Testimony

Before

Subcommittee on Financial Institutions And Consumer Credit

of the

COMMITTEE ON FINANCIAL SERVICES

Regarding

"Fair Credit Reporting Act: How it Functions for Consumers and the Economy"

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Chairman Bachus, Congressman Sanders and other distinguished members of the Financial Services Committee, the National Association of Consumer Advocates (NACA) thanks you for inviting us to testify today in this early stage of considering changes to the Federal Fair Credit Reporting Act.

My name is Leonard A. Bennett. I have been asked to appear before you on behalf of NACA, its 850 plus members and the tens of thousands of consumers who we represent or on whose behalf we litigate. I am a consumer protection attorney. I have practiced law in Virginia since 1994, and in North Carolina since 1995. I obtained my undergraduate degree in Finance from George Mason University and my law degree from the George Mason University School of Law and Economics. I have been asked to represent NACA today because of my litigation experience. More than anything else, my practice is focused on the private enforcement of the FCRA.

I have had the opportunity to review the prepared statements of the sub-committee's witnesses from your May 8th hearing. I expect that you will have heard more of the same today. The position of both the financial services industry and the credit bureaus is essentially the same - the FCRA system is perfect and you should not allow preemption to expire. The reality is far from these mis-truths. The Credit Reporting system remains seriously flawed and under present trends will only get worse. And the fear of the preemption sunset is blown out of proportion and would not jeopardize what national standards the FCRA has established.

Unlike some consumer protection statutes, the FCRA is not targeted to protect any particular group of Americans. It protects all of us. Wealthy and those of modest means alike. Husband and wife. Father and Son. It protects those of us in the South as much as those of you from any other region. I practice primarily in Hampton Roads, Virginia. As a result, I have had the privilege to represent countless members of the United States Armed Forces. I represented several consumers in pending cases while they proudly served our country in Iraq. And whether an enlisted or an officer, the law protects each the same. The FCRA's protections do not know party line or ideology. It is a unique statute for a unique problem. The law must protect our privacy. It should help maintain the security of our information. It could help expand a frictionless economy. And ideally it would better guarantee that those who have earned good credit are able to keep the fruits of their efforts and responsibility.

Beyond the importance of the FCRA to consumers, you must also consider its benefits to our economy and American business. In its original adoption of the FCRA, Congress found that "the banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. Section 1681(a)(1). In considering the 1996 Amendments to the Act, Representative Kennedy explained, "[i]f these reports are not accurate, or if they are distributed without a legitimate purpose, then our whole society suffers. Consumers may be unfairly deprived of credit, employment, and their privacy. And businesses may lose out on the opportunity to gain new customers." 140 Cong. Rec. H9809, September 27, 1994. These insights are still true today. Accurate information is critical for a functioning economy. I am a believer in the free market system. The more accurate the information, the better the decisions made by our economy's actors. One of the principals I was taught in my undergraduate years studying the stock and investment markets is a concept titled "the efficient market hypothesis." The idea is that the investment markets will be fluid and frictionless only if perfect and equal information is available to all market participants. The same may be said for the consumer credit markets. Businesses need more accurate and complete information with which to make better lending decisions. Whether for the financing of an automobile, a home, or a department store purchase, sellers and lenders need access to accurate credit information so that they may transact business safely and with lower risk. These include large consumer lenders such as the credit card industry or mortgage lenders. But, it also includes more modest-sized businesses without the large margins for error available to institutional creditors. Credit file inaccuracies are damaging to businesses in both directions. Inaccurate credit reports may misstate the quality of a consumer's credit in a manner which could cause a potential seller or lender to inappropriately extend credit. The rise in consumer bankruptcies is one of the results of this false positive. On the other side of the coin, inaccurate derogatory information will keep businesses from selling and financing goods and services to consumers with otherwise excellent credit. The growing flaws in the credit system are endangering American businesses in both ways. Credit risks are inappropriately getting credit, while responsible consumers are often saddled with inaccurate derogatory histories that keep them from doing the same. The irony of the credit industry's opposition to FCRA improvement is the fact that the industry stands to gain as much as any other

participant in this debate.

You have heard or will hear from countless witnesses all who express the policy view of their respective organizations or trade groups. Few if any of your witnesses will have any live experience actually using or enforcing the statute. Throughout the history of the consumer credit laws, attorneys such as myself have been titled "private attorneys general" by courts and commentators. It is our role to bring private enforcement actions to ensure compliance with laws such as the FCRA. Without these efforts, the FTC would need an army of regulators to perform the function - a possibility an advocate of limited government such as myself could not accept. You have now met one of the individuals who actually goes into federal court to implement the laws that you enact. I and other members of NACA see the flaws in the FCRA firsthand. We face the walls and obstacles placed in the way of full enforcement by the credit bureaus and their army of lawyers. We face the limitations and restrictions of the FCRA on a daily basis. I would like to take this opportunity to better inform the sub-committee on the mechanics of the FCRA system and some of the flaws within it.

Most of my litigation experience arose from claims of credit file inaccuracy. There are countless ways in which my clients' credit reports have been inaccurate. Often, my client's credit files were combined - partially or entirely - with those of another person. This may happen through the criminal acts of a third-party. I am involved in a Michigan case in which an identity thief discovered that our client, with a social security number off by one digit, had better credit. So she began to apply for credit using our client's social. Within no time, the credit files at the bureaus began to show a single identity with the thief's name as our client's alias. Despite multiple investigation demands, nothing was done about the problem or to keep it from recurring. She has been forced to sue. These cases are identity thefts and they have received the greatest notoriety. Unfortunately, they are far from the exception. The industry describes ID Theft as a criminal law problem. But the only reason that identity theft is so prevalent and so easy to accomplish is because of the lack of any industry safeguards to stop it.

As common in my case portfolio are those claims we describe as "merged identity" cases. As easy as it is for an identity thief's credit files to be combined with that of an innocent consumer, it is even more likely to happen to persons of similar name and address or social security number. The credit reporting industry is now almost entirely automated. Its file

searches do not require full identifying information - either to obtain a credit report or to furnish information to the bureau. As a result, I have been asked to help Sandra K. Brown, who had perfect credit, when Equifax could not keep the files of Sandra M. Brown from merging. And Mary E. Jones and Mary W. Jones, who because of their similar names and addresses had both of their identities combined by Trans Union. Or Teresa B. Davis, who lived on the same street as had Teresa G. Davis several years prior and had much better credit before Equifax merged the two files. These are my cases, solely out of Newport News and Hampton, Virginia. But, there is nothing about this problem which is unique to my community. It is happening everywhere throughout America. And while no one consumer is truly immune from it, the problem is much worse for consumers with common surnames, particularly those who share their name with multiple generations.

I also see a large number of pure inaccuracy cases - those in which an individual item within a credit report is inaccurate. These types of problems, though lacking the glamour and intrigue of an identity theft, are far more common and just as damaging. The Consumer Federation of America study, already made a part of the sub-committee's record by Representative Hinojosa on May 8, found that 1 in 10 credit scores were inaccurate. This is because of inaccurate information within the credit files used to calculate such scores. At the present, there are far more FCRA cases in my community than I can accept and litigate. Some examples which repeat again and again include Mr. Jeffreys who refinanced his Bank of America mortgage in early 2002. Within his credit report the creditor and bureaus continue to report the account as a charge off and pending foreclosure with a full balance. This is despite the fact that he has mailed to all parties a copy of the original note marked paid in full by the creditor, a letter from the Bank stating as much, and a letter from his real estate attorney. Or Linda Johnson, whose ex-husband filed bankruptcy on a credit card for which she was never responsible. When he filed bankruptcy, MBNA added Ms. Johnson as a cardholder and would not remove the account from her credit files until it was sued. These are only examples and they are far more typical of these problems than not.

The FCRA, as amended, includes a system of reinvestigation which Congress had hoped could provide a remedy by which consumers could obtain a correction of an inaccuracy within their credit files. Unfortunately, the system does not work. Of all of the provisions within the Act, no other is more fatally flawed than the investigation requirement. Let me first explain the

real world mechanics of the system.

When a consumer discovers an inaccuracy within his or her credit report, they may initiate a dispute in one of two ways - by contacting the furnisher directly or by contacting the credit reporting agency. If the consumer contacts the furnisher directly, he does so at his own peril. Despite the 1996 amendments, the FCRA has left the furnisher largely immune from effective oversight. Without a private cause of action, the broad and admirable accuracy standards of Section 1681s-2(a) are merely aspirational. The only furnisher liability under the FCRA is under Section 1681s-2(b) and this is only triggered through a contact from the credit reporting agencies. No FCRA case has survived even the earliest stages of litigation without the consumer establishing that the dispute was initiated through the bureaus.

Approximately 80% of all consumer disputes received by the credit reporting agencies are made in writing. The remaining 20% come in by telephone. Each agency has a different process for handling these disputes, but all three use a similar system. The three bureaus collaborated through their trade organization to automate the entire reinvestigation process using an online computer program, E-Oscar. Upon receiving a written dispute, often in the form of a detailed letter with documents attached, the CRA assigns the dispute to its dispute department. The employees within the department are usually hourly employees and are minimally paid. In the case of Equifax, things are even worse. The CRA contracts out its FCRA responsibilities to a foreign company based in Jamaica which uses only foreign labor for its "investigations." The job of a CRA dispute department employee, even if titled "investigator," is solely data entry. No matter how detailed the written dispute, the CRA will merely translate it into a two digit code and, usually by automated means (ACDV), send a message to the furnisher identifying the code its employee believes best describes the dispute. The employees of all three CRAs operate under a quota system whereby each employee is expected to process all of the disputes of an individual consumer in less than four minutes. Worse still, the "codes" used by both the CRAs and their subscribers (the furnishers) are limited in number and rarely describe the actual basis for the consumer's dispute. For example, in two of my recent cases, both identical, consumers Van Evans and Ray Bailey wrote dispute letters to all three bureaus. The disputes were conveyed in great detail and explained that the consumers were not responsible for the disputed accounts and that any signatures claimed to be theirs were forgeries. Each consumer dispute letter also enclosed copies of handwriting exemplars such as signatures on driver's license, military ids and

other credit cards. Van Evans had also obtained a copy of the forged note and included it in his dispute letter. When Equifax and Trans Union received the letters, their employees simplified the disputes to a code and the description "not his/hers." This was all the furnishers received. In a deposition taken in a Pennsylvania case, Trans Union's responsible employee explained the CRA's "investigation procedure."

> Q . . . [T]he dispute investigator looks at the consumer's written dispute and then reduces that to a code that gets transmitted to the furnisher?
> A. Yes.
> Q. Does the furnisher ever see the consumer's written dispute?
> A. No.
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> . . .
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> Q. Are there any instances in which the dispute investigator would call the consumer to find out more about the dispute?
> A. No.

This is consistent with CRA testimony in every other case of which I am aware. The Bureaus do not convey the full dispute or forward any of the documents to the furnishers. As an expected result, nearly all consumer disputes are verified against the consumers.

However, while the CRAs are the cause of many of the FCRA problems, they are not solely responsible. Despite the 1996 Amendments, the furnishers continue to neglect or ignore their role in the credit reporting system. It is not an unfair characterization to describe the investigation process as a shell game wherein the CRAs and furnishers have worked in concert to protect one another from their already minimal liabilities under the FCRA. In nearly every case against a credit reporting agency in which I have been involved, the bureau has asserted as its defense the fact that the furnisher verified and re-reported the inaccurate information. Contrary to the plain language of the FCRA and the unanimous judgment of the federal judiciary, the CRAs do not believe they have any duty under the FCRA to independently evaluate the documents and disputes before them. Rather, they continue to assert the position that their only duty in conducting an investigation is to confirm that the furnisher wishes to maintain the

disputed item. The CRAs continue to blindly mirror whatever the furnishers provide. In its deposition, Trans Union brazenly admitted this fact on the record.

> Q. What happens when a dispute investigator gets some type of documentation, other than the consumer's dispute, that comes from a third party, but doesn't come from the furnisher?
> A. We wouldn't be able to act on any instructions or anything in there. They're not the furnisher of the information.

Trans Union's policy is identical to that of Equifax and Experian. The CRAs simply parrot whatever they receive from the furnisher. At the same time, the furnishers are relying heavily on the fact that there is no private cause of action under Section 1681s-2(a) and no standard for the furnisher investigation under Section 1681s-2(b). Nearly all institutional furnishers have the same procedures. On January 21, 2003, I represented a consumer in a jury trial against a furnisher in a Richmond federal court. In Johnson v. MBNA, we obtained the first plaintiff's verdict in the country under 15 U.S.C. Section 1681s-2(b). In pre-trial depositions and in evidence at trial, MBNA admitted that its sole procedure for handling consumer disputes under the FCRA was to compare the CRA data to its own summary of the account in its computer. That itself was the subject of the consumer's dispute. MBNA's 12 "investigators" were expected to perform an average of 250 investigations per eight hour day. They were never to consult original documents and were not provided any means by which to determine if the account summary within their computer was in fact accurate. Throughout the litigation of this case and now on MBNA's appeal, the furnisher has made two arguments: 1. The furnisher duties under Section 1681s-2(a) are not enforceable by any means and are separate and apart from the duties under Section 1681s-2(b); and 2. There is no qualitative national standard for furnisher compliance under the FCRA. MBNA has opposed even the imposition of a "reasonable investigation" standard under the Act. In its Appellant's Brief, the furnisher argued,

> The words "reasonable" and "procedures" are plainly absent from Section 1681s-2. Thus Congress did not intend to impose upon any furnisher the duty to defend its investigation or

> records qualitatively under Section 1681s-2(b). Indeed, the requirements of accuracy as they relate to mere furnishers of information are contained in Section 1681s-2(a), a section which is expressly made non-actionable by consumers like Johnson under Section 1681s-2(c)-(d). ... If Congress had wanted to subject furnishers to a qualitative standard, it easily could have done so.

This position, taken by MBNA, the largest credit card company in America, exposes the distinction between the industry's cry for Congress to maintain preemption and the reality in which furnishers actually operate - one which still lacks any enforceable national standard.

Rather than comply with the spirit and intent of the FCRA, furnishers continue to fight its application or ignore its accuracy objectives. Nearly every major furnisher who has been deposed has confessed to a policy of automated investigations in which the consumer has almost no hope of obtaining relief. The furnishers merely proofread the form from the CRA and match it to the data within their computer's account screen. There is no other means by which to verify and correct a credit reporting dispute once the error has worked its way into the furnisher's computer account record. None of the major furnishers of which I am aware reviews original documents or paper records. In a May 21, 2003 deposition, Capital One's representative confirmed this fact for her employer.

Q Okay. What kinds of information do your ACDV operators have available to them through the interface of the Odyssey system?
A Name, address, ECOA, pay history, cycle11 date, last date paid. Statements, action or activity on the account, late fees, past-due fees, membership fees, etc.
Q What about original application information?
A That, we cannot see in Unisys.
Q All right. Is there a reason why it is that your ACDV operators do not have access to all of the other systems that I mentioned, being Tandem, CHIA, Retain One, Casper, Baltrax, Amdahl, Capstone, and Rocky?
A Yeah, I'll give you the simplified answer first. Based on what my associates do, which is to verify the information, the -- some of the systems that you mentioned there are for in-depth research; my associates do not complete in-depth research.

When questioned further as to why Capital One would never conduct “in-depth research” of FCRA disputes, the representative explained that the furnisher’s procedures were developed in collaboration with the three bureaus, and that this is the policy which was developed through such involvement.

Q Okay, why is it that your associates do not complete in-depth research?
A They do that because, when the -- we had three bureau reps actually come to Capital One in -- I can verify this, I want to say it was like February of 2000 --
Q When you say -- let me stop you here for a minute and interrupt, I'm sorry -- you say three bureau reps, do you mean a rep from each of the different bureaus or from combinations thereof?
A I'm sorry, a representative from each bureau came on three separate visits, so a Trans Union rep came, Experian rep, and then an Equifax rep.
Q Okay.
A And they came to explain to my team how to more properly and more accurately work accounts, the cases. One of the questions that I had for them, as a manager, was should we verify the accounts -- and I even explained to them what my definition of verify is -- which is, we pull up our system of record, in this case Unisys or Beast, we look at what the bureau has sent us on the ACDV. If there are any discrepancies, we make sure that what the bureau has mirrors exactly what we, as Capital One, have. That's verifying.
Q That was what you described to the representatives as verifying?
A Yes.
Q And what did they say in response to that?
A Well, I actually followed that up with, Do6 you want us to do that, or do you want us to do things such as pull statements, etc., actually do the research which would involve CHIA. And in each case, the bureau rep said, No, we want you to verify it. We want you to make our system look like your system. So that's what we've been doing.

As long as consumers remain stuck in the catch-22 of the CRA-Furnisher responsibility dodge, the FCRA will continue to offer little relief for your constituents. The Bureaus will

continue to issue flawed and inaccurate credit reports to the many innocent users who must rely on same for their daily business decisions. Whether or not the industry lobby accepts this truth, the financial services industry has far more to gain by improving the credit reporting system than by accepting its serious flaws.

The continuing drumbeat from the other side of this issue is for extension of the FCRA's preemption of state credit reporting statutes. The argument that was made on May 8 and will be repeated today is that our economy would be badly harmed if we replaced the FCRA's "national standards" with a patchwork of state substitutes. This argument is founded upon several false assumptions. First, the argument assumes that the FCRA in its current form is working. It is not. Disputes are up, identity theft is rampant, and consumer complaints to the FTC in the FCRA and identity theft areas are overwhelming all other matters. Businesses cannot now comfortably rely upon the credit reporting industry to produce an accurate predictor of default or bankruptcy. Despite the efforts made in 1996, the FCRA still has failed to place and keep pressure upon either the credit reporting agencies or the furnishers to maintain accuracy in the information they report.

Industry's preemption argument assumes that the FCRA's "national standards" are in competition with certain, unstated state standards. They are not. At a minimum, even with the scheduled sunset, Section 1681t(a)'s preemption of "inconsistent" state laws will remain. Furthermore, the FCRA establishes for furnishers a "national standard" of completeness and accuracy. (The standard for CRAs remains "maximum possible accuracy.") I am unaware of any state laws whose standards exceed those of the FCRA. The issue is not competing state standards but more generous state remedies that protect consumers better than the FCRA does. Industry ought to be forced to identify the purported "unworkable" state standards that form the foundation of its position. If there really is a legitimate problem with competing state law standards, NACA would join with industry and this Committee in accommodating those concerns. Otherwise, the national standards established by the FCRA need simply to be followed. This objective will not be furthered by adopting industry's proposed amendment.