

Privacy and Fair Credit Reporting Act Update—2014

By Andrew M. Smith and Peter Gilbert*

INTRODUCTION

As reported in last year's *Annual Survey*,¹ the Bureau of Consumer Financial Protection ("CFPB") made the credit reporting system a central focus in 2013. This year, the trend continued with the CFPB providing important guidance to furnishers of credit information through enforcement actions and bulletins. The CFPB also exhorted banks to provide consumers with free copies of their credit score, issued reports on the predictiveness of certain types of data in credit reports, and provided an initial account of its efforts to examine the three nationwide consumer reporting agencies ("CRAs"). The year also brought significant reports from the Federal Trade Commission ("FTC") and the White House evaluating, among other things, data vendors not otherwise covered by the Fair Credit Reporting Act ("FCRA").² This survey begins with an analysis of the White House and FTC reports, then discusses the CFPB's efforts with respect to credit reporting, and concludes with a summary of relevant litigation developments.

WHITE HOUSE BIG DATA REPORT: SEIZING OPPORTUNITIES, PRESERVING VALUES

On May 24, 2014, the Executive Office of the President published a report on the use by government and industry of big data and its implications for consumer privacy ("Big Data Report").³ The report highlights the unique value of big data and encourages seizing those opportunities for consumers, industry,

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1. See generally Andrew M. Smith & Peter Gilbert, *Fair Credit Reporting Act Update—2013*, 69 BUS. LAW. 573 (2014) (in the 2014 *Annual Survey*) [hereinafter *FCRA 2013*].

2. Pub. L. No. 91-508, tit. VI, 84 Stat. 1114, 1127-36 (1970) (codified as amended at 15 U.S.C. §§ 1681-1681x (2012)).

3. EXEC. OFFICE OF THE PRESIDENT, *BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES* (May 2014), available at http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_5.1.14_final_print.pdf.

and government,⁴ while also identifying significant risks that must be addressed in order to preserve privacy values.⁵ According to the report, “protecting privacy of ‘small’ data has been effectively addressed in the United States through the Fair Information Practice Principles, sector-specific laws, robust enforcement, and global privacy assurance mechanisms.”⁶ The report concludes that new legislation and modified approaches are necessary to address the challenges big data presents.⁷ The report also recognizes that the reach of “sector-specific” laws, notably the FCRA, fails to cover a large swath of data used for marketing and fraud risk,⁸ and notes that unregulated data will grow exponentially as industry embraces big data.⁹

The report further details some of the many benefits of big data, including that big data tools allow industry to analyze transactional and operational data resulting in significant economic value.¹⁰ Government can use big data to improve services (e.g., by decreasing Medicare and Medicaid fraud¹¹), or to assist in homeland security and military defense (e.g., by locating likely placement points for improvised explosive devices).¹² Big data can even save lives through medical applications known as “predictive medicine.”¹³

With those promising benefits, however, come new risks. The sheer volume of big data and the complexity of algorithms used to analyze it complicate transparency in data collection and use,¹⁴ and the rapidly increasing volume of aggregated personal data increases the risks of data security breaches for consumers.¹⁵ The report also details how big data could enable discriminatory and predatory practices—for example, a seemingly neutral algorithm that verifies consumers based on surnames can unfairly discriminate against ethnic or racial groups, who have a tradition of multiple surnames, or against women, who more frequently change their surnames because of marriage.¹⁶ Big data also could be used to “digitally redline” racial or ethnic groups perceived as undesirable to marketers, employers, and others.¹⁷

The report concludes with a number of recommendations, including calling for new privacy and data breach legislation and focusing increased government resources on potential discrimination.¹⁸ The report also foreshadows a shift in

4. *Id.* at 5–6. The report defines “big data” as “large, diverse, complex, longitudinal, and/or distributed datasets generated from instruments, sensors, Internet transactions, email, video, click streams, and/or all other digital sources available today and in the future.” *Id.* at 3 (citation omitted).

5. *Id.* at 53–55.

6. *Id.* at 21.

7. *Id.* at 60–61.

8. *Id.* at 18–19, 43–45 (discussing the FCRA, among other things).

9. *See id.* at 39.

10. *Id.*

11. *Id.* at 6.

12. *Id.* at 6, 27–29.

13. *Id.* at 6, 22–24.

14. *Id.* at 41–42, 45.

15. *Id.* at 51.

16. *Id.* at 51–53.

17. *Id.* at 53.

18. *Id.* at 61, 65.

the privacy paradigm driven by the advent of big data. Specifically, the report questions whether “notice and consent” at the point of data collection, long one of the core tenets of fair information privacy practices, is a sustainable privacy solution in the evolving big data world.¹⁹ The “trend toward ubiquitous collection” of huge volumes of data from sources like WiFi signals, power consumption meters, and facial recognition tools, in combination with the ease of adding identifiers to that anonymous data, makes “focusing on controlling the collection and retention of personal data” less compelling.²⁰ Instead, the report recommends increased regulatory focus on “responsible use” of data in order to protect personal privacy, rather than controls at the point of collection.²¹ Interestingly, this conclusion seems consistent with the so-called “harm-based approach” to privacy regulation that was endorsed by the FTC in 2001,²² and later discounted by the FTC “for failing to recognize a wider range of privacy-related concerns.”²³

FTC DATA BROKER REPORT: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY

Also in May 2014, the FTC released a report on the results of its study of nine data brokers (“Data Broker Report”).²⁴ The report details the FTC’s past efforts to improve transparency related to data broker practices,²⁵ describes the data broker industry,²⁶ outlines risks and benefits that the data broker industry presents,²⁷ and highlights the lack of meaningful choice consumers have about their data.²⁸ Like the White House’s Big Data Report and a handful of prior FTC reports, the Data Broker Report concludes there is a “fundamental lack of transparency about data broker industry practices.”²⁹

19. *Id.* at 53–56, 58. The report also discusses fair information privacy practices. *Id.* at 17–18.

20. *Id.* at 54.

21. *Id.* at 56.

22. See Timothy J. Muris, Former Chairman, Fed. Trade Comm’n, Remarks at the Privacy 2001 Conference—Protecting Consumers Privacy: 2002 and Beyond (Oct. 4, 2001), available at <http://www.ftc.gov/public-statements/2001/10/protecting-consumers-privacy-2002-and-beyond>. In his remarks, former FTC Chairman Muris stated that “what probably worries consumers most are the significant consequences [risks to physical security, risks of economic injury, and unwanted intrusions into daily life] that can result when their personal information is misused. . . . [The FTC’s] privacy program will reduce the negative consequences of misuse of information. . . .” *Id.*

23. FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS 2 (Mar. 2012) (“The ‘harm-based model,’ which focused on protecting consumers from specific harms—physical security, economic injury, and unwarranted intrusions into their daily lives—had been criticized for failing to recognize a wider range of privacy-related concerns, including reputational harm or the fear of being monitored.” (citation omitted)), available at <http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

24. FED. TRADE COMM’N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY (May 2014), available at <http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>.

25. *Id.* at 4–6.

26. *Id.* at 11–40.

27. *Id.* at 46–49.

28. *Id.* at 42–45, 49.

29. *Id.* at 49.

The FTC also observes that consumers lack transparency and choice about how their data is used, and the report makes legislative recommendations that are consistent with recommendations in the White House's Big Data Report. For example, the Data Broker Report calls for legislation addressing data brokers not otherwise regulated by the FCRA, namely those that trade in marketing products and fraud risk mitigation products.³⁰ The Data Broker Report also suggests that marketing brokers should provide access to their files and the ability for consumers to exercise choice, possibly through a mandatory centralized internet portal,³¹ and that similar access, dispute, and correction processes should apply to risk mitigation brokers.³² Like the White House's Big Data Report, the FTC's Data Broker Report recognizes that the changing data environment presents challenges to traditional privacy concepts. For example, in the report, the FTC concedes that, although access continues to be an important component of its privacy framework, providing a consumer access to every data element in the consumer's file "would likely be impractical,"³³ and proposes instead that access to summary level information should be sufficient to promote transparency.³⁴

The FTC also brought enforcement actions against two data brokers for allegedly failing to comply with the FCRA. Instant Checkmate, Inc. and InfoTrack Information Services, Inc. allegedly sold reports to landlords and employers for use in making decisions about prospective tenants and applicants for employment.³⁵ The FTC alleged that these two companies were operating as CRAs without, among other things, implementing the proper procedures to ensure that (1) they sold reports only to persons with a permissible purpose under the statute,³⁶ and (2) the reports that they provided were as accurate as possible.³⁷ In combination with the FTC's Data Broker Report, these enforcement actions put the consumer information industry on notice that the FTC will vigorously enforce existing laws.

30. *Id.* at 49–54; *see also id.* at i (“The FCRA covers the provision of consumer data by consumer reporting agencies where it is used or expected to be used for decisions about credit, employment, insurance, housing, and similar eligibility determinations; it generally does not cover the sale of consumer data for marketing and other purposes.”).

31. *Id.* at 50–53.

32. *Id.* at 53–54.

33. *Id.* at 54; *see also id.* at 51 (noting that “consumers may be overwhelmed by the breadth of information”).

34. *See id.* at 51, 54.

35. *See* Press Release, Fed. Trade Comm’n, Two Data Brokers Settle FTC Charges that They Sold Consumer Data Without Complying with Protections Required Under the Fair Credit Reporting Act (Apr. 9, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/04/two-data-brokers-settle-ftc-charges-they-sold-consumer-data>.

36. Complaint at 6, *United States v. Instant Checkmate, Inc.*, No. 14CV0675 H JMA (S.D. Cal. Mar. 24, 2014), available at <http://www.ftc.gov/system/files/documents/cases/140409instantcheckmatecmpt.pdf>.

37. *See id.*; *see also* Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief at 6, *United States v. InfoTrack Info. Servs., Inc.*, No. 14-CV-2054 (N.D. Ill. Mar. 24, 2014), available at <http://www.ftc.gov/system/files/documents/cases/140409infotrackcmpt.pdf>.

CFPB ENFORCEMENT, GUIDANCE, AND REPORTS

As expected, the CFPB made credit reporting one of its priorities this past year.³⁸ In particular, the CFPB has focused on the obligations under the FCRA of lenders, debt collectors, and other companies that provide data to CRAs, known as “furnishers.”³⁹

FURNISHER ENFORCEMENT ACTION

The CFPB settled an enforcement action with auto finance company First Investors Financial Services Group, Inc. (“First Investors”)⁴⁰ for allegedly providing inaccurate information to CRAs;⁴¹ failing to provide the date of first delinquency on past due accounts, as required under the FCRA;⁴² overstating the amount by which its customers were past due;⁴³ understating monthly payment amounts;⁴⁴ and providing an incorrect “account status code” for accounts where collateral (i.e., the automobile securing the loan) was voluntarily surrendered, rather than involuntarily repossessed.⁴⁵ Although the CFPB has brought enforcement actions in the past alleging violations of the data furnishing provisions of the FCRA,⁴⁶ this was the first CFPB enforcement action focused entirely on data furnishing.

The CFPB also charged First Investors with the failure to “implement reasonable written policies and procedures regarding the accuracy and integrity of the information” furnished to CRAs.⁴⁷ Because First Investors also included an FAQs section on its website stating that “we only furnish accurate information relating to a consumer,” the CFPB also charged the respondent with engaging in a deceptive practice.⁴⁸ Under the terms of the consent order, First Investors must pay a civil money penalty of \$2.75 million, implement an audit program designed to detect “systemic inaccuracies” in data furnished to CRAs, and cease furnishing entirely on any consumer accounts “potentially affected by [any identified] Systemic Inaccuracy.”⁴⁹ The CFPB also ordered First Investors to notify consumers about the inaccurate reporting, inform them about their statutory right to a free

38. See *FCRA 2013*, *supra* note 1, at 582–83 (citing statements by CFPB Director Cordray that consumer credit reporting will be a high priority for the CFPB, in part because consumers have little say in the credit reporting process).

39. See 15 U.S.C. § 1681s-2 (2012) (listing responsibilities of furnishers of information to CRAs).

40. See Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against Auto Finance Company for Distorting Borrower Credit Reports (Aug. 20, 2014), available at <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-auto-finance-company-for-distorting-borrower-credit-reports/>.

41. Consent Order at 4–5, *In re* First Investors Fin. Servs. Grp., Inc., No. 2014-CFPB-0012 (C.F.P.B. Aug. 20, 2014) [hereinafter Consent Order], available at http://files.consumerfinance.gov/f/201408_cfpb_consent-order_first-investors.pdf.

42. *Id.* at 5.

43. *Id.* at 5–6.

44. *Id.* at 6.

45. *Id.* at 7.

46. See *FCRA 2013*, *supra* note 1, at 580–82 (discussing prior CFPB enforcement action against American Express).

47. Consent Order, *supra* note 41, at 7 (quoting 12 C.F.R. § 1022.42(a)).

48. *Id.* at 8 (quoting First Investors’ response to a frequently asked question).

49. *Id.* at 9, 12.

annual credit report, and provide another free credit report for any consumer who already had obtained his or her free annual credit report.⁵⁰

Finally, First Investors employed a service provider to assist it in furnishing account information to CRAs, and discovered and self-reported these errors, in addition to notifying its service provider of the issue. But First Investors then apparently failed to follow up to ensure that a remedy was implemented by the service provider,⁵¹ reinforcing the importance of vendor oversight.⁵²

DATA FURNISHING BULLETINS

The CFPB also published two bulletins addressing furnisher responsibilities. In a 2013 bulletin, the CFPB addressed the obligation of furnishers to review all relevant information provided by CRAs in connection with consumers' disputes of credit report information.⁵³ When consumers dispute information in a consumer report to a CRA, the CRA must conduct a reinvestigation that includes notifying the furnisher and providing to the furnisher "all relevant information' regarding the dispute that the CRA timely received from the consumer."⁵⁴ In a 2012 report, the CFPB observed that CRAs were not consistently passing all consumer-submitted documentation to furnishers.⁵⁵ In 2013, the CRAs enhanced their automated dispute system, known as e-OSCAR, to pass all supporting documentation to furnishers consistently,⁵⁶ though this action was not necessarily prompted by the CFPB's 2012 report.⁵⁷ The 2013 bulletin reminds furnishers that the FCRA requires that they review and consider all relevant information, including all documents that the CRA includes with the notice of dispute.⁵⁸ The 2013 bulletin also points out that furnishers must "have reasonable systems and technology in place to receive and process" the documentation forwarded to them by CRAs.⁵⁹ Finally, the 2013 bulletin noted that furnishers that lacked such a process should take "immediate steps" to comply and admonished them that it would monitor consumer com-

50. *Id.* at 10–11.

51. *See id.* at 6–7 (listing allegations, including that First Investors "allowed [inaccuracies in customer accounts] to persist").

52. *See* Richard Cordray, Consumer Fin. Prot. Bureau, Prepared Remarks of CFPB Director Richard Cordray on the First Investors Press Call (Aug. 2014), <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-on-the-first-investors-press-call/> ("You cannot pass the buck on this responsibility. Using a flawed computer system purchased from an outside vendor does not get you off the hook for meeting your own obligations.").

53. CFPB BULL. NO. 2013-09, THE FCRA'S REQUIREMENT TO INVESTIGATE DISPUTES AND REVIEW "ALL RELEVANT" INFORMATION PROVIDED BY CONSUMER REPORTING AGENCIES (CRAs) ABOUT THE DISPUTE (Sept. 4, 2013), available at http://files.consumerfinance.gov/f/201309_cfpb_bulletin_furnishers.pdf.

54. *Id.* at 1 (citing 15 U.S.C. § 1681i(a)(1)–(2)).

55. *See* 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 32, 34–35 (Dec. 2012), available at http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

56. *See* Kelly Dilworth, *Credit Dispute Process Fix Coming Soon*, CREDITCARDS.COM (June 17, 2013), http://www.creditcards.com/credit-card-news/credit_bureaus-report-dispute-fix-evidence-1270.php.

57. *See id.* ("The CDIA's Stuart Pratt, however, disputes that timeline. He says the industry began talking about changing the system well before the CFPB showed up.").

58. *See* CFPB BULL. NO. 2013-09, *supra* note 53, at 1.

59. *Id.*

plaints on this topic and would prioritize supervisory and enforcement actions based on the relative risk posed to consumers.⁶⁰

The CFPB also issued a 2014 bulletin that addressed dispute resolution responsibilities, providing guidance on the definition of the “reasonable investigation” required in response to a consumer dispute.⁶¹ Specifically, the CFPB warned that furnishers should not assume that deleting a tradeline without conducting an investigation constitutes “a reasonable investigation” of a dispute.⁶² CFPB Director Richard Cordray also stated that the 2014 bulletin puts “furnishers on notice that taking a shortcut by simply deleting a line in a credit report does not generally constitute a reasonable investigation of a consumer dispute that is enough to satisfy their obligations under the law.”⁶³ The 2014 bulletin further points out that proper investigation of disputes serves several important functions, some or all of which may not be achieved where furnishers simply delete a tradeline without investigation.⁶⁴ Specifically, proper handling of disputes may prompt a correction to consumer information, may reveal systematic errors prompting corrections beneficial to other consumers, and may result in updates to all the CRAs to which the furnisher reports.⁶⁵ In a somewhat confusing conclusion, the CFPB cautions that “[a] furnisher should not assume that it ceases to be a furnisher with respect to an item that a consumer disputes simply because it directs the CRA to delete that item.”⁶⁶ Whether this statement is intended simply to restate the premise of the bulletin or to convey some ongoing obligation with respect to items deleted from the CRA’s files is unclear.

CFPB CREDIT SCORING EFFORTS

The CFPB repeatedly has emphasized the importance of credit scores, and the need to inform consumers about credit scores.⁶⁷ In fact, CFPB Director Cordray “sent letters to the nation’s top credit card companies urging them to . . . mak[e] credit scores . . . freely available to their customers.”⁶⁸ In the letter, Director Cordray stated that free credit scores may prompt consumers to “request their credit

60. *Id.* at 2.

61. CFPB BULL. NO. 2014-01, THE FCRA’S REQUIREMENT THAT FURNISHERS CONDUCT INVESTIGATIONS OF DISPUTED INFORMATION (Feb. 27, 2014), available at http://files.consumerfinance.gov/f/201402_cfpb_bulletin_fair-credit-reporting-act.pdf.

62. *Id.* at 1–2.

63. Richard Cordray, Consumer Fin. Prot. Bureau, Prepared Remarks of CFPB Director Richard Cordray at the Consumer Advisory Board Meeting (Feb 27, 2014), <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-consumer-advisory-board-meeting/>.

64. See CFPB BULL. NO. 2014-01, *supra* note 61, at 2 (“[F]urnishers should not assume that simply deleting [an] item will generally constitute a reasonable investigation.”).

65. *Id.* at 1–2.

66. *Id.* at 2.

67. See, e.g., *What Information Goes into My Credit Score?*, CONSUMER FIN. PROT. BUREAU (July 14, 2014), <http://www.consumerfinance.gov/askcfpb/317/what-information-goes-into-my-credit-score.html>.

68. *CFPB Calls on Top Credit Card Companies to Make Credit Scores Available to Consumers*, CONSUMER FIN. PROT. BUREAU (Feb. 27, 2014), <http://www.consumerfinance.gov/newsroom/cfpb-calls-on-top-credit-card-companies-to-make-credit-scores-available-to-consumers/>.

report, address concerns, investigate errors or fraud-related entries, and improve negative aspects of their credit usage.”⁶⁹

The CFPB also published two studies of credit scoring, each concluding that information initially thought to be predictive of consumers’ credit worthiness was not. The first of these studies, involving medical collections, concluded that consumers with unpaid medical bills that have been referred to collection agencies may be more credit worthy than consumers with other types of collection accounts—specifically, consumers with medical collection accounts were observed to have delinquency rates comparable to consumers with higher credit scores.⁷⁰

The second CFPB study concluded that a consumer’s history of providing remittance transfers—frequently used by new immigrants to send money to their family members who remain abroad—was similarly not predictive of credit worthiness.⁷¹ The CFPB concluded in this report that “remittance histories add very little to the predictiveness of a credit scoring model” and “building a credit scoring model that includes remittance history information is unlikely to increase the credit scores of consumers who send remittance transfers.”⁷² In some cases, however, the CFPB found a positive correlation between the use of remittance transfers and default (i.e., people who use remittance transfers regularly may be more likely to default on credit obligations).⁷³

SUPERVISION OF CONSUMER REPORTING AGENCIES

In late 2012, the CFPB began its supervision program for the three nationwide CRAs.⁷⁴ These initial examinations were limited to an evaluation of the agencies’ compliance management systems.⁷⁵ These examinations have subsequently been expanded to encompass dispute handling practices.⁷⁶

The CFPB found numerous deficiencies in the compliance management systems of one or more of the agencies examined, including: no dedicated chief

69. Form Letter from Richard Cordray, Dir., Consumer Fin. Prot. Bureau, to CEO of Unspecified Credit Card Company (Feb. 10, 2014), available at http://files.consumerfinance.gov/f/201402_cfpb_letters_credit-scores.pdf.

70. CONSUMER FIN. PROT. BUREAU, DATA POINT: MEDICAL DEBT AND CREDIT SCORES 13–16 (May 2014), available at http://files.consumerfinance.gov/f/201405_cfpb_report_data-point_medical-debt-credit-scores.pdf. Subsequent to the CFPB’s report, FICO announced that its new credit scores would weigh medical collection accounts less heavily in the score calculation, and ignore paid medical collection accounts entirely. See Tara Siegel Bernard, *Credit Scores Could Rise with FICO’s New Model*, N.Y. TIMES, Aug. 8, 2014, at B3.

71. See CONSUMER FIN. PROT. BUREAU, REPORT ON THE USE OF REMITTANCE HISTORIES IN CREDIT SCORING 4 (July 2014), available at http://files.consumerfinance.gov/f/201407_cfpb_report_remittance-history-and-credit-scoring.pdf.

72. *Id.* at 4, 5.

73. *Id.* at 19 (“[D]efault rates are consistently higher for consumers in the remitter sample than they are for consumers in the control sample with identical [credit scores].”).

74. See CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS 5 (Spring 2014) [hereinafter SUPERVISORY HIGHLIGHTS], available at http://files.consumerfinance.gov/f/201405_cfpb_supervisory-highlights-spring-2014.pdf.

75. *Id.* at 8.

76. *Id.*

compliance officer;⁷⁷ inadequate oversight of compliance by the boards of directors;⁷⁸ no board approval for compliance policies and procedures;⁷⁹ failure to document compliance policies and procedures;⁸⁰ failure to review and update compliance policies and procedures;⁸¹ failure to communicate pertinent policy and procedure updates to relevant staff;⁸² failure to oversee third-party service providers providing call center services, handling consumer disputes, or selling products and services directly to consumers;⁸³ failure to ensure that service providers understand their compliance obligations, are properly trained, and are in fact complying with federal consumer financial laws;⁸⁴ and, failure to monitor and track consumer disputes and complaints to identify areas of potential consumer risk.⁸⁵

In addition to these general compliance management failures, the CFPB examination team found that one or more CRAs failed to forward to data furnishers “all relevant information” provided by consumers in connection with a dispute of consumer report information.⁸⁶ This alleged shortcoming was remedied by the e-OSCAR enhancements outlined above.⁸⁷ CFPB examiners also claimed that one or more CRAs required consumers to purchase a credit report in order to file a dispute with the agency online or over the telephone, allegedly in violation of the FCRA, which requires a CRA to investigate a dispute “free of charge.”⁸⁸

LITIGATION DEVELOPMENTS

There were at least two significant FCRA cases decided in the federal appellate courts in the past year.

FURNISHER REINVESTIGATION DUTIES

In *Seamans v. Temple University*,⁸⁹ the U.S. Court of Appeals for the Third Circuit considered the plaintiff’s allegation that the defendant failed to report to CRAs the date of first delinquency on the plaintiff’s student loan and failed to report the debt as disputed.⁹⁰ The case presented several questions of first impression in the Third Circuit. First, the court held that the FCRA applies to institutions of higher education, and is not preempted by the Higher Education Act,⁹¹ which provides

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 9.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 10.

87. See *supra* notes 55–57 and accompanying text (discussing issues related to e-OSCAR).

88. SUPERVISORY HIGHLIGHTS, *supra* note 74, at 10 (quoting 15 U.S.C. § 1681i(a)(1)(A)).

89. 744 F.3d 853 (3d Cir. 2014).

90. *Id.* at 859–60.

that CRAs may report delinquent student loans until paid in full, potentially a longer period of time than the seven-year period generally provided by the FCRA.⁹² In addition, the court ruled that, when presented with a dispute by a consumer, a data furnisher must conduct a reasonable investigation of the dispute, which normally requires weighing the costs to the furnisher of the investigation against the harm to the consumer if erroneous information remains in the consumer's credit report.⁹³ Finally, the court found that a private cause of action accrues against a furnisher for a failure to report a "potentially meritorious dispute" by a consumer to a CRA.⁹⁴ This final holding of *Seamans* is generally in accord with decisions in the U.S. Courts of Appeals for the Fourth and Ninth Circuits.⁹⁵

OBTAINING A CONSUMER REPORT IN CONNECTION WITH A FRAUDULENT TRANSACTION

The U.S. Court of Appeals for the Sixth Circuit considered a related issue in *Bickley v. Dish Network, LLC*,⁹⁶ a case of first impression. In *Bickley*, the plaintiff alleged that the defendant satellite provider obtained a credit report without a permissible purpose.⁹⁷ An imposter (i.e., an identity thief) had applied for satellite service using the plaintiff's Social Security number.⁹⁸ The defendant used the identifying information provided by the imposter to request consumer report information from each of the three nationwide CRAs, and ultimately declined the service because it was unable to positively identify the applicant.⁹⁹ That is, the defendant used the information from the CRAs to thwart the identity theft.

The reports obtained from the CRAs included identity verification reports and "declined no-hit" responses, where the agencies were unable to locate a consumer report regarding the applicant.¹⁰⁰ The court held that these responses were not "consumer reports" within the meaning of the FCRA, and, therefore, the defendant did not need a permissible purpose to obtain the information.¹⁰¹ At least one of the reports, however, included a credit score, which the court believed would qualify as a "consumer report,"¹⁰² but the court held that the defendant had a permissible purpose.¹⁰³ Specifically, the defendant had a "legiti-

91. *Id.* at 863 (interpreting 20 U.S.C. § 1087cc(c)(3)).

92. *Id.* (interpreting 15 U.S.C. § 1681c(a)).

93. *Id.* at 865.

94. *Id.* at 867.

95. See Andrew M. Smith, Peter Gilbert & Scott Johnson, *Fair Credit Reporting Update—2009*, 65 *BUS. LAW.* 595, 601–04 (2010) (in the *2010 Annual Survey*) (discussing *Gorman v. Wolpoff & Abramson, LLP*, 552 F.3d 1008 (9th Cir. 2009); *Saunders v. Branch Banking & Trust Co. of Va.*, 526 F.3d 142 (4th Cir. 2008)).

96. 751 F.3d 724 (6th Cir. 2014).

97. *Id.* at 727.

98. *Id.* at 726.

99. *Id.* at 726–27.

100. *Id.* at 726.

101. *Id.* at 729.

102. *Id.* at 728–29 (quoting 15 U.S.C. § 1681a(d)(1) (defining "consumer report")).

103. *Id.* at 732.

mate business need” to verify the applicant’s identity,¹⁰⁴ had acted in good faith that it was plaintiff initiating the transaction,¹⁰⁵ and had provided a benefit to the plaintiff by preventing the theft of the plaintiff’s identity.¹⁰⁶ The court concluded that this was precisely the purpose of the FCRA—to protect the consumer while facilitating the provision of the service for which there is an FCRA permissible purpose.¹⁰⁷ Moreover, the court seemed troubled that the plaintiff was seeking to use the FCRA “as a sword against businesses protecting consumers’ identities,” and explicitly “decline[d] to grant such a weapon to a party as litigious and seemingly insensible of the benefit that he has received.”

CONCLUSION

Looking ahead, we anticipate further discussion by and among Congress, the FTC, and the White House on the proper regulation of “big data” and data brokers; whether this will lead to legislation or substantive regulation, perhaps using the FCRA as a model, is much more speculative. Less speculative is the CFPB’s continued focus on the credit reporting system. Public enforcement action by the CFPB against CRAs seems likely.

104. *Id.*

105. *Id.* at 732–33.

106. *Id.* at 733.

107. *Id.*

