Fair Credit Reporting Act and Financial Privacy Update—2016

*By Andrew M. Smith and Lucille C. A. Bartholomew**

Introduction

The previous *Annual Survey* reported that the Consumer Financial Protection Bureau ("CFPB") was bringing enforcement actions and issuing guidance under the Fair Credit Reporting Act ("FCRA"),[1] particularly with respect to data accuracy and the duties of companies that furnish data to consumer reporting agencies ("CRA").[2] That activity continued apace this year. In addition, the Federal Trade Commission ("FTC") weighed in with a report on the use of "big data," which warned businesses against using data in a manner that might subject them to FCRA liability.[3] With respect to financial privacy, Congress amended the Gramm-Leach-Bliley Act ("GLBA")[4] to allow financial institutions to forego the annual mailing of privacy notices in certain limited instances.[5] The courts were also active.

Enforcement and Guidance Concerning Data Furnishers, CRAs, and Privacy Notices

Enforcement Against Data Furnishers

The CFPB has made the obligations of data furnishers under the FCRA one of its enforcement and policy priorities and settled two enforcement actions during the past year alleging violations of the FCRA furnisher provisions. The FTC also settled two cases of its own.

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

2. *See* Andrew M. Smith & Peter Gilbert, *Fair Credit Reporting Act and Financial Privacy Update—2015*, 71 Bus. Law. 661, 664–69 (2015) [hereinafter *FCRA 2015*] (in the 2015 *Annual Survey*).

3. *See* Fed. Trade Comm'n, Big Data: A Tool for Inclusion or Exclusion? (Jan. 2016) [hereinafter Big Data Report], https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.

4. Pub. L. No. 106-102, tit. V, 113 Stat. 1338, 1436–50 (1999) (codified as amended at 15 U.S.C.A. §§ 6801–6827 (2009 & Supp. 2016)).

5. 15 U.S.C.A. § 6803.

In an enforcement action against Interstate Auto Group, Inc. ("Interstate"), a used car dealership group, and Universal Acceptance Corp. ("UAC"), its financing affiliate, the CFPB alleged that the companies maintained inadequate written policies and procedures to ensure the accuracy and integrity of data furnished to CRAs in violation of the Furnisher Rule in Regulation V.[6] UAC did not establish or implement any written policies or procedures regarding the accuracy and integrity of the consumer information it reported to CRAs, as required by the Furnisher Rule, until August 2013.[7] Even after UAC adopted policies and procedures, the CFPB found that those policies and procedures were inadequate because they did not incorporate certain elements, such as "having an appropriate system for furnishing information; maintaining records; having internal controls; conducting training; correcting records; and describing investigation methods."[8]

Moreover, from January 2009 through September 2013, UAC allegedly furnished information that it knew, or had reasonable cause to believe, was inaccurate based on consumer performance, information in the Interstate and UAC databases, or other information, in violation of section 623(a)(1) of the FCRA.[9] For example, for many consumers who took advantage of Interstate's seventy-two-hour money-back guarantee and return policy to walk away from the transaction, UAC inaccurately reported that the vehicle was repossessed, charged-off, or had a current or unpaid balance other than zero, among other things.[10] The CFPB was able to bring these and similar allegations against UAC under section 623(a)(1) because Interstate and UAC failed to specify an address where consumers could send notices that information furnished by UAC was inaccurate.[11] Specifying such an address for consumer notices relieves a furnisher of liability for reporting information to CRAs that it knows, or has reasonable cause to believe, is inaccurate.[12]

The CFPB also alleged that Interstate represented in writing to consumers in marketing and sales materials that it reports "good credit" to CRAs and emphasized that it helped consumers build and maintain good credit.[13] In fact, according to the CFPB, Interstate did not furnish, or ensure that UAC furnished, certain types of positive payment history information, and UAC deleted certain positive information in attempting to correct other errors.[14] As part of the settlement, the CFPB required Interstate to pay a $6,465,000 civil money penalty.[15]

6. Consent Order, *In re* Interstate Auto Grp., Inc., No. 2015-CFPB-0032 (Dec. 17, 2015) [hereinafter Interstate Consent Order], http://files.consumerfinance.gov/f/201512_cfpb_carhop-consent-order.pdf; *see also* 12 C.F.R. § 1022.42(a) (2016). *See generally id.* pt. 1022 (2016) (Regulation V).
7. Interstate Consent Order, *supra* note 6, at 1–2, 12.
8. *Id.* at 13.
9. *Id.* at 1, 5–6.
10. *Id.* at 6–7.
11. *Id.* at 10–11.
12. *See* 15 U.S.C. § 1681s-2(a)(1)(C) (2012).
13. Interstate Consent Order, *supra* note 6, at 11.
14. *Id.* at 11–12.
15. *Id.* at 19.

The CFPB also settled an enforcement action against data furnisher EOS CCA ("EOS"), alleging that EOS violated the FCRA by reporting to CRAs that accounts were disputed by the account holder when in fact they were not.[16] The CFPB's allegations all stemmed from a single portfolio of accounts purchased by EOS from AT&T in 2012.[17] According to the CFPB, AT&T did not provide EOS with adequate information about the accounts and, for a period of time, coded all of these accounts as "disputed" when it reported them to CRAs,[18] ostensibly because EOS did not have sufficient records from AT&T to determine which accounts were disputed and which were not disputed. The FCRA prohibits a data furnisher from reporting to a CRA an account, if that account is disputed by the account holder, without providing notice to the CRA that the account is disputed by the consumer.[19] Because EOS was unsure which accounts had been disputed by consumers, it coded all accounts as disputed, essentially over-complying with the FCRA requirement.[20] The CFPB saw the situation differently, however, and charged EOS with reporting inaccurate information because it knew that not every account was disputed.[21] EOS was required to pay a civil money penalty of $1.85 million and refund approximately $750,000 to affected consumers.[22]

The FTC also entered into two settlements over allegations that companies failed to maintain written policies and procedures for consumer dispute investigations and ensure the accuracy of data furnished to CRAs. First, in September 2015, the FTC settled with Tricolor Auto Group ("Tricolor") and its loan-servicing group.[23] According to the FTC, Tricolor had no written policies or procedures to address the accuracy of reported information, and Tricolor allegedly referred consumers back to the CRA, instead of conducting investigations for each consumer dispute.[24] As part of the settlement, the FTC required Tricolor to pay an $82,777 civil money penalty and barred the car dealership from violating the FCRA's Furnisher Rule again.[25]

16. Stipulated Final Judgment and Order, CFPB v. Collecto, Inc., No. 1:15-cv-14024 (D. Mass. Dec. 7, 2015) [hereinafter Collecto Consent Order], http://files.consumerfinance.gov/f/201512_cfpb_proposed-consent-order-eos.pdf; Complaint at 4–5, CFPB v. Collecto, Inc., No. 1:15-cv-14024 (D. Mass. Dec. 7, 2015) [hereinafter Collecto Complaint], http://files.consumerfinance.gov/f/201512_cfpb_complaint-eos.pdf. Collecto, Inc. does business as EOS.

17. Collecto Complaint, *supra* note 16, at 3.

18. *Id.* at 4–5.

19. 15 U.S.C. § 1681s-2(a)(3) (2012).

20. Collecto Complaint, *supra* note 16, at 4–5.

21. *Id.* at 8–9. The CFPB also alleged that EOS violated debt collection requirements and engaged in deceptive conduct by continuing to collect on debts that were disputed by consumers or that EOS had reason to believe were fraudulent, paid, time-barred, or otherwise not owed. *Id.* at 9–13.

22. Collecto Consent Order, *supra* note 16, at 12, 16.

23. Stipulated Final Judgment, United States v. Tricolor Auto Acceptance, LLC, No. 3:15-cv-3002-G (N.D. Tex. Sept. 15, 2015) [hereinafter Tricolor Consent Order], https://www.ftc.gov/system/files/documents/cases/150916tricolorstip.pdf.

24. Complaint at 4–5, United States v. Tricolor Auto Acceptance, LLC, No. 3:15-cv-3002-G (N.D. Tex. Sept. 15, 2015), https://www.ftc.gov/system/files/documents/cases/150916tricolorcmpt.pdf.

25. Tricolor Consent Order, *supra* note 23, at 3–4.

In May 2016, the FTC settled allegations that debt collector Credit Protection Association ("CPA") did not have adequate policies and procedures for handling consumer disputes regarding information that CPA had furnished to CRAs and notifying consumers of the outcomes of their disputes.[26] The FTC also alleged that employees of CPA were not adequately trained with respect to the handling of consumer disputes, and that CPA failed to properly maintain copies of documents consumers submitted to support their disputes.[27] According to the FTC, CPA relied on the original debt holders to investigate consumer disputes and did not have effective procedures for forwarding disputes and supporting documentation to their clients.[28] The settlement required CPA to design and implement new procedures and pay a $72,000 civil money penalty.[29]

CFPB Supervisory Guidance on Furnisher Obligations

The CFPB also published guidance that emphasizes the importance of furnisher obligations. For example, in February 2016, the CFPB published a bulletin discussing the requirements for furnishers to implement reasonable written policies and procedures.[30] In the bulletin, the CFPB emphasized furnishers' obligations under Regulation V regarding the accuracy and integrity of the information that they report to CRAs.[31] The bulletin indicated that a furnisher's policies and procedures are dependent on "the nature, size, complexity, and scope of the furnisher's activities," and that each furnisher should consider the factors listed in Interagency Guidelines Concerning the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies in Regulation V.[32] The bulletin also indicated that the CFPB expects furnishers to periodically review their policies and procedures and update them, as appropriate, to ensure their effectiveness.[33] The bulletin further provided that the policies and procedures must cover furnishing information to all types of CRAs, including nationwide and specialty CRAs.[34] The bulletin promised that the CFPB would continue to monitor furnishers for compliance with Regulation V and that it would take supervisory and enforcement action, as appropriate.[35]

26. Stipulated Final Order at 3–5, United States v. Credit Prot. Ass'n, LP, No. 3:16-cv-01255-D (N.D. Tex. May 9, 2016) [hereinafter CPA Consent Order], https://www.ftc.gov/system/files/documents/cases/160509cpaorder.pdf.

27. Complaint at 4–5, United States v. Credit Prot. Ass'n, LP, No. 3:16-cv-01255-D (N.D. Tex. May 9, 2016), https://www.ftc.gov/system/files/documents/cases/160509cpacmpt.pdf.

28. *Id.* at 5–7.

29. CPA Consent Order, *supra* note 26, at 3–6.

30. Consumer Fin. Prot. Bureau, CFPB Bull. No. 2016-01: The FCRA's Requirement that Furnishers Establish and Implement Reasonable Written Policies and Procedures Regarding the Accuracy and Integrity of Information Furnished to All Consumer Reporting Agencies (Feb. 3, 2016) [hereinafter Bulletin], http://files.consumerfinance.gov/f/201602_cfpb_supervisory-bulletin-furnisher-accuracy-obligations.pdf.

31. *Id.* at 1.

32. *Id.* at 2; *see also* 12 C.F.R. pt. 1022, app. E (2016).

33. Bulletin, *supra* note 30, at 2 (citing 12 C.F.R. § 1022.42(c)).

34. *Id.*

35. *Id.*

The CFPB regularly publishes *Supervisory Highlights,* a bulletin that advises supervised entities of the CFPB's supervisory priorities, including anonymized examination findings that would not otherwise be publicly available information. The CFPB addressed FCRA issues in the Fall 2015 *Supervisory Highlights*, reporting that, in the course of examinations of depository institutions, its examiners found that some depository institutions had failed to establish and implement written policies and procedures regarding the accuracy and integrity of deposit account information furnished to specialty CRAs that collect and disseminate deposit account information.[36] Examiners found that some depository institutions failed to: provide notice to consumers of the results of the investigations of direct disputes, distinguish credit reporting disputes from other types of complaints received from consumers, and train employees with respect to the furnishing of deposit account information to CRAs.[37] With respect to the use of consumer report information from these specialty CRAs, examiners found that some depository institutions failed to provide adverse action notices to consumers or include contact information for CRAs in such notices.[38]

CFPB examiners also found that some student loan servicers failed to maintain accurate policies and procedures for furnishing data to CRAs, including inadequate training on how to handle investigations of consumer disputes; no internal controls, such as verifying random samples; no periodic reviews of the servicer's data furnishing practices; and no documented practice of reviewing exception reports from CRAs.[39]

The CFPB also examined debt collectors for adherence to data furnisher obligations and found that some debt collectors had inadequate written policies and procedures to ensure the accuracy and integrity of information furnished to CRAs.[40] For example, some policies and procedures directed employees to delete, rather than investigate, disputed information, and did not include adequate guidance on how to identify and distinguish disputes made under the FCRA and the Fair Debt Collection Practices Act.[41]

The Winter 2016 *Supervisory Highlights* also indicated deficiencies with respect to certain depository institutions furnishing data to specialty CRAs. Specifically, some depository institutions failed to maintain policies and procedures relating to the furnishing of deposit account information to specialty CRAs and failed to notify the specialty CRAs when consumers had paid in full or settled in full charged-off accounts, i.e., deposit accounts with negative credit balances.[42]

The Winter 2016 *Supervisory Highlights* also stated that one or more student loan servicers failed to have written policies and procedures regarding the accu-

36. Consumer Fin. Prot. Bureau, Supervisory Highlights 5–7 (Fall 2015), http://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf.
37. *Id.* at 6–7.
38. *Id.* at 6.
39. *Id.* at 25–26.
40. *Id.* at 8–9.
41. *Id.* at 9.
42. Consumer Fin. Prot. Bureau, Supervisory Highlights 5–6 (Winter 2016), http://files.consumerfinance.gov/f/201603_cfpb_supervisory-highlights.pdf.

racy and integrity of information furnished to CRAs, and that other servicers had inadequate policies and procedures.[43] For example, the CFPB found policies and procedures that did not reference one another, so that "it is difficult to determine which policy or procedure applies."[44] The CFPB also made clear that it expects data furnishing policies and procedures to include provisions with sufficient detail regarding "record retention, internal controls, audits, testing, third-party vendor oversight, . . . the technology used to furnish information to CRAs . . . , and . . . employee training."[45]

CFPB Enforcement Against CRAs

The CFPB alleged that Clarity Services, Inc. ("Clarity"), a CRA, imposed artificial obstacles on consumers who attempted to dispute inaccurate or incomplete information in their files.[46] Specifically, the CFPB alleged that Clarity would refuse to investigate a dispute from consumers who did not provide documentation supporting the dispute.[47] The CFPB alleged that this practice violates the FCRA requirement that CRAs conduct reasonable investigations of consumer disputes free of charge.[48]

The CFPB also alleged that Clarity obtained credit reports without a permissible purpose.[49] Clarity and other CRAs frequently conduct risk analyses for customers using anonymized credit report data.[50] For example, a CRA may take application data from a lender customer, ask another CRA to append credit attributes and anonymize the resulting data set, and use the anonymized data set to analyze the effectiveness of the lender's underwriting criteria.[51] In one instance, however, rather than obtaining anonymized data from the CRA, Clarity obtained 190,000 live credit reports.[52] Because the FCRA does not permit obtaining personally identifiable credit report information to perform these types of analyses, the CFPB alleged that obtaining the live credit reports violated the FCRA.[53] As a result of this alleged misconduct, the CFPB required Clarity to pay an $8 million civil money penalty.[54]

The CFPB also brought an enforcement action against two background screening companies, General Information Services, Inc. ("GIS") and e-Background-

43. *Id.* at 14–19.
44. *Id.* at 19.
45. *Id.*
46. Consent Order at 7–9, *In re* Clarity Servs., Inc., No. 2015-CFPB-0030 (Dec. 3, 2015), http://files.consumerfinance.gov/f/201512_cfpb_consent-order_clarity-services-inc-timothy-ranney.pdf.
47. *Id.* at 8.
48. *Id.* at 9 (citing 15 U.S.C. § 1681i).
49. *Id.* at 1, 6.
50. *See id.* at 5–6.
51. *See id.*
52. *Id.* at 6.
53. *Id.* at 1, 7 (citing 15 U.S.C. § 1681b(f)).
54. *Id.* at 15.

checks.com, Inc. ("BGC"), as CRAs, for violations of the FCRA.[55] GIS and BGC provide employment background screening reports, including criminal background checks, to employers. Although the CFPB does not generally have supervision or UDAAP authority with respect to employment background screening agencies,[56] it does have authority to enforce the FCRA, which was the basis of this enforcement action.[57] The CFPB alleged that GIS and BGC failed to: employ reasonable procedures to assure maximum possible accuracy of information in their reports, in violation of section 607(b) of the FCRA;[58] maintain strict procedures designed to ensure that, when public record information is reported and is likely to have an adverse effect on a consumer's ability to obtain employment, it is complete and up-to-date, in violation of section 613(a);[59] and exclude non-reportable civil lawsuits and judgments more than seven years old from their reports, in violation of sections 605(a)(2) and (5).[60]

The CFPB offered a grab-bag of bases for its allegations that GIS and BGC violated the FCRA's maximum possible accuracy requirement, including that the companies: lacked "written procedures for researching public records information for consumers with common names or who use nicknames"; allowed employees to use discretion to determine "whether a record matched consumers with common names and nicknames"; did not require employers "to provide middle names for applicants for purposes of matching criminal records to consumers"; failed to "use consumer dispute data to identify the root causes of accuracy errors"; "failed to analyze . . . consumer dispute data to determine . . . whether certain jurisdictions had data integrity problems, ascertain when a specific reporting procedure was causing errors, or recognize when a particular employee was making significant mistakes"; failed to track consumer dispute outcomes in a manner designed to identify trends or pinpoint reporting errors; did not hold internal meetings "on a regular basis to discuss errors observed . . . and ways to prevent those errors"; did not conduct "sufficient testing or sampling of . . . non-disputed reports to assure . . . maximum possible accuracy" of reported information; and failed to apply its proprietary software on a consumer-wide basis "to identify possible errors and prevent inconsistencies" in criminal history reports, but instead only applied it on an employer-specific basis.[61]

55. Consent Order, *In re* Gen. Info. Servs., Inc., No. 2015-CFPB-0028 (Oct. 29, 2015) [hereinafter GIS Consent Order], http://files.consumerfinance.gov/f/201510_cfpb_consent-order_general-information-service-inc.pdf.

56. 12 U.S.C. § 5481(15)(A)(ix)(I)(cc) (2012) (defining "financial product or service" to include "collecting, analyzing, maintaining, or providing consumer report information . . . except to the extent that a person . . . provides information that is used or expected to be used solely in any decision regarding the offering or provision of a product or service that is not a consumer financial product or service, including a decision for employment"). UDAAP means "unfair, deceptive, or abusive acts or practices."

57. 15 U.S.C. § 1681s(b)(1)(H) (2012) (authorizing the CFPB to enforce the FCRA "with respect to any person subject to this subchapter").

58. *Id.* § 1681e(b).

59. *Id.* § 1681k(a).

60. *Id.* § 1681c(a)(2), (5); *see* GIS Consent Order, *supra* note 55, at 5–8.

61. GIS Consent Order, *supra* note 55, at 5–7.

The consent order also alleged a violation of section 613(a) of the FCRA because the companies' "strict procedures" for assuring information reported is complete and up-to-date were no different than, and had the same alleged flaws as, the procedures for complying with the maximum possible accuracy requirement.[62] The CFPB did not clearly state whether section 613(a)'s "strict procedures" must be different from the reasonable procedures required by section 607(b) to assure maximum possible accuracy, however. As part of the consent order, the companies were required to provide approximately $1,000 to each affected consumer, totaling at least $10.5 million in remediation.[63] The companies were collectively required to pay a $2.5 million civil money penalty.[64]

Financial Privacy: GLBA Regulatory Relief

Regulation P requires that financial institutions provide an annual privacy notice to their customers informing them of the information that the financial institution collects, the persons to whom the financial institution discloses the data, and the rights of customers to opt out of such disclosure.[65] This annual notice must be provided in writing or, if the consumer agrees, electronically.[66] The Eliminate Privacy Notice Confusion Act was enacted into law as part of the Fixing America's Surface Transportation Act,[67] and it provides that financial institutions are not required to deliver an annual privacy notice to their customers under Regulation P, as long as they only share customer data with others as permitted by Regulation P[68] and have not changed their privacy policies and practices with respect to data sharing during the prior year.[69]

In response to the enactment of the new law, the CFPB proposed to amend Regulation P to exempt financial institutions from the requirement to send annual privacy notices to customers.[70] The CFPB proposal also would include provisions for delivery of annual privacy notices if a financial institution no longer meets the requirements for an exception from the annual privacy notice requirement.[71] As reported in the 2015 *Annual Survey*, the CFPB previously amended Regulation P to exempt financial institutions from the annual privacy notice, but that exemption required use of the CFPB's Model Privacy Form and was not available to financial institutions that permitted customers to opt out of dis-

62. *Id.* at 7 (citing 15 U.S.C. § 1681k(a)).
63. *Id.* at 15–16.
64. *Id.* at 16.
65. 12 C.F.R. §§ 1016.5, 1016.6 (2016). *See generally* 12 C.F.R. pt. 1016 (2016) (Regulation P).
66. 12 C.F.R. § 1016.9 (2016).
67. Pub. L. No. 114-94, tit. LXXV, 129 Stat. 1312, 1787 (2015) (codified at 15 U.S.C. § 6803 (Supp. III 2015)).
68. 12 C.F.R. §§ 1016.13–1016.15 (2016).
69. *See* 15 U.S.C.A. § 6803 (Supp. 2016).
70. *See* Annual Privacy Notice Requirement Under the Gramm-Leach-Bliley Act (Regulation P), 81 Fed. Reg. 44801, 44801–02 (proposed July 11, 2016) (to be codified at 12 C.F.R. pt. 1016).
71. *Id.* at 44812 (to be codified at 12 C.F.R. § 1016.5(e)(2)).

closures of information to affiliates.[72] The CFPB's new proposal does not include these limitations, which made the alternative delivery method of little or no use for those financial institutions that disclose information to affiliated companies or that are unable to adhere in every respect to the safe harbor form notice.[73] Even if the notice is compliant in all other respects with the requirements of Regulation P,[74] minor variances from the safe harbor form would disqualify a financial institution from using the alternative delivery method.[75]

FTC Big Data Report

The FTC published a report titled *Big Data: A Tool for Inclusion or Exclusion?* ("*Big Data Report*"), which surveyed the relevant laws governing the use of big data, including the FCRA, and provided advice to businesses on the requirements of these laws.[76] The *Big Data Report* is the product of the FTC's workshop on big data in September 2014[77] and its seminar on alternative scoring products in March 2014.[78] Although the report does not define "big data," it appears to address data not typically found in traditional credit reports, such as utilities, rent payments, social media data, shopping history, and demographic information.[79]

The *Big Data Report* states that companies that compile big data, including social media information, may be CRAs subject to the FCRA.[80] The FTC cautions that simply posting a disclaimer on a company's website stating that profiles may not be used for FCRA-covered purposes is insufficient to avoid liability under the FCRA.[81] Instead, the company must ensure that data is not used to determine eligibility through up-front diligence of users, contract provisions, and back-end monitoring of users.[82]

72. *FCRA 2015*, *supra* note 2, at 668–69; *see* 12 C.F.R. § 1016.9(c)(2)(i) (2016) (cross-referencing section 1016.6(a)(7)).

73. The CFPB conducted a survey of financial institutions' privacy notices in connection with making the final rule, and it determined that only 21 percent of banks with assets over $10 billion could use the alternative delivery method. Amendment to the Annual Privacy Notice Requirement Under the Gramm-Leach-Bliley Act (Regulation P), 79 Fed. Reg. 64057, 64076 (Oct. 28, 2014) (to be codified at 12 C.F.R. pt. 1016). The CFPB determined that 81 percent of banks with assets of less than $10 billion could use the alternative delivery method. *Id.*

74. *See* Final Model Privacy Form Under the Gramm-Leach-Bliley Act, 74 Fed. Reg. 62890, 62891 (Dec. 1, 2009) ("While the model form provides a legal safe harbor, institutions may continue to use other types of notices that vary from the model form so long as these notices comply with the privacy rule.").

75. *See* 12 C.F.R. pt. 1016, app. B(1)(b) (2016) ("Institutions seeking to obtain the safe harbor through use of the model form may modify it only as described in these Instructions.").

76. *See* Big Data Report, *supra* note 3, at i–v.

77. *See Big Data: A Tool for Inclusion or Exclusion?*, Fed. Trade Comm'n (Sept. 15, 2014), https://www.ftc.gov/news-events/events-calendar/2014/09/big-data-tool-inclusion-or-exclusion.

78. *See Spring Privacy Series: Alternative Scoring Products*, Fed. Trade Comm'n (Mar. 19, 2014), https://www.ftc.gov/news-events/events-calendar/2014/03/spring-privacy-series-alternative-scoring-products.

79. Big Data Report, *supra* note 3, at 1–3, 16.

80. *See id.* at ii, v, 13.

81. *Id.* at 13–14.

82. *See id.*

A puzzling footnote in the *Big Data Report* casts doubt on a longstanding FTC interpretation, dating back to the original 1973 FTC Commentary on the FCRA, which states that "information that does not identify a specific consumer does not constitute a consumer report even if the communication is used in part to determine eligibility."[83] The *Big Data Report* states that the FTC no longer believes that its longstanding interpretation is accurate, taking the position that a report "crafted for eligibility purposes with reference to a particular consumer or set of particular consumers (e.g., those that have applied for credit)" is "a consumer report even if the identifying information of the consumer has been stripped."[84]

Although a report that can be identified or linked with an individual consumer, even if it does not include the consumer's name, address, or other identifying information, would seem to meet the definition of a consumer report if "crafted . . . with reference to a particular consumer" and used to determine that consumer's eligibility for credit or another FCRA-permitted transaction, the *Big Data Report* also states that a report "crafted . . . with reference to a . . . set of consumers," e.g., aggregated or averaged data regarding attributes of consumers sharing certain characteristics, can be a consumer report.[85] Putting aside the statutory requirement that a consumer report must bear on an individual consumer, the FTC's footnote does not address the problems that would result from applying the FCRA regulatory regime to aggregated data. For example, how would a CRA disclose to a consumer information about other individuals in the consumer's cohort, and how would the consumer dispute or correct such information?

Commissioner Maureen Ohlhausen appended a separate statement to the *Big Data Report* that indicated that many of the harms identified in the report were merely hypothetical.[86] She also posited that the market would discipline companies that use big data in an unfair or inefficient way.[87] For example, companies should have economic disincentives to use big data that is not fully predictive to make decisions, or to use big data to target credit advertising away from otherwise creditworthy individuals.[88]

83. *Id.* at 16 n.85 (quoting FED. TRADE COMM'N, 40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT 20 (July 2011), https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf); *see* Statements of General Policy of Interpretations, 38 Fed. Reg. 4945, 4946 (Feb. 23, 1973) ("[T]his interpretation . . . does not preclude the furnishing of information by a [CRA] which is coded so that the consumer's identity is not disclosed, and therefore does not constitute a 'consumer report' until decoded.").

84. *See* BIG DATA REPORT, *supra* note 3, at 16 n.85.

85. *Id. Compare* 15 U.S.C. § 1681a(d)(1) (2012) ("The term 'consumer report' means any . . . communication of any information by a [CRA] bearing on a consumer's credit worthiness . . . which is used . . . as a factor in establishing the consumer's eligibility for . . . credit . . . .").

86. BIG DATA REPORT, *supra* note 3, at app. A1–A2 (Separate Statement of Commissioner Maureen K. Ohlhausen (Jan. 6, 2016)).

87. *Id.*

88. *Id.* at A1.

Litigation Developments

In addition to the U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins*,[89] which addressed standing for a claimed FCRA violation where only statutory damages were alleged, and which is discussed elsewhere in this *Annual Survey*,[90] the U.S. Court of Appeals for the Fourth Circuit defined the term "use" under FCRA section 609(g) in what appears to be a case of first impression, *Kingery v. Quicken Loans, Inc.*[91] Section 609(g) requires that mortgage lenders that "use" a credit score in connection with a mortgage application "initiated or sought by a consumer" provide the credit score and accompanying information "to the consumer as soon as reasonably practicable."[92] Section 609(g) is still relatively new, having become effective in 2004,[93] and it has been used as a basis for class action claims against mortgage lenders, particularly in the Fourth Circuit.[94]

In *Kingery*, the plaintiff applied to refinance her mortgage with the defendant lender.[95] Although the lender obtained credit scores relating to the plaintiff and "integrat[ed the scores] into its computer system," it argued that it never actually used the scores within the meaning of the FCRA. Rather, the lender claimed that it denied the plaintiff's refinancing application for the sole reason that the plaintiff was in mortgage foreclosure proceedings on the loan she was seeking to refinance.[96] The Fourth Circuit affirmed the lower court's decision to grant summary judgment for the defendant, holding that, in the context of section 609(g), the term "use" means "to employ or to derive service from," and that the plaintiff was unable to offer any evidence that the defendant lender did anything more than handle or process the credit scores relating to the plaintiff.[97] That is, according to the Fourth Circuit, simply obtaining a credit score, or even reviewing a credit score, does not trigger the required disclosures under section 609(g); rather, there must be some "employment" of the score to make a decision regarding the consumer.[98]

89. 136 S. Ct. 1540 (2016).

90. *See* Matthew O. Stromquist, Anna-Katrina S. Christakis & Jeffrey D. Pilgrim, *The High Court Speaks on Standing, Mootness, Arbitration, and Representative Evidence*, 71 Bus. Law. 567 (2017) (in this *Annual Survey*).

91. 629 F. App'x 509 (4th Cir. 2015) (per curiam).

92. 15 U.S.C. § 1681g(g) (2012).

93. Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 212(c), 117 Stat. 1952, 1975 (2003) (codified as amended at 15 U.S.C. § 1681g (2012)).

94. *See, e.g.*, Bartlett v. Bank of Am., N.A., No. MJG-13-975, 2014 WL 3773711 (D. Md. July 29, 2014), *aff'd*, 603 F. App'x 209 (4th Cir. 2015) (per curiam); Domonoske v. Bank of Am., N.A., 705 F. Supp. 2d 515 (W.D. Va. 2010).

95. *Kingery*, 629 F. App'x at 511–12.

96. *Id.* at 515; *see id.* at 514.

97. *Id.* at 514 (quoting Smith v. United States, 508 U.S. 223, 229 (1993)).

98. *Id.* at 514–15.