d. 438, 446 (D. N.J. 2010).
[3] 15 U.S.C. § 1681a(f).
[4] 15 U.S.C. § 1681a(d)(1).

The statute excludes from this definition any "report containing information solely as to transactions or experiences between the consumer and the person making the report."[5] Taken together, these definitions mean that the FCRA only covers information provided by a party without a relationship with a consumer to another party which is making an eligibility determination for credit, insurance, or employment.

For consumers, the FCRA provides specific rights regarding the content of the consumer's credit report. In particular when a consumer report user (i.e. a lender, insurer, or employer) makes an adverse decision, the FCRA requires the consumer report user to give consumers an adverse action notice that explains the basis for the adverse decision.[6] It also gives the consumer the right to ask the consumer reporting agency that provided a report to the consumer report user—typically the issuing consumer reporting agency—to provide the consumer with a copy of the credit report.[7] The operating premise of the FCRA—traceable back to the President Johnson and President Nixon era Consumer Protection Commission—is that consumers can review the contents of any reports, then correct any errors, and finally reapply for whatever they were denied whether it be a loan, insurance, or employment.[8]

Within its scope, the FCRA is comprehensive. It maps out the relationships between the users of credit reports, suppliers of credit reports, parties that provide information to the suppliers of credit reports, and the subjects of those reports (*i.e.*, consumers). But the reach of the FCRA ends there. It does not govern (1) eligibility determination models; (2) consumer

[5] 15 U.S.C. § 1681a(d)(2)(A)(i).
[6] 15 U.S.C. § 1681m(a).
[7] 15 U.S.C. § 1681g(a).
[8] Note that the Economic Growth, Regulatory Relief and Consumer Protection Act (P.L. 115–74) did recently enhance certain consumer protections under the FCRA including additional requirements for veterans and providing consumers with the right to place a security freeze on credit reports free of charge.

information used for underwriting decisions; and (3) consumer reporting companies' obligations to protect the consumer information they hold.

First, the FCRA does not govern the models that lenders, insurers, or employers use to make eligibility determinations. One implication of the FCRA not governing eligibility determinations is that "fairness" as sought by the FCRA does not mean "equitable." Rather, the FCRA leaves "fairness" in the sense of "equitable" to the Equal Credit Opportunity Act (the "ECOA"). Somewhat confusingly, the term "Fair Lending" as used in consumer protection circles does not refer to the FCRA at all. It refers to the ECOA.[9] Another implication of the FCRA not governing models for eligibility determinations is that credit reports that are provided to consumers under the FCRA do not have credit scores on them.

Next, the FCRA only governs information that is provided to lenders, insurers, or employers by third parties that do not have a direct relationship with the consumer.[10] Information received directly from the consumer, or parties that have a direct relationship with the consumer, are not included in the FCRA's definition of "credit reports," thus falling outside the scope of the FCRA. In practice, this means that much of the information used by lenders, insurers, or employers to make underwriting decisions is not governed by the FCRA.[11]

Finally, the obligations and consequences of privacy breaches suffered by consumer reporting agencies are not governed by the FCRA. While the FCRA is tasked with governing consumer reporting agencies, it does not impose obligations on them to protect the

[9] This may be the most confusing piece of the interaction between the FCRA and ECOA.
[10] 15 U.S.C. § 1681(d)–(f).
[11] Here is why the narrow definition of "credit report" in the FCRA is important to understand what the FCRA actually does. That the information about consumers that lenders, insurers, or employers use to make underwriting decisions falls outside the scope of the FCRA is by virtue of the unintuitive and narrow definition of "credit report" used by the FCRA. This is likely the second most confusing aspect of the FCRA.

information that they hold about consumers from unauthorized access nor does it govern obligations to provide consumers with notice in the event those records are accessed without authorization. The obligation to keep information protected arises, principally, from the Gramm-Leach-Bliley Act (the "GLBA").[12] Further, the obligation to provide consumers with notice in the event of an unauthorized access is dictated at the state level by various state breach notification statutes.[13]

GOOD NEWS BAD NEWS ON CONSUMER CREDIT INDUSTRY

The United States has one of the most well developed consumer credit industries in the world. Our consumer credit industry has a strong enough foundation to support $4.01 trillion in outstanding consumer credit—nearly 20% of our national GDP.[14]

This industry would not exist in anything resembling its current form without the consumer reporting agencies. They serve as the backbone for this industry, constantly collecting, synthesizing, and distributing all of the consumer records produced in the United States. According to the Federal Trade Commission ("FTC"), consumer reporting agencies maintain information on approximately 200 million consumers aggregated from roughly

[12] 113 Stat. 1338. Note that this is further complicated by the Dodd-Frank Act (124 Stat. 1376–2223) which created the Consumer Financial Protection Bureau (the "CFPB") and assigned that agency broad enforcement powers over a series of enumerated consumer laws, including the GLBA but preserved the Federal Trade Commission's role for GLBA's provisions concerning a financial institution's use and protection of nonpublic consumer information. 15 U.S.C. §§ 6802–09.

[13] *See e.g.*, Cal. Civ. Code § 1798.82.

[14] *See Consumer Credit Outstanding*, Federal Reserve Bank (Feb. 7, 2019) (available at https://www.federalreserve.gov/releases/g19/current/) (last visited on February 22, 2019).

30,000 data furnishers nationwide.[15] In any month, the consumer reporting agencies receive information on over 1.3 billion consumer credit accounts from furnishers.[16]

The consumer reporting agencies—particularly the three national agencies—do an impressive job of managing these records. According to the FTC, the national consumer reporting agencies maintain accurate consumer records for almost 150 million consumers in America.[17] To do so, they must accurately collect and synthesize over a billion pieces of new data every month.[18]

The consumer reporting agencies are not perfect. There is widespread recognition that consumer credit reports covering millions of American are not accurate, notwithstanding accuracy requirements built into the statutory framework.[19] Estimates of the number of reports that contain one potentially material error run as high as 26% of all consumers.[20] Given how important length is to the predictive power of a credit report, these errors almost certainly have a disproportionate affect on the traditionally disadvantaged, the young, and immigrants.[21] Errors in consumer reports are also a problem for the consumer credit industry. The use of a credit reports to create fake credit profiles of consumers—so-called synthetic

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[15]*Fifth Interim Federal Trade Commission Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003*, Federal Trade Commission, at 2 (Dec. 2012) (available at https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf) (last visited Feb. 22, 2019) ("2012 FTC Credit Accuracy Report").
[16], *Key Dimensions and Processes in the U.S. Credit Reporting System*, Consumer Financial Protection Bureau, at 3 (2012) (available at https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf) (last visited on Feb. 22, 2019) ("2012 CFPB Credit Reporting White Paper").
[17] *See* 2012 FTC Credit Accuracy Report, at 35 (finding a 26% error rate).
[18] 2012 FTC Credit Accuracy Report, at i.
[19] 15 U.S.C. § 1681e(b).
[20]*See e.g.*, Aaron Klein, *The Real Problem with Credit Reports is the Astounding Number of Errors*, Brookings Center on Regulation and Markets (Sept. 28, 2017) (available at https://www.brookings.edu/research/the-real-problem-with-credit-reports-is-the-astounding-number-of-errors/) (last viewed Feb. 22, 2019); 2012 Credit Accuracy Report; 2012 CFPB Credit Reporting White Paper, at 23.
[21] *See* Upstart Request for a No-Action Letter, at 1 (available at https://files.consumerfinance.gov/f/documents/201709_cfpb_upstart-no-action-letter-request.pdf) (last visited on Feb. 22, 2019).

identity fraud—has been a significant loss for lenders over the last few years. Synthetic identity fraud is estimated to have cost credit card issuers $800 million in 2017.[22]

In addition to inaccuracies, there is significant evidence of consumer frustration. Between October 1, 2017 and September 30, 2018, the Consumer Financial Protection Board (the "CFPB") received 329,000 consumer complaints; of these complaints, 37% were for problems with credit or consumer reporting—the largest segment by approximately 1.5 times.[23] Although the FCRA requires consumer reporting agencies to follow certain procedures to allow consumers to dispute issues on reports about them, the volume of complaints received by the CFPB indicates such mechanisms are not effective.[24] Finally, the Equifax breach of 2017 remains one of the most significant exposures of sensitive consumer information in history.

Taken together, all of these examples provide evidence that this industry is not completely healthy. And where an industry is as closely tied to the underlying regulatory framework as this one, this evidence provides support for some legislative action.

MARKET RESPONSE TO EXISTING CREDIT REPORTING INDUSTRY

There is evidence that the market is responding to at least some of the problems with the credit reporting industry. But these market solutions are, for the most part, coming from outside the industry directly regulated by the FCRA.

Lenders are building models to incorporate data not traditionally found on credit reports and not scored by the models built on that data. The clearest example, at least from

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[22] *See* Matt Tatham, *Identity Theft Statistics*, Experian (March 15, 2018) (available at https://www.experian.com/blogs/ask-experian/identity-theft-statistics/) (last visited Feb. 22, 2019).
[23] *Semi-Annual Report of Bureau of Consumer Financial Protection*, Consumer Financial Protection Bureau, at 19 (2018) (available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_semi-annual-report-to-congress_fall-2018.pdf) (last visited Feb. 22, 2019).
[24] 15 U.S.C. § 1681i.

my perspective, is Upstart. Fortunately, the story behind the example is a matter of public record as it can be found in the request for No-Action Letter that Upstart sought and, ultimately, obtained from the CFPB. As that request explains, Upstart launched a lending platform in 2014 to serve a population of people who generally find it difficult to obtain credit—people with limited credit history.[25]

As the Upstart request explains, the challenge in serving people with a limited credit history arises from the fact that credit scores generated from shorter credit histories (sometimes called "thin files") are less predictive than credit scores generated from longer histories (or "thick files").[26] Credit history length correlates with the score: the longer the history, the higher the score on average; the short the history, the lower the score. This means that younger borrowers and immigrants tend to find it difficult to obtain credit on favorable terms. Even where they can obtain credit, they generally receive lower limits and pay higher prices.

Upstart set about to find a way to identify good credit risks in the population of people whose credit histories are too short to provide a good risk indicator. It developed a model that includes "both an examination of the borrower's financial indicators as well as his or her education and/or [work] experience."[27] As Upstart's application explains, through the use of these non-traditional variables, Upstart is able to offer loans with more favorable terms to

[25] Upstart Request for a No-action Letter, at 1 (available at https://files.consumerfinance.gov/f/documents/201709_cfpb_upstart-no-action-letter-request.pdf) (last visited on Feb. 22, 2019).
[26] *Id.*, at 7.
[27] *Id.*, at 4.

many customers who would not otherwise qualify for credit or who would only be able to obtain credit on less favorable terms.[28]

Although Upstart is the only company to have sought and received a no-action letter from the CFPB, Upstart is not the only company trying to serve underserved and traditionally disadvantaged groups by using data not found on a credit report, others include

- Petal, which has introduced a credit card without fees that is available to anyone. As the company's website explains, "[m]illions of Americans [are not] able to access credit, simply because they [have not] had credit in the past. Millions more are trapped in confusing and expensive credit card debt that feels impossible to overcome."[29] Petal reviews a customer's full financial record to underwrite its product, not just the information that is captured on a credit report.[30]
- Oportun, which offers installment loans to "the estimated 100 million people in the United States who have little or no credit history or whose credit scores do not property reflect their credit worthiness." Opportun uses a proprietary underwriting model to identify consumers "who have an ability to pay back [their] loan[s]."[31]

[28] *See id.*, at 8 (estimating that its model enables it to lower rates by 500–700 basis points compared to a traditional underwriting model and to expand the pool of people to whom it can offer a loan).
[29] https://www.petalcard.com/the-company (last visited on Feb. 22, 2019).
[30] *Id.*
[31] *Id.*

Companies are also tackling problems with the reports themselves.[32] As noted above, losses related to synthetic identity theft have grown rapidly of the past several years. Sentilink, a small startup, has built a tool that enables lenders to "detect and block synthetic identities, where the name, date of birth, and SSN don't correspond to a single real person."[33] Also, there is also concern in some quarters that consumer focus on boosting credit scores is "mucking with their relationship to the underlying credit risk."[34] To combat that risk, ZestFinance has built a cloud-based machine learning platform that enables it to increase the variables in underwriting models used by lenders in a range of industries, including the auto lending industry, by ten or even one-hundred times.[35]

KEY COMPONENTS FOR REFORM

Proposed legislative reform of the FCRA tends to focus on consumer frustration with errors on their reports. This is understandable. Consumers do not choose to have consumer reporting agencies collect information about them, and the content of the reports to lenders, insurers, employers, and others can meaningfully affect lives. When consumers find themselves frustrated by the inability to correct errors on their reports, they have little practical recourse other than to complain.[36] When those complaints do not lead to change, the

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[32] There has also been a fair amount of innovation outside of the U.S. Mines.io and Tala have both built very advanced platforms to provide loans to individuals in the developing world. *See* www.mines.io (last visited Feb. 24, 2019) and www.tala.co (last visited Feb. 24, 2019).
[33] https://sentilink.com/ (last visited on Feb. 22, 2019).
[34] Bruce Upbin, *Skeptics Say Algorithms Cannot Improve On The Art And Science Of Lending. We Beg To Differ* (Jan 11, 2019) (available at https://www.zestfinance.com/blog/skeptics-say-algorithms-cannot-improve-on-the-art-and-science-of-lending-we-beg-to-differ) (last visited Feb. 22, 2019).
[35] https://www.zestfinance.com/ (last visited on Feb. 22, 2019).
[36] *See generally*, Albert O. Hirschman, *Exit, Voice, and Loyalty* (1970).

next stop is Congress.[37] That issue merits attention, but in tackling the FCRA, Congress should also look for ways to encourage innovation in the space.

Crafting an effective response to consumer frustration with the inaccuracy of information on credit reports is tricky. First, the past—for good or ill—is often predictive of the future when it comes to the behavior of a given consumer. This means that derogatory information is valuable even if the consumer to whom that information relates would prefer that the information not be shared.[38] Second, all errors on reports are not created equal. Although some errors are material and inexcusable, many errors are immaterial, understandable, or both. Third, consumer reporting agencies are not the ultimate source of truth when it comes to the information reflect on a given report. Any information on a consumer report can ultimately be tracked back to a party that has direct relationship with the consumer who is the subject of the report.

Recognizing the complexity of the problem of dealing with inaccurate derogatory information, I have two concrete suggestions. I believe that consumers should have the ability to go to court to obtain injunctive relief to correct reports that relate to them. The discussion draft circulated by the Chairwoman includes such a provision.[39] I also believe that consumers should have the ability to more easily raise disputes with furnishers about derogatory information. In my view, the ideal regime would allow consumers to dispute information once and have the information updated on all reports. With the observation of Judge Debevoise in *Burrell* ringing in my ears, however, I think that the CFPB, not Congress,

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[37] *See* Chairwoman Maxine Waters, Remarks at the Center for American Progress (Jan. 16, 2019) (available at https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=401718) (last accessed Feb. 25, 2019) (highlighting the need to reform the credit reporting sector).

[38] Judith A. Ouellette & Wendy Wood, *Habit and Intention in Everyday Life: The Multiple Processes by Which Past Behavior Predicts Future Behavior*, Psychological Bulletin, Vol. 124, No. 1, pg. 60–62 (1998).

[39] Chairwoman Maxine Waters, *Discussion Draft to Amendment the FCRA to Improve the Consumer Reporting System, and for Other Purposes*, at Sec. 110 (Feb. 21, 2019).

should design the procedure that enables consumers to dispute information at the furnisher level. And I note that the SECURE Act assigned that task to the Bureau.[40]

Even assuming that some version of these reform efforts pass, this Committee should also recognize that improving the credit report accuracy will do little to help the approximately 40 million people in America with no existing or a very short credit file to obtain credit. The problem facing that universe of people is that credit reports—however accurate or inaccurate—are simply not that predictive of future behavior. The only solution to the problem of short or non-existence histories is more data. As I mentioned above, there is some hope. Many companies have recognized that there is a large market of Americans with little access to credit, and they have built solutions to meet that need.

But consumer permissioned access to data, particularly the cash flow information that appears to be particularly useful, falls in a legal twilight. The U.S. Department of the Treasury has concluded that consumers have an unambiguous right to provide third-parties with access to information about their accounts, including their core demand deposit accounts.[41] Nevertheless, none of the agencies that supervises and regulates firms providing financial services to consumers appears to be making any effort to require financial institutions to meet this obligation.[42] This includes the CFPB, which has explicit rule making authority in this area. Even passing the access issue, there are additional questions about whether and how the FCRA applies to such information if it is used to make a credit decision.

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[40] SECURE Act of 2017, S. 2144 (available at https://www.congress.gov/bill/115th-congress/senate-bill/1786/text?q=%7B%22search%22%3A%5B%22Fair+Credit+Reporting+Act%22%5D%7D&r=5&s=7) (last accessed Feb. 24, 2019).
[41] *Nonbank Financials, Fintech, and Innovation*, U.S. Department of the Treasury (July, 2018) (available at https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation_0.pdf) (last accessed on Feb. 24, 2019).
[42] *Id.*

I think Congress should direct the CFPB and the prudential regulators to require financial institutions to live up to their obligation under 12 U.S.C. § 5533. I also believe that Congress should make clear that the use of information accessed via means that comply with 12 U.S.C. § 5533 does not fall within the scope of the FCRA. The first point is, I assume, uncontroversial. Laws drafted by Congress and duly enacted under the Constitution should be enforced.[43]

The second merits some discussion, though I believe it is equally straight forward and ties back to why the FCRA exists in the first place. Consumers do not explicitly authorize consumer reporting agencies to collect information about them or to report that information to entities making decisions about them. The FCRA was enacted to give consumers access to those reports when those reports were used as a basis for denying them access to credit, insurance, or employment. Where consumers explicitly provide permission to prospective lenders and others to access information about them and where they have a direct relationship with the entities that hold and provide that information, the concerns that motivated the enactment of the FCRA, thus, do not apply.[44] Assuming that financial institutions adhere to their obligations under 12 U.S.C. § 5533, consumers have equal access to the information that they provide to the entities using it, and they have the ability to revoke permission to use it whenever they see fit.

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[43] The Federalist No. 21 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[44] *See The History, Purpose, and Function of The Fair Credit Reporting Act and Provisions Subject to the Expiring Preemption Provisions Specifically; The Growing Problem of Identity Theft; Affiliate Sharing Practices; Accuracy of Credit Report Information; Consumer Awareness and Understanding The Credit Granting Process and Addressing Measures to Enhance the Acts*, 108th Cong., Hrg. 108–579 (2003) (statement by Richard Shelby) (discussing the original purpose of the Fair Credit Reporting Act as regulating the vital function that consumer reporting agencies perform in supplying consumer information because of the grave responsibilities that consumer reporting agencies have with respect to fairness, impartiality, and respect for the consumer's right to privacy).

Congress should also grapple with problem that consumers face in policing and protecting their identity. Congress took some steps in that direction last year with the provisions of the Economic Growth, Regulatory Relief, and Consumer Protection Act directing the Social Security Administration to accept electronic signatures for purposes of authorizing the SSA to verify that the person presenting a social security number is the person to whom that number has been assigned.[45] Properly implemented, such a verification step could significantly reduce the problem of identity theft. But it may prove necessary to take additional steps, including eliminating social security numbers as a consumer identifier on consumer reports as was proposed by the Ranking Member during the last Congress.[46]

CONCLUSION

Our consumer lending industry is the envy of the developed world. Yet it rests on a dated regulatory foundation. Congress has the opportunity to make important changes in that foundation that are likely to expand opportunities for millions of Americans and reduce risks associated with the current system. I hope it takes advantage of this opportunity.

Thank you for inviting me to appear today. I am happy to answer any of the Committee's questions.

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[45] Public Law No. 115-174, Sec. 215 (2018).
[46] PROTECT Act of 2017, H.R. 4028 (available at https://www.congress.gov/bill/115th-congress/house-bill/4028/text) (last accessed February 25, 2019).