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# A LEGISLATIVE FRAMEWORK FOR REDUCING FRAUD IN THE CREDIT REPAIR INDUSTRY

JAMES P. NEHF\*

*Large computer databases collect and distribute information about the creditworthiness of most American adults. Businesses use this data to gauge the solvency of potential customers. Yet the information in these vast computer files is often partly or wholly inaccurate. Incorrect entries in his credit file may render a consumer unable to obtain credit until such information is deleted. Removing this data is often difficult and costly.*

*In recent years a new industry has arisen to assist consumers in their efforts to correct inaccuracies in their files. Companies, in exchange for a fee, promise to improve a person's credit rating by challenging negative information that appears on her credit report. Unfortunately, instances of poor service and fraud in the credit repair industry are widespread, causing a rising tide of consumer complaints. As a result, several states have sought to regulate the activities of credit repair organizations, but with limited success.*

*In this Article Professor Nehf claims that credit repair organizations have flourished because the Fair Credit Reporting Act makes it difficult for consumers to remove mistakes from their credit reports without outside assistance. He argues that instances of fraud would be greatly reduced if Congress would simply amend the Act to require better disclosure and simplify the labor that consumers must undertake to investigate and remove errors. Such a revision would reduce the need for consumers to seek assistance from credit repair organizations. Professor Nehf also argues that federal regulation of the credit repair industry is needed to combat widespread fraud; he then analyzes current state statutes regulating credit repair organizations in order to provide a legislative framework for reform.*

Potential creditors often seek information about consumers before entering into long-term commercial relationships. Much of this data is supplied by credit bureaus<sup>1</sup> that sell credit histories and other personal

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1. This Article uses the term "credit bureaus" to refer to organizations that regularly

information about consumers to businesses interested in evaluating an individual's credit risk. In recent years the use of credit by consumers has increased dramatically,<sup>2</sup> resulting in an unprecedented number of requests for credit reports by the business community. Credit bureaus now issue more than 450 million reports on consumers each year.<sup>3</sup>

The Fair Credit Reporting Act (FCRA),<sup>4</sup> enacted in 1970, is the principal federal statute regulating the activities of credit bureaus and users<sup>5</sup> of consumer reports, and establishing the rights of consumers affected by the issuance of such reports. The statute is generally regarded as one of the most vaguely written consumer protection statutes; as a result, it historically has been poorly enforced.<sup>6</sup> Recently, problems with

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assemble and evaluate information on consumers for the purpose of furnishing credit reports to third parties. Under the Fair Credit Reporting Act, such organizations are called "consumer reporting agencies." 15 U.S.C. § 1681a(f) (1988). For a good description of the credit reporting system in the United States, see Paul B. Razor, *Financial Information, in PRIVACY LAW AND PRACTICE* ¶ 3.01[4]-[5] (George B. Trubow ed., 1987).

2. The average cardholder currently holds eight bank and store credit cards, and the amount of consumer debt continues to rise each year. According to the American Institute for Economic Research, consumer debt (including mortgage debt) equaled 72% of disposable income in 1980. By 1988, the figure had risen to 91%. Credit card debt now totals over \$200 billion. See Gerri Detweiler & Mary Beth Butieri, *Getting Out of Debt: Part One*, *BANKCARD CONSUMER NEWS*, Nov.-Dec. 1990, at 1, 1. Outstanding credit card debt on Visa and MasterCard accounts alone increased from \$20 billion in 1981 to \$154 billion in 1990. Glenn von Nostitz & Michael Alcamo, *Plastic Fantastic Profits*, *HARPER'S*, Aug. 1991, at 56, 56-57.

3. *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 221 (1989) [hereinafter *1989 FCRA Hearing*] (statement of Walter R. Kurth, President, Associated Credit Bureaus). Outstanding consumer installment credit in 1989 was estimated to be \$700 billion. *Id.* at 223.

4. Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1136 (1970) (codified as amended at 15 U.S.C. §§ 1681-1681t (1988 & Supp. 1989)). The FCRA was added as Title VI to the Consumer Protection Act of 1968, and became effective April 24, 1971. See FEDERAL TRADE COMM'N, STATEMENT OF GENERAL POLICY OR INTERPRETATIONS OF THE FAIR CREDIT REPORTING ACT, printed in 55 Fed. Reg. 18,804, 18,828 (1990) [hereinafter STATEMENT OF GENERAL POLICY]. Many states also have credit reporting statutes that supplement federal law. Such laws are valid if not inconsistent with provisions of the FCRA. See 15 U.S.C. § 1681t (1988). Most of the state laws contain provisions similar to the FCRA. See WILLARD P. OGBURN, FAIR CREDIT REPORTING ACT 149-57 (2d ed. 1988).

5. Typically, "users" of reports are potential creditors, employers, or insurance companies who desire information about an applicant before deciding to do business with her. Landlords also use credit bureau services when reviewing tenant applications, but because of an omission in the statute, landlords are not covered by the FCRA. See 15 U.S.C. § 1681m (1988) (imposing duties only on those who use consumer reports for credit, insurance, or employment purposes). Businesses that use credit reports as the basis for refusing to accept payment by check also are not covered by the FCRA because acceptance of checks traditionally has not been considered an extension of credit. See STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 10 to § 615 (interpreting FCRA § 615 (codified at 15 U.S.C. § 1681m (1988))), at 18,826.

6. See *1989 FCRA Hearing*, *supra* note 3, at 211 (statement of Elgie Holstein, Executive Director, Bankcard Holders of America); OGBURN, *supra* note 4, at 20.

the Act have drawn great attention because the credit reporting industry has changed dramatically during the twenty years since the law's enactment. The industry has been transformed from an association of approximately 2,000 community credit bureaus, which served largely as independent clearinghouses for creditor review of a consumer's local credit history, to a highly automated network of bureaus linked by three nationwide computerized reporting services.<sup>7</sup> This automation and industry concentration currently allows vast amounts of information about virtually any consumer to be circulated easily and instantaneously to potential creditors, employers, landlords, and insurance companies across the country.

When the information contained in a consumer report is accurate and complete, consumers and businesses generally benefit from this increased efficiency.<sup>8</sup> If a report contains material errors, however, the resulting consumer injury can be significant and difficult to remedy as the inaccuracy is copied and automatically transmitted to credit bureaus throughout the United States. An unfavorable credit report can prevent a consumer from obtaining a broad range of valuable services. A consumer's ability to receive credit, to rent an apartment, to cash a check, to secure insurance, or to obtain employment all may be jeopardized. In today's credit-dominated economy, it is therefore more important than ever that consumers take adequate precautions to ensure accurate reporting of their credit histories.

Protecting the integrity of credit reports has proved to be a difficult task.<sup>9</sup> Despite nationwide educational efforts sponsored by state and federal consumer protection agencies,<sup>10</sup> as well as informational campaigns

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7. 1989 FCRA Hearing, *supra* note 3, at 221, 222, 227 (statement of Walter R. Kurth, President, Associated Credit Bureaus). Each month approximately two billion lines of credit history and two million public record items (e.g., bankruptcy filings, court judgments) are entered into the reporting system. *Id.* at 223. The three industry giants—TRW Credit Data Division of southern California; CBI, Inc. of Atlanta, Georgia; and Trans Union Corp. of Chicago, Illinois—often supply local bureaus with information upon request. *Amendments to the Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 146 (1990) [hereinafter 1990 FCRA Hearing] (statement of Edmund Mierzwinski, Consumer Advocate, U.S. Public Interest Research Group); 1989 FCRA Hearing, *supra* note 3, at 290 (statement of Robert Ellis Smith, Publisher, *Privacy Journal*); *id.* at 537 (statement of Gwen Moore, Chairperson, California General Assembly).

8. Indeed, advanced technology may result in greater accuracy in consumer reports because it is less cumbersome now to report more information, including positive information about a consumer. See 1989 FCRA Hearing, *supra* note 3, at 985 (statement of the Federal Trade Commission).

9. See OGBURN, *supra* note 4, at 19-20 (discussing some of the reasons why consumers seldom seek to enforce the FCRA).

10. The Federal Trade Commission (FTC) has issued several free brochures explaining

by the three large credit reporting agencies,<sup>11</sup> consumer awareness of the contents of credit reports and rights under the FCRA is extremely dim.<sup>12</sup> With their credit reputations at stake and with the potential for economic injury relatively high, it is not surprising that an increasing number of consumers are seeking outside assistance to assert the protections of the FCRA. Over the last several years, credit service or credit "repair" organizations (CROs) have begun operating in virtually every state,<sup>13</sup> offering (for a fee) to assist confused, frustrated, and sometimes desperate consumers in their efforts to correct erroneous credit information and to improve their credit records.<sup>14</sup>

Although some CROs provide legitimate services to troubled consumers,<sup>15</sup> allegations of fraud frequently have surfaced, and in several cases these charges have been well documented and publicized. Typical complaints have alleged misrepresentations by the CRO that a consumer's credit history can be improved when in fact it is reported accurately and is not likely to change; refusals to honor money-back guarantees as advertised; and charges of exorbitant fees (often several hundred dollars) for providing few services and doing little that the con-

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consumers' rights under the FCRA, including *Solving Credit Problems, Scoring for Credit, Building a Better Credit Record*, and *Fix Your Own Credit Problems and Save Money*. See 1989 FCRA Hearing, *supra* note 3, at 1066, 1078, 1082 (reproducing these brochures); Jean Noonan, *Federal Trade Commission Activity: Pursuing Unfair and Deceptive Practices in Consumer Financial Services*, 43 BUS. LAW. 1069, 1079 (1988). See generally 1989 FCRA Hearing, *supra* note 3, at 313, 314, 325 (statement of Janet D. Steiger, Chairperson, FTC). The Federal Reserve Board (FRB) also publishes explanatory information, *see id.* at 618 (statement of Alan Greenspan, Chairman, FRB), as do state consumer protection agencies, *see, e.g., id.* at 560 (statement by William N. Lund, Superintendent, Maine Bureau of Consumer Protection).

11. The trade association representing credit bureaus publishes several explanatory pamphlets. See 1989 FCRA Hearing, *supra* note 3, at 230-31 (statement of Walter R. Kurth, President, Associated Credit Bureaus); *id.* at 138 (statement of Edward A. Barbieri, Vice President & General Manager, TRW Credit Data Division).

12. *Id.* at 215 (statement of Elgie Holstein, Executive Director, Bankcard Holders of America); *id.* at 951 (reproduction of letter from Daniel Oliver, FTC, to Rep. Frank Annunzio (May 11, 1987)).

13. One attorney general has noted that the credit repair business did not begin to flourish until 1985 and did not exist when the FCRA was enacted in 1970. 1986 Op. Va. Att'y Gen. 33; see *Credit Repair Organizations: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 100th Cong., 2d Sess. 119-25 (1988) [hereinafter 1988 CRO Hearing] (statement of the FTC).

14. One court has defined a CRO as a business which, "for a fee, will seek to advise consumers of their rights with respect to consumer credit reports and to assist consumers in correcting or deleting information in credit reports that is improper under the [FCRA]." A-1 Credit & Assurance Co. v. Trans Union Credit Info. Co., 678 F. Supp. 1147, 1148 (E.D. Pa. 1988).

15. See generally 1988 CRO Hearing, *supra* note 13, at 25 (statement of Elena Halford, President, American Association of Credit, Inc.).

sumer could not do by himself under the law.<sup>16</sup> The problems have been exacerbated by consumers' discoveries that the CRO often has gone out of business and cannot be located soon after the transgression occurred.<sup>17</sup>

Consumer complaints have prompted many states to enact legislation regulating CROs,<sup>18</sup> but problems persist for two reasons. First, because many consumers find it difficult to understand and enforce their rights under the FCRA without assistance,<sup>19</sup> a CRO still can attract a substantial amount of business from consumers who trust the CRO's purported expertise and who believe its promises of miracle cures. Second, CROs are highly mobile enterprises. They can operate interstate with little difficulty through media advertisements and toll-free telephone numbers, and can change locations quickly, thereby eluding local enforcement efforts.<sup>20</sup> Consequently, since 1988 Congress has been studying legislation that would regulate CROs nationally.<sup>21</sup>

This Article argues that a double-barrelled federal attack on this growing problem is necessary to protect unsuspecting consumers and to restore consumer confidence in the credit industry. First, federal regulation of CROs is necessary to address the interstate nature of the problem. More important, Congress should amend the FCRA to cure its obvious defects and to make the law easier to enforce without the assistance of third parties. CROs proliferate in part because the FCRA is not easily understood by consumers and is in dire need of revision to reflect the modern realities of the credit reporting business. Without reform of the FCRA, CROs will continue to find a market among confused consumers

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16. *Id.* at 138-40 (statement of Kenneth P. Walton, Deputy Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation); *id.* at 124 (statement of Jean Noonan, Associate Director for Credit Practices, FTC); COMMERCIAL LAW AND PRACTICE, COURSE HANDBOOK SERIES, RETAIL FINANCIAL SERVICES 1989, FTC ENFORCEMENT ACTIVITIES (June 1, 1989) (summarizing FTC actions against six CROs); Anne P. Fortney, *Consumer Credit Compliance and the Federal Trade Commission: Continuing the Process of Education and Enforcement*, 41 BUS. LAW. 1013, 1019 (1986); Noonan, *supra* note 10, at 1071-72; see *infra* text accompanying note 111. Other recent credit-related scams include fraudulent promises of instant credit by calling a "900 number" (calls that can cost \$50 or more), and offers of credit opportunities to consumers who disclose their checking account number for "verification" (numbers then used to create counterfeit checks drawn against the consumer's account). See FEDERAL TRADE COMM'N, HOW TO SPOT CREDIT REPAIR SCAMS 1 (1991).

17. Informal surveys in 1988 by two of the largest credit bureaus showed that at least one-half of CROs move or go out of business within one year. 1988 CRO Hearing, *supra* note 13, at 124 (statement of L. Jean Noonan, Associate Director for Credit Practices, FTC).

18. See *infra* notes 116-65 and accompanying text.

19. See OGBURN, *supra* note 4, at 19-20.

20. See 1988 CRO Hearing, *supra* note 13, at 77 (reproduction of advertisement); *id.* at 83, 94 (reproductions of various promotional materials); *id.* at 23 (statement of George L. Rayburn, Assistant Commissioner of Consumer Credit, State of Maryland).

21. Several bills addressing CROs have been introduced in the present Congress. See, e.g., H.R. 421, 102d Cong., 1st Sess. (1991); H.R. 194, 102d Cong., 1st Sess. (1991).

who are willing to pay substantial sums for the promise of a clean credit record. If Congress makes the FCRA more "user friendly" and provides a stronger framework for ensuring that consumer reports will be accurate, the problem of CRO fraud may dissipate as the market for credit repair services shrinks.

This Article presents a legislative framework for reducing CRO fraud. Part I provides an overview of consumer rights under the FCRA and highlights the principal inadequacies of the current law as a guardian of consumer interests. Part II describes the operation of the CRO, the abuses that have surfaced to date, and the enforcement efforts taken by state consumer protection agencies and the Federal Trade Commission (FTC) to combat the problem. Part III reviews the laws regulating CROs that many states recently have enacted and evaluates these laws as models for federal CRO legislation. Part IV proposes amendments to the FCRA that would provide consumers with a greater opportunity to protect the integrity of their credit reports with less reliance on CROs or other outside assistance.

## I. CONSUMER RIGHTS UNDER THE FCRA

Enacted in 1970 as a new title to the Consumer Credit Protection Act of 1968,<sup>22</sup> the FCRA aims to protect consumers from inaccurate or obsolete information in reports that businesses use to determine a person's eligibility for credit, employment, or insurance.<sup>23</sup> The legislation is not a pure consumer protection statute, however; it was drafted to accommodate the sometimes conflicting goals of facilitating the free flow of information about consumers while ensuring the issuance of substantially accurate reports. The law seeks to balance the interests of consumers in having accurate credit reports against the desire of the business community to obtain quick and inexpensive data necessary to make informed commercial decisions. Thus, while the law attempts to ensure that credit

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22. The enormous expansion of consumer credit after World War II led to the enactment of perhaps the most significant federal consumer protection law, the Consumer Credit Protection Act of 1968 (CCPA), Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1693r (1988 & Supp. 1989)). Title I of the CCPA generally is referred to as the Truth-in-Lending Act. Congress subsequently amended the CCPA with the Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1136 (1970) (codified as amended at 15 U.S.C. §§ 1681-1681t (1988 & Supp. 1989)), the Fair Credit Billing Act, Pub. L. No. 93-495, 88 Stat. 1512 (1974) (codified as amended at 15 U.S.C. §§ 1666-1666j (1988)), the Consumer Leasing Act, Pub. L. No. 94-240, 90 Stat. 257 (1976) (codified as amended at 15 U.S.C. §§ 1667-1667e (1988)), and the Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692-1692o (1988 & Supp. 1989)).

23. See 15 U.S.C. § 1681(b) (1988 & Supp. 1989); *Milbauer v. TRW, Inc.*, 707 F. Supp. 92, 95 (E.D.N.Y. 1989); *Porter v. Talbot Perkins Children's Servs.*, 355 F. Supp. 174, 176 (S.D.N.Y. 1973).

bureaus issue consumer reports fairly and respect the consumer's right to privacy, it does not mandate completely accurate consumer reports.<sup>24</sup> The principal means of ensuring accuracy is to afford the individual a reasonable opportunity to correct any errors that may have occurred.<sup>25</sup> The FCRA thus provides a base level of consumer protection that relies heavily on consumers monitoring their reports. This balance between business and consumer interests, with its dependence on consumer self-policing, inadequately protects credit-seeking consumers.

#### A. Accuracy

To prove a bureau's violation of the minimum accuracy requirements imposed by the FCRA, a consumer first must establish that the report is materially incorrect. Early court decisions applied a narrow test of accuracy and rejected claims that the information contained in a report, while technically correct, was misleading, incomplete, or irrelevant. For example, in *Todd v. Associated Credit Bureau Services, Inc.*<sup>26</sup> a report disclosed that the consumer's \$1,200 debt had been turned over to a collection agency, but it failed to note that the consumer had paid the debt in full prior to the date on which the report was issued. The court held that although the report was not complete and may have been misleading, it was not inaccurate because the reported information was literally true.<sup>27</sup> Similarly, the court in *Austin v. BankAmerica Service Corp.*<sup>28</sup> rejected the claim of a consumer whose report disclosed that he was a defendant in a lawsuit but omitted the fact that he was sued only in his official capacity as a deputy sheriff.<sup>29</sup> Decisions such as these have been

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24. Section 607(b) of the Act requires that credit bureaus maintain "reasonable procedures to assure maximum possible accuracy" in consumer reports. 15 U.S.C. § 1681e(b) (1988). Determining whether a bureau's procedures are reasonable requires balancing both business and consumer interests. See *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51 (D.C. Cir. 1984); *Alexander v. Moore & Assocs., Inc.*, 553 F. Supp. 948, 952 (D. Haw. 1982); *infra* notes 32-37 and accompanying text.

25. DIVISION OF CREDIT PRACTICES, FEDERAL TRADE COMM'N, COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT pt. II (2d ed. 1979) [hereinafter COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT], reprinted in 5 Consumer Cred. Guide (CCH) ¶ 11,303 (Feb. 19, 1980).

26. 451 F. Supp. 447 (E.D. Pa. 1977), *aff'd*, 578 F.2d 1376 (3d Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979).

27. *Id.* at 449.

28. 419 F. Supp. 730 (N.D. Ga. 1974).

29. *Id.* at 732; see also *Colletti v. Credit Bureau Servs.*, 644 F.2d 1148, 1151 (5th Cir. 1981) (holding that Credit Bureau Services's failure to reflect total account information did not constitute negligence); *Wright v. TRW Credit Data*, 588 F. Supp. 112, 114 (S.D. Fla. 1984) (holding that no cause of action exists against a credit agency for failing to print explanatory information); *McPhee v. Chilton Corp.*, 468 F. Supp. 494, 497 (D. Conn. 1978) (holding that failure to include bankruptcy information in credit report did not make report inaccurate);



subject to criticism,<sup>30</sup> and courts recently have upheld consumer claims when the report is technically accurate but misleading. When information is so incomplete as to be extremely misleading and when clarifying information is readily obtainable, courts may find that the accuracy requirement of the FCRA has been violated.<sup>31</sup>

Even if a consumer can establish that the report contains inaccurate or extremely misleading information, the credit bureau still may not have violated the act. The FCRA does not mandate accurate credit reports, only that credit bureaus maintain "reasonable procedures" to assure "maximum possible accuracy."<sup>32</sup> In any action against a credit bureau for inaccurate reporting, the consumer has the additional burden of proving that the bureau did not have reasonable procedures in place.<sup>33</sup> While the law does not specify the precise procedures a bureau must establish, the FTC has issued guidelines and general standards that bureaus are expected to follow.<sup>34</sup> For example, bureaus should implement procedures to ensure that employees are properly trained to create, update, and release consumer reports, and that data is properly recorded and reproduced. Agencies that transmit data electronically over long distances (the dominant method under current practice)<sup>35</sup> must exercise care to ensure that the information is properly converted to computer format and that it is neither modified nor susceptible to unauthorized access during transmission. The FTC also discourages certain credit bureau policies thought to invite inaccurate reporting, such as maintaining quotas or creating financial incentives for investigators to uncover nega-

Middlebrooks v. Retail Credit Co., 416 F. Supp. 1013, 1016 (D. Ga. 1976) (holding that inclusion of arrest report in credit update does not constitute grounds for liability).

30. See generally Carla S. Harwitt, Note, *Fair Credit Reporting: Are Misleading Reports Reasonable?*, 55 N.Y.U. L. REV. 111, 114-27 (1980) (proposing balancing test rather than strict standards for determining inaccuracy); G. Allan Van Fleet, Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability*, 76 COLUM. L. REV. 458, 491-506 (1976) (advocating a less restrictive role for civil actions under the FCRA).

31. See *Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, 47 (D.C. Cir. 1984); *Houston v. TRW Info. Servs., Inc.*, 707 F. Supp. 689, 693-94 (S.D.N.Y. 1989); *Alexander v. Moore & Assocs., Inc.*, 553 F. Supp. 948, 952-53 (D. Haw. 1982); *Miller v. Credit Bureau, Inc.*, [1969-1973 Transfer Binder] Consumer Cred. Guide (CCH) ¶ 99,173 (D.C. Super. Ct. June 22, 1972). See generally 2 HOWARD J. ALPERIN & ROLAND F. CHASE, CONSUMER LAW § 541, at 250 (1986) (explaining obligations of reporting agencies to report accurately).

32. 15 U.S.C. § 1681e(b) (1988).

33. *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51 (D.C. Cir. 1984); *Hauser v. Equifax, Inc.*, 602 F.2d 811, 814-15 (8th Cir. 1979).

34. See COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT, *supra* note 25, at pt. IV.

35. In 1989 more than 60% of credit bureaus maintained computer links with the three national reporting services, and the trend is toward continued automation of the industry. See 1989 FCRA Hearing, *supra* note 3, at 222 (statement of Walter R. Kurth, President, Associated Credit Bureaus).

tive information about consumers.<sup>36</sup> As with the FCRA in general, determining the reasonableness of reporting procedures requires balancing the credit bureau's interest in minimizing time and expense against the consumer's interest in accuracy.<sup>37</sup>

Consumers' concerns about inaccuracies in credit reports may be well founded. One study estimates that more than forty percent of the consumer reports existing in credit bureau data banks contain erroneous information.<sup>38</sup> The most common errors include mistaken information about the status of an account or payment history, information on one consumer mixed with data on a different individual, and the failure of the credit reporting agency to remove obsolete information as required by the FCRA.<sup>39</sup> In today's automated reporting network any injury is quickly compounded. Once inaccurate information enters the system, it

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36. See *In re Equifax, Inc.*, 96 F.T.C. 844, 1007-10 (1980), *set aside in part*, 678 F.2d 1047 (11th Cir. 1982) (quotas on negative information ranging from 6% to 16%); COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT, *supra* note 25, at pt. IV. In the decade before 1983, the FTC devoted substantial resources to investigating credit-reporting industry procedures, culminating in a consent order against Trans Union Information Systems. See Anne P. Fortney, *Consumer Credit Compliance and the Federal Trade Commission: Sketching the New Directions*, 39 BUS. LAW. 1305, 1313 (1984).

37. In *Alexander v. Moore & Assocs., Inc.*, 553 F. Supp. 948 (D. Haw. 1982), the court struck the balance in the following way:

Clearly, the more misleading the information, and the more easily available the clarifying information, the greater is the burden upon the consumer reporting agency to provide this clarification. Conversely, if the misleading information is of relatively insignificant value, a consumer reporting agency should not be required to take on a burdensome task . . . and it should not be penalized . . . .

*Id.* at 952. See generally Barbara C. Sherland, Note, *The Functions of Consumer Reporting Agencies Under the Fair Credit Reporting Act*, 59 WASH. L. REV. 401, 416 (1984) (discussing consumer reporting agency as "conduit of information" until consumer disputes credit report).

38. See 1990 FCRA Hearing, *supra* note 7, at 137, 146 (statement of Edmund Mierzwinski, Consumer Advocate, U.S. Public Interest Research Group) (reporting that, in a study of 1500 reports, up to 43% contain "serious" errors); *id.* at 521, 537 (statement of James R. Williams, Chief Executive Officer, Consolidated Information Services, Inc.) (reporting that the study revealed that 33% of erroneous files contained obsolete or outdated information, 27% had incorrect credit ratings, 25% contained information not pertaining to the applicant, and 10% had conflicting information among reports supplied by the three major credit bureaus); 1989 FCRA Hearing, *supra* note 3, at 287 (statement of Rep. E. Clay Shaw, Jr.); Ellen James Martin, *Make Sure Credit Report Has All Errors Corrected Before Applying For a Loan*, INDIANAPOLIS STAR, Aug. 4, 1991, at 3 (reporting that American Civil Liberties Union estimates that at least 30% of credit reports contain inaccuracies). The credit bureau trade association disputes these figures. See 1989 FCRA Hearing, *supra* note 3, at 255 (statement of Walter P. Kurth, President, Associated Credit Bureaus) (contending that less than one-half of one percent of reports contain mistakes). In 1988, however, it reported that of nine million consumer inquiries, three million, or one-third, resulted in corrections or amendments. 1990 FCRA Hearing, *supra* note 7, at 146 (statement of Edmund Mierzwinski, Consumer Advocate, U.S. Public Interest Research Group).

39. See 1990 FCRA Hearing, *supra* note 7, at 140-41, 145 (statement of Edmund Mierzwinski, Consumer Advocate, U.S. Public Interest Research Group).

can spread rapidly throughout the country to computer terminals belonging to creditors, employers, landlords, and insurance companies.<sup>40</sup>

Credit bureaus, of course, cannot be guarantors of completely accurate information. Bureaus obtain most of the information in credit reports from outside sources, typically businesses that extend credit and provide payment histories to the bureau for inclusion in a consumer's file. A bureau does not violate the FCRA when it fails to mention, for example, that a consumer eventually paid an overdue retail account if neither the store nor the consumer so informed it.<sup>41</sup> Yet the FTC and the courts have concluded that credit bureaus are not merely conduits of information.<sup>42</sup> If the bureau should reasonably be aware of errors that indicate systemic problems or a pattern of unreliability with a particular source of information, the bureau should evaluate its procedures and implement cost-effective adjustments.<sup>43</sup> In addition, the FCRA requires periodic review of data to determine whether information has become obsolete or misleading with the passage of time,<sup>44</sup> and may require that bureaus maintain records showing the relative accuracy of information provided by their sources to determine which sources have submitted inaccurate data.<sup>45</sup> Bureaus also must exercise reasonable care to verify that the information in a report pertains only to the particular consumer about whom the report was requested, in order to avoid mixing data on more

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40. One of the ways information can enter the reporting system is through computer entries made by an individual business which might, for example, report that a consumer's account is 60 days overdue. In one "automatic capturing" system, the central bureau's file automatically accepted and copied a business's entire history on an individual when the business accessed the central file. This facilitated the continuous updating of files, but because special auditing procedures were not built into the system, erroneous information could enter the central file unnoticed. See *Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509, 511-12 (5th Cir. 1982) (system automatically "captured" a stranger's file and mixed the information with data on the plaintiff).

41. STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 3F to § 607 (codified at 15 U.S.C. § 1681e (1988)), at 18,821.

42. See *Bryant v. TRW, Inc.*, 689 F.2d 72, 78-79 (6th Cir. 1982); *Chilton Corp. v. Moore*, 508 S.W.2d 679, 682-83 (Tex. Civ. App. 1974); COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT, *supra* note 25, at pt. IV.

43. See STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 3A to § 607 (codified at 15 U.S.C. § 1681e (1988)), at 18,820. In 1988, 18 years after the FCRA's enactment, the FTC proposed official commentary on the Act. See FEDERAL TRADE COMMISSION, STATEMENTS OF GENERAL POLICY OR INTERPRETATIONS OF THE FAIR CREDIT REPORTING ACT, *printed in* 53 Fed. Reg. 29,696 (1988). Final commentary was published in 1990. See STATEMENT OF GENERAL POLICY, *supra* note 4, at 18,804. The official commentary supersedes previously issued FTC compliance manuals and the numerous informal staff opinion letters and formal FTC interpretations of the FCRA. See *id.* at 18,809.

44. COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT, *supra* note 25, at pt. IV; see OGBURN, *supra* note 4, at 80.

45. See *Bryant v. TRW, Inc.*, 487 F. Supp. 1234, 1240-42 (E.D. Mich. 1980), *aff'd*, 689 F.2d 72 (6th Cir. 1982).

than one consumer.<sup>46</sup>

### B. *Obsolete Information*

Except in transactions involving large amounts of money, credit bureaus may not disclose adverse information that is more than seven years old (ten years for bankruptcies).<sup>47</sup> There is no requirement that a credit bureau delete obsolete information from its files, only that it not include such information in a report.<sup>48</sup> Consumers can enforce this part of the FCRA with relative ease because, unlike the disclosure of inaccurate information, a bureau's improper disclosure of obsolete information automatically violates the FCRA regardless of the reasonableness of the agency's procedures.<sup>49</sup> While instances of unlawful disclosure of obsolete information are not uncommon, many of the disputes over this section of the FCRA center on whether the credit bureau had reasonable grounds to believe that the information was being disclosed in connection with one of the specified exempt transactions involving relatively large sums of money.<sup>50</sup> To facilitate enforcement, the FTC has interpreted this section as requiring the creation of separate files for obsolete information that may be accessed only after the bureau determines that an exemption applies.<sup>51</sup>

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46. *Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509, 513 (5th Cir. 1982); *cf. Lowry v. Credit Bureau, Inc.*, 444 F. Supp. 541, 544 (N.D. Ga. 1978) (holding that bureau need not establish special procedures to ensure that information is accurate with respect to the specific consumer about whom a report was requested).

47. 15 U.S.C. § 1681c (1988). The seven-year limit applies to civil lawsuits and court judgments, paid tax liens, accounts placed for collection or written off as losses, records of arrest, indictment, or conviction of a crime, and any other adverse information. *Id.* § 1681c(a)(1)-(6). Exemptions include credit or life insurance transactions involving \$50,000 or more, and employment positions with annual salaries of \$20,000 or more. *Id.* § 1681c(b).

48. *See Herring v. Retail Credit Co.*, 266 S.C. 455, 458-59, 224 S.E.2d 663, 664-65 (1976) (holding that court cannot order bureau to delete obsolete information permanently from its files).

49. Since reporting obsolete information is a per se violation of the FCRA, FTC staff opinions and lawsuits often center on when the seven- or ten-year limitation period begins to run. For a thorough discussion of this issue, see OGBURN, *supra* note 4, at 69-70.

50. Because obsolete information may be disclosed only in exempt transactions, credit bureaus should keep the information in a separate file that is accessible only after the creditor provides assurance that an exemption applies. The FCRA states that prospective users of consumer reports must identify themselves to the bureau and certify the purpose for which the information is sought. 15 U.S.C. § 1681e(a) (1988). For a discussion of exemptions, see *supra* note 47 and accompanying text.

51. *See COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT*, *supra* note 25, at pt. IV.C.3.

### C. Consumer Access to Files

The only way consumers can ensure that their credit files are completely accurate is to discover and correct errors themselves. The FCRA facilitates this task by giving consumers the right to learn the contents of their credit bureau files.<sup>52</sup> With few exceptions,<sup>53</sup> the FCRA requires that all information in a consumer's file be available upon proper advance notice and identification. The consumer has no statutory right to receive a copy of the report, however;<sup>54</sup> the consumer is entitled only to learn the "nature and substance" of the report,<sup>55</sup> which means that the bureau must explain the contents of the report, either in person or over the telephone.<sup>56</sup> The FCRA uses the term "nature and substance" because Congress recognized that in many cases the technical, sometimes coded, information found in a consumer report will be meaningless to the consumer if given verbatim.<sup>57</sup> Despite the statutory language, many larger bureaus provide a copy of the report and explain its contents if the consumer requests.<sup>58</sup>

Recent studies show that credit bureau data banks contain more than 500 million files; yet, consumers review only four million each

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52. 15 U.S.C. § 1681g (1988).

53. The exceptions are for medical information and the names of sources who provided information used in an "investigative report." *Id.* § 1681g(a)(1), (2). The exception for medical information is apparently based on the concern that most consumers would not understand medical data without the aid of a physician. See 1 ALPERIN & CHASE, *supra* note 31, § 264, at 457 n.3; MICHAEL M. GREENFIELD, *CONSUMER TRANSACTIONS* 186 (1983). The rationale behind the exception for sources of information in an investigative report (defined in the FCRA as a report based on interviews with persons concerning the subject's character and reputation, 15 U.S.C. § 1681a(e) (1988)) is that individuals will be more forthright in giving candid opinions if assured that their identities will not be disclosed. 1 ALPERIN & CHASE, *supra* note 31, § 264, at 458 n.4; see *Retail Credit Co. v. Dade County*, 393 F. Supp. 577, 581-82 (S.D. Fla. 1975) (discussing disclosure requirement and exceptions thereto). The identity of such sources is available to the consumer only through discovery procedures in a court action brought under the FCRA. 15 U.S.C. § 1681g(a)(2) (1988).

54. For criticism of this omission, see JOHN R. FONSECA, *HANDLING CONSUMER CREDIT CASES* 463 (3d ed. 1986) (indicating that the consumer should have the opportunity to check the file "word for word" because he and the credit bureau may have differing views as to what constitutes the "nature and substance" of the report).

55. 15 U.S.C. § 1681g(a)(1) (1988).

56. See *STATEMENT OF GENERAL POLICY*, *supra* note 4, cmt. 5 to § 609 (codified at 15 U.S.C. § 1681g (1988)), at 18,822. The bureau may choose to provide a copy of the report as an alternative means of compliance. *Id.*

57. See *COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT*, *supra* note 25, at pt. IV.C.4.

58. Increased automation in the industry has made written disclosure, with a copy of the file, the most efficient method of compliance. See *1989 FCRA Hearing*, *supra* note 3, at 252 (statement of Walter R. Kurth, President, Associated Credit Bureaus).

year.<sup>59</sup> Critics of the FCRA attribute this low access rate to deficiencies in the statute. Many consumers are not aware of their right to review their files.<sup>60</sup> Even when a creditor, employer, or insurance company uses negative credit information to make an adverse decision, the FCRA does not require that the consumer be informed of his right to review the report that influenced the decision.<sup>61</sup> The user of the report must inform the consumer that a report was considered and must provide the name and address of the bureau issuing the report, but the user has no further obligations under the FCRA.<sup>62</sup> The Act assumes that an interested consumer will then contact the designated bureau, where he may be informed of his right to disclosure of the contents of his file, although the statute does not require the bureau to disclose this right or the right to dispute the accuracy of the report.<sup>63</sup>

Even if the consumer contacts the credit bureau and requests disclo-

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59. See *1990 FCRA Hearing*, *supra* note 7, at 538 (statement of James P. Williams, Chief Executive Officer, Consolidated Information Services, Inc.).

60. See *1989 FCRA Hearing*, *supra* note 3, at 201 (statement of Bonnie Guiton, Special Advisor to the President for Consumer Affairs); *id.* at 208 (statement of Steven W. Hamm, Administrator, South Carolina Department of Consumer Affairs).

61. See *id.* at 201 (statement of Bonnie Guiton, Special Advisor to the President for Consumer Affairs). Even though the law does not require that the creditor inform the consumer of his right to review the report, some evidence exists that the process works well in practice. See *id.* at 934-35 (statement of Janet D. Steiger, Chairperson, FTC).

62. See 15 U.S.C. § 1681m(a) (1988). Even this obligation only applies to certain types of users of consumer reports. See *supra* note 5 (noting that duty does not apply to landlords or to businesses accepting payment by check). The FCRA does not require the user to state the reasons for denying the application, but § 701(d) of the Equal Credit Opportunity Act (ECOA) does require a statement of reasons when credit is denied. See 15 U.S.C. § 1691(d)(2) (1988); 12 C.F.R. § 202.9(a), (b)(2) (1991). According to one study, a substantial percentage of consumers will supply the creditor with corrective information after receiving a specific notice of the reason why credit was denied. See *Exercise of Consumer Rights Under the Equal Credit Opportunity and Fair Credit Billing Acts*, 64 FED. RESERVE BULL. 363, 365-66 (1978). The ECOA disclosure requirement has been the subject of numerous enforcement actions in which the FTC alleged a pattern of noncompliance. See *United States v. Allied Fin. Co.*, No. 3-85-1933F (N.D. Tex. Sept. 30, 1985) (consent order); *United States v. Fidelity Acceptance Corp.*, Civ. No. 3-85-1588 (D. Minn. Sept. 30, 1985) (consent order); *United States v. Winkelman Stores, Inc.*, No. C85-2214 (N.D. Ohio Aug. 8, 1985) (consent order).

63. See 15 U.S.C. § 1681g (1988); *1989 FCRA Hearing*, *supra* note 3, at 201 (statement of Bonnie Guiton, Special Advisor to the President for Consumer Affairs). The FTC has instituted several enforcement actions against creditors who failed to give consumers appropriate notice of the adverse action pursuant to § 615 of the FCRA. See *United States v. Norwest Fin., Inc.*, No. 87 Civ. 06025R (C.D. Cal. Sept. 25, 1986) (consent decree); *United States v. Strawbridge & Clothier, Inc.*, Civ. No. 85-6855 (E.D. Pa. Nov. 14, 1985) (consent decree); *Allied Fin. Co.*, No. 3-85-1933F (consent order); *Fidelity Acceptance Corp.*, Civ. No. 3-85-1588 (consent decree); *Winkelman Stores, Inc.*, No. C85-2214 (consent order); *United States v. Allied Stores Corp.*, No. 83 Civ. 2730 (S.D.N.Y. Apr. 11, 1984); *In re Wright-Patt Credit Union*, 106 F.T.C. 354, 358 (1985) (consent decree); *In re Associated Dry Goods Corp.*, 105 F.T.C. 310, 314 (1985) (consent decree); *In re Hospital & Health Servs. Credit Union*, 104 F.T.C. 589, 593-94 (1984).

sure, other obstacles may impede his ability to obtain complete disclosure. The consumer may learn that the bureau charges a fee for disclosure—often ten to twenty dollars—which the FCRA permits unless the bureau issued a report that a business used to deny credit, employment, or insurance within thirty days preceding the request.<sup>64</sup> If the consumer makes the request within the thirty-day window or pays the fee, disclosure still may be largely incomplete. The credit bureau can only disclose the information in its own file. Other credit bureaus in the consumer's community or in other parts of the country may have files containing information compiled from the same or different sources. Many consumers are not aware of this, and the FCRA does not require the bureaus to disclose this information.<sup>65</sup> Thus, even if the consumer discovers and corrects erroneous information in the file of the bureau she contacted, the same data may be present in the files of other bureaus that potential creditors might use. Moreover, if the consumer discovers the names and locations of other credit bureaus—in particular, those of the three large national processing centers—he may have to pay a separate fee for disclosure of the file in each bureau.<sup>66</sup> In short, the FCRA does little to facilitate consumer access to the universe of personal information in credit files beyond the bureau to which the initial inquiry was made.

#### D. Correction of Erroneous and Misleading Information

Even if a consumer gains access to information stored in his file at a credit bureau, the exercise yields no economic benefit unless erroneous or misleading information is purged from the consumer reporting system.<sup>67</sup>

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64. 15 U.S.C. § 1681j (1988). See 1989 FCRA Hearing, *supra* note 3, at 258 (statement of Walter R. Kurth, President, Associated Credit Bureaus); Martin, *supra* note 38, at 3 (consumers pay up to \$20 for disclosure of credit reports).

65. See 1989 FCRA Hearing, *supra* note 3, at 201-02 (statement of Bonnie Guiton, Special Advisor to the President for Consumer Affairs). The three major credit bureaus are attempting to address this problem. See *id.* at 727 (statement of Edward A. Barbieri, Vice President & General Manager, TRW Credit Data Division).

66. Section 612 of the FCRA mandates free disclosure of the report only from the bureau whose report was used to deny credit, employment, or insurance within the 30 days prior to the request. 15 U.S.C. § 1681j. Other bureaus may charge a fee for disclosure, although sometimes the fee will be waived if the consumer was rejected based on a report issued by another bureau. See 1989 FCRA Hearing, *supra* note 3, at 727 (statement of Edward A. Barbieri, Vice President & General Manager, TRW Credit Data Division).

67. TRW, one of the three national credit bureaus, reported that in 1988 1.36 million consumers requested disclosure of their files and that 20% of those persons registered disputes. Of all such challenges only two percent resulted in changes to the file. See 1989 FCRA Hearing, *supra* note 3, at 726 (statement of Edward A. Barbieri, Vice President & General Manager, TRW Credit Data Division); *cf.* 1990 FCRA Hearing, *supra* note 7, at 146 (statement of Edmund Mierzwinski, Consumer Advocate, U.S. Public Interest Research Group) (reporting that nine million consumer inquiries were made in 1988; three million resulted in corrections).

This is perhaps the area in which the FCRA is most seriously deficient.

In the abstract, the FCRA procedure for correcting inaccuracies appears straightforward and adequate. If a consumer questions the accuracy of a file and believes that additional information would correct an error or clarify a misleading statement, the bureau must investigate the claim.<sup>68</sup> The bureau must make a good faith investigation, which according to the FTC means that, at a minimum, the bureau must verify the information within a "reasonable time" by checking back with the original source and confirming the data.<sup>69</sup> The only exception to the investigation requirement is when the bureau has reason to believe that the consumer's dispute is frivolous or irrelevant.<sup>70</sup> If after the investigation the bureau agrees with the consumer and finds the information to be inaccurate, it must delete the data from its files.<sup>71</sup> Moreover, if the information can neither be confirmed nor denied within a reasonable time (determined by the FTC to be thirty days in most cases), it must be deleted.<sup>72</sup> If the consumer is not satisfied with the outcome of the investigation, she may file with the bureau a brief statement clarifying her side of the dispute.<sup>73</sup> In subsequent reports, the bureau must note that the item is disputed and must provide either the consumer's statement or a clear summary of the dispute along with the report.<sup>74</sup>

If the investigation results in the deletion of information or the inclusion of a consumer's statement of dispute, the bureau must explain to the consumer that she can instruct the bureau to provide the correction to previous recipients of the report.<sup>75</sup> Upon the consumer's request, the bureau then must provide the new information to persons who received the report for employment purposes within the past two years and to other recipients within the last six months.<sup>76</sup> In this way, the consumer can attempt to correct any misimpressions caused by the release of incomplete or erroneous reports in the recent past.

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68. 15 U.S.C. § 1681i (1988).

69. See STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 2 to § 611 (codified at 15 U.S.C. § 1681i), at 18,823; COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT, *supra* note 25, at pt. IV.C.4(b).

70. 15 U.S.C. § 1681i(a), (c); STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 11 to § 611 (codified at 15 U.S.C. § 1681i), at 18,824; see *infra* text accompanying notes 105-06.

71. 15 U.S.C. § 1681i(a).

72. *Id.*; STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 12 to § 611 (codified at 15 U.S.C. § 1681i), at 18,824.

73. 15 U.S.C. § 1681i(b).

74. *Id.* § 1681i(c); see STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 13 to § 611 (codified at 15 U.S.C. § 1681i), at 18,824 (consumer may submit 100-word statement on each disputed item).

75. 15 U.S.C. § 1681i(d).

76. *Id.* The bureau must disclose to the consumer the right to make such a request. *Id.*



Notwithstanding its apparent simplicity and comprehensiveness, this procedure for correcting inaccurate or incomplete files has proved ineffective in practice. Several problems have surfaced. Perhaps most importantly, because the FCRA does not require bureaus to inform consumers of their rights under the statute, most consumers are not aware of the procedures for disputing a file and relatively few take advantage of the opportunity.<sup>77</sup> The statute does not require bureaus to inform consumers that the bureau must investigate disputed items.<sup>78</sup> Bureaus are not required to contact consumers when an investigation has been completed, to inform them of the outcome of the investigation, or to explain why the bureau decided the issue as it did.<sup>79</sup> Nor is the bureau obligated to tell the consumer that she has a right to submit a statement disputing the outcome of an investigation and that the statement, or a summary of it, must appear on all future reports.<sup>80</sup> Unless the consumer is aware of these rights, she probably will not assert them.

In addition, some evidence suggests that investigations of disputed information are often perfunctory and incomplete, with the bureau merely returning to the original source, asking the same question, and receiving the same response.<sup>81</sup> Bureaus seldom go behind the affirmations of their sources to determine the truth of an item.<sup>82</sup> The FTC suggests that although the bureau may rely on the accuracy of a source's ledger sheets and other records, it should at the very least explain the consumer's complaint and ask whether the source confirms the original information, qualifies it, or accepts the consumer's explanation.<sup>83</sup> Critics

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77. Of the 500 million files on 200 million households in credit bureau data banks, only 4 million consumers asked to see their files in 1989. *1990 FCRA Hearing, supra* note 7, at 538 (statement of James R. Williams, Chief Executive Officer, Consolidated Information Services, Inc.).

78. *See OGBURN, supra* note 4, at 109 (observing that courts have refused to require such a duty under an analogous FCRA provision); cases cited *infra* note 80.

79. *See 1990 FCRA Hearing, supra* note 7, at 327 (statement of Elgie Holstein, Executive Director, Bankcard Holders of America). Although the FCRA does not require that bureaus inform consumers of the results of an investigation, all three of the major credit bureaus claim that they regularly do so. *See 1989 FCRA Hearing, supra* note 3, at 727 (statement of Edward A. Barbieri, Vice President & General Manager, TRW Credit Data Division).

80. *See OGBURN, supra* note 4, at 112. Courts have held that bureaus have no duty to disclose this right. *Roseman v. Retail Credit Co.*, 428 F. Supp. 643, 646 (E.D. Pa. 1977); *Middlebrooks v. Retail Credit Co.*, 416 F. Supp. 1013, 1017-18 (N.D. Ga. 1976).

81. *See 1990 FCRA Hearing, supra* note 7, at 325 (statement of Elgie Holstein, Executive Director, Bankcard Holders of America).

82. *See 1989 FCRA Hearing, supra* note 3, at 727 (statement of Edward A. Barbieri, Vice President & General Manager, TRW Credit Data Division).

83. STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 2 to § 611 (codified at 15 U.S.C. § 1681i (1988)), at 18,823-24; COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT, *supra* note 25, at pt. IV.C.4(b). The FTC also has indicated that a proper investigation should include an effort to contact any other sources named by the consumer who may have

suspect, however, that even these minimum procedures often are not followed.<sup>84</sup>

Consumers have charged that bureaus sometimes refuse to conduct investigations by claiming that the consumer's dispute is frivolous or irrelevant.<sup>85</sup> Bureaus use this statutory excuse most often when the consumer wishes to add information to a report. The bureau typically characterizes this information as merely an explanation of extenuating circumstances for a negative item, rather than a dispute of the item's technical accuracy. A common example of this situation occurs when a consumer seeks to explain why he was fired from his former job. The credit bureau's position has sometimes been upheld, particularly by courts that have interpreted narrowly the FCRA's standard of "maximum possible accuracy."<sup>86</sup> Bureaus also refuse to reinvestigate disputes previously resolved against consumers, a frustrating response when the consumer believes that the original investigation was inadequate.<sup>87</sup>

One of the most pressing problems for consumers is making sure that erroneous or incomplete information is corrected in as many computer data banks as possible, not merely in the files of the bureau initially contacted. Several obstacles stand in the consumer's way. First, the consumer must discover what information is in the other data systems.<sup>88</sup> Under the current law bureaus need not inform consumers that other systems exist, much less give them the names and addresses of the dominant national data bases. More importantly, if an investigation results in an item being deleted or modified in one bureau, or in the consumer's

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information relevant to the dispute. *See* MIB, Inc., 101 F.T.C. 415, 423 (1983) (consent order).

84. *See 1990 FCRA Hearing, supra* note 7, at 327 (statement of Elgie Holstein, Executive Director, Bankcard Holders of America).

85. *See, e.g., Hauser v. Equifax, Inc.*, 601 F.2d 811, 814 (8th Cir. 1979); *Equifax, Inc.*, 96 F.T.C. 844, 1077-80 (1980), *rev'd on other grounds*, 678 F.2d 1047 (11th Cir. 1982).

86. *See, e.g., Roseman v. Retail Credit Co.*, 428 F. Supp. 643, 645-46 (E.D. Pa. 1977). The FTC has created a rebuttable presumption that a consumer's dispute is bona fide. STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 11 to § 611 (codified at 15 U.S.C. § 1681i (1988)), at 18,824. A dispute is not considered irrelevant unless the bureau can conclude that the information is not "adverse"; it is not frivolous unless it is "clearly" beyond credulity or made in bad faith. *Equifax*, 96 F.T.C. at 1078-79. The FTC has concluded that a bureau need not investigate if the consumer merely gives a "reason for failing to pay a debt" rather than challenging the item's accuracy. STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 4 to § 611 (codified at 15 U.S.C. § 1681i), at 18,824.

87. STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 11 to § 611 (codified at 15 U.S.C. § 1681i), at 18,824. If the consumer provides additional evidence of an inaccuracy, the bureau must reinvestigate. *Id.*; *see 1990 FCRA Hearing, supra* note 7, at 326 (statement of Elgie Holstein, Executive Director, Bankcard Holders of America).

88. *See supra* text accompanying note 65.

explanatory statement<sup>89</sup> being included in the file, there is no requirement that the bureau transmit that information to other data bases. Nor is the source that initially provided the erroneous information to the bureau required to notify other bureaus that it made a mistake. The consumer must shoulder the burden of discovering the locations of other reporting systems, examining their files, requesting additional investigations of disputed items (which probably will result in bureaus making multiple verification requests to the same source), submitting additional statements of dispute, and requesting that previous creditors receive the updated information. Thus, the present structure not only makes burdensome demands on even the most sophisticated consumers, it also fosters duplicative efforts by all segments of the reporting industry as the same error is investigated and corrected several times.

## II. THE EMERGENCE OF CREDIT REPAIR ORGANIZATIONS

Most consumers are vaguely aware that information on their past credit behavior exists in data banks somewhere in the country, but they remain largely ignorant of the extent of the information being stored, the location of the bureaus, and the inner workings of the reporting system.<sup>90</sup> It is perhaps not surprising, then, that when a problem relating to a credit report surfaces, many consumers lack a basic understanding of their rights under the FCRA, the process for investigating the accuracy of credit reports, and the mechanism for setting the record straight.<sup>91</sup> When consumers began to rely more heavily on credit to obtain desired goods and services in the 1970s and 1980s, the frequency of their encounters with credit reports and bureaus increased. As consumer confusion and ultimate frustration with the reporting system mounted, entrepreneurs began filling the information gap with promises of assistance to consumers whose credit reports were causing them difficulty. By 1984, the credit repair industry was active in most states, and credit repair organizations (CROs) already were generating controversy.<sup>92</sup>

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89. Associated Credit Bureaus reports that approximately 100,000 consumers file explanatory statements each year. *1989 FCRA Hearing, supra* note 3, at 256 (statement of Walter R. Kurth, President, Associated Credit Bureaus).

90. *See id.* at 206-09 (statement of Steven W. Hamm, Administrator, South Carolina Department of Consumer Affairs). In recent years employers have used credit reports even more frequently as laws governing the use of polygraph tests have become stricter and quick character checks on applicants are needed. *See 1990 FCRA Hearing, supra* note 7, at 148 (statement of Edmund Mierzwinski, Consumer Advocate, U.S. Public Interest Research Group).

91. *1990 FCRA Hearing, supra* note 7, at 128-30 (statement of Janlori Goldman, Legislative Counsel, American Civil Liberties Union).

92. By 1984 the staff of the FTC had begun investigating "credit repair clinics" following allegations of fraudulent representations. *See Fortney, supra* note 36, at 1309; *see also 1988*

Troubled consumers need not have turned to CROs to guide them through the intricacies of the FCRA. Free explanatory information—in the form of brochures, pamphlets, and telephone advice—has been available for some time from the FTC, state consumer protection agencies, and the large credit bureaus themselves.<sup>93</sup> But for a variety of practical reasons, many consumers nevertheless patronize CROs. Because CROs advertise heavily in print and electronic media, they tend to be more visible than alternative sources of assistance.<sup>94</sup> Moreover, some consumers may have concerns about confronting large credit bureaus alone and perceive CROs as providing the necessary “clout” as well as the expertise to elicit prompt and effective responses from the business community.<sup>95</sup> Finally, many consumers are drawn to CROs by claims of high success rates, some as high as 100%, for fixing poor credit histories.<sup>96</sup> Such guarantees are particularly attractive to consumers who sorely need credit but have poor credit records and desperately seek to keep their homes, automobiles, and other valuable assets.<sup>97</sup> As a result, credit repair businesses, which require relatively little initial capital investment, have become very lucrative. By 1987, one rather notorious CRO had recorded six million dollars in accounts and had collected over two million dollars from 9,000 consumers.<sup>98</sup>

By 1988, CROs had attracted considerable attention at both the FTC and local consumer protection agencies as consumers began reporting a pattern of unethical, and in some cases fraudulent, activity. According to CRO critics, many consumers were promised full refunds if their credit records were not improved, but the CROs often could not be

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*CRO Hearing*, *supra* note 13, at 52-71 (providing excerpts from newspaper and television reports exposing CRO scams).

93. *See supra* notes 10-11.

94. *See, e.g., 1988 CRO Hearing*, *supra* note 13, at 72-103 (reproducing examples of CRO advertisements in print media and samples of direct-mail promotional material).

95. *See id.* at 25-26 (statement of Elena Halford, President, American Association of Credit, Inc.).

96. *See id.* at 72 (sample advertisement); *id.* at 3 (statement of Kenneth P. Walton, Inspector, Federal Bureau of Investigation).

97. *See 1990 FCRA Hearing*, *supra* note 7, at 665 (statement of Jim Mattox, Attorney General, State of Texas); *1989 FCRA Hearing*, *supra* note 3, at 578-79 (statement of James M. Shannon, Attorney General, Commonwealth of Massachusetts); *1988 CRO Hearing*, *supra* note 13, at 9 (statement of Michelle Arnold, former CRO employee).

98. Credit-Rite, Inc. was the subject of an FBI investigation in 1987. As a result of the investigation, the principal managers of the company received prison terms of seven years. The operations of Credit-Rite are described in *1988 CRO Hearing*, *supra* note 13, at 137-40 (statement of Kenneth P. Walton, Inspector, Federal Bureau of Investigation). *See also id.* at 40 (statement of Walter R. Kurth, President, Associated Credit Bureaus) (describing Credit-Rite as a member of a new industry that preys on overextended consumers and abuses certain FCRA provisions).

located or refused the refund after failing to deliver the promised results. CROs also misled consumers by advertising guaranteed credit cards regardless of credit history, but then offering the card only if the consumer established a savings account with the issuing financial institution as collateral. Some consumers claimed that CROs took their money and performed virtually no services whatsoever.<sup>99</sup>

The practices that probably have caused the most controversy and anger among the credit bureaus are the tactics CROs use to create good credit records from bad. In addition to helping the consumer correct errors in a credit report, CROs typically use two approaches to purge unwanted items from data banks. One tactic is to inundate each of the three major national credit bureaus with letters disputing virtually every item in a consumer's file, even items about which there is no dispute, thereby triggering a multitude of investigations under the FCRA.<sup>100</sup> If a credit bureau is mired in dispute letters, inevitably some of the investigations will not be completed within the thirty-day time limitation set by the bureaus and the FTC, and the item often will be deleted from the file until it can be verified.<sup>101</sup> The second method of purging negative items is to negotiate with the creditor on behalf of the consumer. The CRO may persuade the creditor to accept a full or partial payment, or an extended payment plan, in exchange for the creditor withdrawing the negative information from each of the credit bureau's files in which the item was originally reported.<sup>102</sup> Although in many cases these tactics have

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99. See *1988 CRO Hearing*, *supra* note 13, at 22 (statement of George L. Rayburn, Assistant Commissioner of Consumer Credit, State of Maryland); *id.* at 124 (statement of the FTC); Fortney, *supra* note 16, at 1019-20; Noonan, *supra* note 10, at 1071-72; *cf.* *1988 CRO Hearing*, *supra* note 13, at 25 (statement of Elena Halford, President, American Association of Credit Inc.) (asserting that CROs do give refunds to dissatisfied customers; success ratio is 89-90%).

100. See *1989 FCRA Hearing*, *supra* note 3, at 257 (statement of Walter R. Kurth, President, Associated Credit Bureaus, Inc.); *id.* at 209 (statement of Steven W. Hamm, Administrator, South Carolina Department of Consumer Affairs); *id.* at 578-79 (statement of James M. Shannon, Attorney General, Commonwealth of Massachusetts); *id.* at 948-49 (reproduction of letter from Daniel Oliver, Chairman, FTC, to Rep. Frank Annunzio (May 11, 1987)); *1988 CRO Hearing*, *supra* note 13, at 4 (statement of Kenneth P. Walton, Inspector, Federal Bureau of Investigation).

101. See STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 10 to § 611 (codified at 15 U.S.C. § 1681i (1988)), at 18,824 (opining that for most disputes, "reasonable time" is 30 days).

102. See *1988 CRO Hearing*, *supra* note 13, at 4 (statement of Kenneth P. Walton, Inspector, Federal Bureau of Investigation). This approach is not as offensive as the "shotgun" tactic of disputing every item in the file because the CRO and its client are, presumably, not misrepresenting any facts when they negotiate the resolution of a dispute with a creditor. This negotiating tactic is endorsed by the National Consumer Law Center, one of the most respected consumer representatives in the country. See *1988 CRO Hearing*, *supra* note 13, at 25 (statement of Elena Halford, President, American Association of Credit, Inc.); OGBURN, *supra* note 4, at 351-53.

succeeded in improving a consumer's credit history (at least temporarily),<sup>103</sup> credit bureaus complain, with some justification, that the deletion of accurate information through this process undermines the integrity of the reporting system.<sup>104</sup>

The principal opponents of CROs have been credit bureaus and government agencies responsible for consumer protection. The obvious tension between CROs and credit bureaus has resulted in several bureaus simply ignoring the communications of CROs on behalf of consumer clients. In many cases bureaus legally can refuse to investigate CRO-initiated disputes by identifying them as frivolous or irrelevant.<sup>105</sup> This action finds support in the FCRA and is endorsed by the FTC.<sup>106</sup> Such refusals to investigate, however, require a line-by-line review of each dispute and credit report, and often it will not be immediately obvious that a dispute is meritless without at least some preliminary investigation, which can be time consuming and costly. Thus, credit bureaus recently have sought ways to avoid dealing with CROs altogether. For instance, bureaus have maintained that information about credit files need not be provided to a CRO or any person other than the consumer himself, citing privacy concerns, FTC commentary, and language in the FCRA.<sup>107</sup> If a

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103. Information deleted because the bureau's investigation was not completed within 30 days likely will reappear in the file when the information is ultimately verified. Thus, the report may be "repaired" for only a short while, although during that time the consumer may be able to obtain credit, employment, or insurance from an unsuspecting business. See 1989 FCRA Hearing, *supra* note 3, at 578-79 (statement of James M. Shannon, Attorney General, Commonwealth of Massachusetts); 1988 CRO Hearing, *supra* note 13, at 48 (statement of Walter R. Kurth, President, Associated Credit Bureaus, Inc.).

104. See 1989 FCRA Hearing, *supra* note 3, at 948-49 (reproduction of letter from Daniel Oliver, Chairman, FTC, to Rep. Frank Annunzio (May 11, 1987)); *id.* at 209 (statement of Steven W. Hamm, Administrator, South Carolina Department of Consumer Affairs); 1988 CRO Hearing, *supra* note 13, at 24, 49 (statements of Walter R. Kurth, President, Associated Credit Bureaus, Inc.).

105. See 1990 FCRA Hearing, *supra* note 7, at 326 (statement of Elgie Holstein, Executive Director, BankCard Holders of America); 1989 FCRA Hearing, *supra* note 3, at 257 (statement of Walter R. Kurth, President, Associated Credit Bureaus, Inc.).

106. See 15 U.S.C. § 1681i(a), (c) (1988). The FTC has stated that sending letters disputing all information in a file without making specific allegations, or submitting multiple letters in similar format, may indicate frivolous contentions. STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 11 to § 611 (codified at 15 U.S.C. § 1681i (1988)), at 18,824.

107. See A-1 Credit & Assurance Co. v. Trans Union Credit Info. Co., 678 F. Supp. 1147, 1149 (E.D. Pa. 1988); 1988 CRO Hearing, *supra* note 13, at 26, 109 (statement of Elena Halford, President, American Association of Credit, Inc.). In enacting the FCRA, Congress was concerned about bureaus respecting the privacy interests of consumers. The Act thus permits disclosure of the file only for limited purposes. See 15 U.S.C. § 1681b (1988 & Supp. 1989). Moreover, the Act provides that credit bureaus must disclose the contents of the report "to the consumer—in person . . . or by telephone." *Id.* § 1681h. The FTC appears to agree with the bureaus that the FCRA requires disclosure only to the consumer personally. See 1988 CRO Hearing, *supra* note 13, at 28-29 (statement of Jean Noonan, Associate Director for

CRO cannot gain easy access to the data in a client's file, its ability to assist the client is severely impaired. Moreover, bureaus have refused to honor dispute letters submitted by CROs, relying on language in the FCRA that the consumer himself must register the dispute.<sup>108</sup> This position has received a warm response from the FTC,<sup>109</sup> but it has been rejected by at least one court, which held that third parties may make disputes if they have the consumer's written power of attorney and present adequate identification.<sup>110</sup>

The complaints of the powerful credit bureaus, combined with an accelerating stream of consumer inquiries, led to several investigations of CROs by the FTC and state consumer protection agencies in the mid-1980s. The investigations generally resulted in allegations that the targeted CROs misrepresented the services they could lawfully perform on behalf of consumers.<sup>111</sup> In many of the cases the parties entered into consent decrees which prohibited various forms of deceptive conduct, such as claiming that truthful negative items could be removed from a consumer's credit files, representing that credit cards could be obtained for all clients, or advertising that credit lines could readily be established in clients' names.<sup>112</sup> In a few instances, targeted CROs have agreed to fund consumer education campaigns, warning consumers about false credit repair claims.<sup>113</sup> At least one investigation led to criminal indict-

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Credit Practices, FTC); *cf.* *Milbauer v. TRW, Inc.*, 707 F. Supp. 92, 96 (E.D.N.Y. 1989) (holding that bureau could require written permission from consumer but must disclose to third party if permission is given); STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 4 to § 609 (codified at 15 U.S.C. § 1681g (1988)), at 18,822 (bureau "may" disclose to third party with written power of attorney).

108. Section 611 requires the bureau to investigate disputes "directly conveyed to the consumer reporting agency by the consumer." 15 U.S.C. § 1681i (1988).

109. See STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 8 to § 611 (codified at 15 U.S.C. § 1681i), at 18,824; FTC Staff Opinion Letter, Aug. 4, 1987, *reprinted in* OGBURN, *supra* note 4, at 344-45.

110. *Milbauer*, 707 F. Supp. at 96.

111. See *In re Steven Leff*, No. 89-2046-H (N.D. Tex. Aug. 8, 1989); *In re American Credit Servs., Inc.*, No. 89-3651 KN (SX) (C.D. Ca. June 6, 1989); *In re Credit Repair, Inc.*, No. 89-C-0344 (N.D. Ill. Jan. 17, 1989); *In re Nationwide Credit Servs., Inc.*, No. 88-4071 (E.D. La. Sept. 15, 1988); *In re Action Credit Sys., Inc.*, No. C-88-1322-EFL (N.D. Cal. Apr. 6, 1988); *In re Credit Rite, Inc.*, No. 88-1206 (GEB) (D.N.J. Mar. 17, 1988); *In re Thornburg v. International Business Serv.*, No. 88 CVS 11045 (Super. Ct., Wake Co., N.C. Dec. 9, 1988). See generally Fortney, *supra* note 16, at 1019 (describing FTC enforcement actions against credit repair "counselors"); Fortney, *supra* note 36, at 1309 (noting that investigations of credit counseling firms would be pursued vigorously); Noonan, *supra* note 10, at 1071 (discussing deceptive practices in field of credit repair).

112. See cases cited *supra* note 111.

113. See *FTC v. Liberto*, No. 86 Civ. 4237 (E.D.N.Y. Dec. 12, 1986) (advertising); *In re George Tannous*, 107 F.T.C. 488, 495 (1986) (radio campaign).

ments.<sup>114</sup> For the most part, however, the enforcement efforts have proven ineffective in curbing credit repair abuses, as new companies form, operate for a short while, and then move or liquidate before authorities detect a pattern of consumer abuse.<sup>115</sup> The investigations did draw attention to the problem, and state legislatures have responded with a variety of regulatory approaches.

### III. STATE REGULATION OF CROS AS A MODEL FOR FEDERAL ACTION

More than thirty states and the District of Columbia have enacted some form of legislation regulating the activities of CROs.<sup>116</sup> The laws range from outright prohibition of credit repair services in one state<sup>117</sup> to modest licensing requirements in others.<sup>118</sup> In between are various, sometimes innovative, laws that acknowledge a legitimate commercial role for credit service organizations, but protect against the potential for deception and consumer injury. The laws present an interesting study of alternative approaches to this relatively new consumer problem. They

114. See *1988 CRO Hearing, supra* note 13, at 3-6 (statement of Kenneth P. Walter, Inspector, Federal Bureau of Investigation).

115. According to the FTC, the "fly-by-night" nature of the CRO industry makes administrative enforcement extremely difficult. Even when the FTC has located the principals of a fraudulent CRO, the proceeds usually have been spent. *Id.* at 124 (statement of the FTC).

116. See ARIZ. REV. STAT. ANN. §§ 44-1701 to -1712 (Supp. 1991); ARK. CODE ANN. §§ 4-91-101 to -109 (Michie Supp. 1991); CAL. CIV. CODE §§ 1789.10-.24 (West 1985 & Supp. 1992); COLO. REV. STAT. §§ 12-14.5-101 to -113 (1991); CONN. GEN. STAT. ANN. § 36-435/ (West Supp. 1991); D.C. CODE ANN. §§ 28-4601 to -4608 (1991); FLA. STAT. ANN. §§ 817.7001, .7005, .701-.706 (West Supp. 1991); GA. CODE ANN. § 16-9-59 (Michie 1988); HAW. REV. STAT. § 481B-12 (Supp. 1990); IDAHO CODE §§ 26-2222 to -2252 (1990 & Supp. 1991); ILL. ANN. STAT. ch. 121½, paras. 2101-2116 (Smith-Hurd Supp. 1991); IND. CODE ANN. §§ 24-5-15-1 to -11 (Burns 1991 & Supp. 1991); IOWA CODE ANN. §§ 533C.1 -.14 (West Supp. 1991); Act of April 18, 1991, ch. 156, 1991 Kan. Sess. Laws 1037; LA. REV. STAT. ANN. §§ 9:3573.1-.8 (West 1991); ME. REV. STAT. ANN. tit. 9-A, §§ 10-101 to -401 (West Supp. 1990); MD. COM. LAW II CODE ANN. §§ 14-1901 to -1916 (1990 & Supp. 1991); MASS. ANN. LAWS ch. 93, §§ 68A-68E (Law. Co-op. Supp. 1991); MICH. COMP. LAWS ANN. §§ 445.1701 -.1708 (West Supp. 1991) (MICH. STAT. ANN. § 23.1125(91)-(98) (Callaghan 1991)); Act of May 30, 1991, ch. 314, 1991 Minn. Sess. Law Serv. 1494 (West); Credit Services Organization Act, ch. 292, 1991 Neb. Laws 902; NEV. REV. STAT. §§ 598.281 -.289 (1987); N.H. REV. STAT. ANN. §§ 359-D:1 to :11 (Supp. 1990); N.Y. GEN. BUS. LAW §§ 458-a to -k (McKinney Supp. 1991); OKLA. STAT. ANN. tit. 24, §§ 131-147 (West Supp. 1992); TENN. CODE ANN. §§ 47-18-1001 to -1011 (1988); TEX. BUS. & COM. CODE ANN. §§ 18.01 -.15 (West 1987 & Supp. 1991); UTAH CODE ANN. §§ 13-21-1 to -9 (1986 & Supp. 1991); VA. CODE ANN. §§ 59.1-335.1 to -335.12 (Michie Supp. 1991); WASH. REV. CODE ANN. §§ 19.134.010 -.900 (West 1989 & Supp. 1991); W. VA. CODE §§ 46A-6C-1 to -12 (Supp. 1991).

117. See GA. CODE ANN. § 16-9-59(b), (c) (Michie 1988).

118. *E.g.*, IDAHO CODE § 26-2223 (1990); MICH. COMP. LAWS ANN. § 445.1703(a)-(h) (West Supp. 1991) (MICH. STAT. ANN. § 23.1125(93a)-(93h) (Callaghan 1991)); OKLA. STAT. ANN. tit. 24, §§ 145-147 (West Supp. 1992); W. VA. CODE § 46A-6C-5 (Supp. 1991).



thus provide a generous reservoir of ideas for potential federal legislation on the subject.

Some consumer representatives have questioned whether federal CRO legislation is necessary or even advisable, urging instead that CROs either be prohibited altogether or regulated by individual states as the need arises.<sup>119</sup> The case for prohibition has support from a former manager of a large credit repair company.<sup>120</sup> CRO opponents argue that CROs create most of their revenues by promising to do what cannot lawfully be done—to remove negative, but accurate, information from credit records.<sup>121</sup> They contend that no legitimate role thus exists for CROs in the credit reporting system. While there is some evidence to support this position,<sup>122</sup> most state and federal consumer protection authorities have concluded that the private sector can play a legitimate role in helping consumers understand the FCRA and exercise their statutory rights.<sup>123</sup> Many professions charge fees for lending assistance in areas in which consumers have little experience,<sup>124</sup> and the FCRA has proven to be a difficult statute for consumers to enforce without guidance. Consumers can benefit from properly drafted legislation that reduces the likelihood of CRO fraud but allows legitimate credit services to be performed for compensation. Outright prohibition would unnecessarily eliminate the beneficial functions performed by CROs along with the deceptive practices.

Most state legislatures have concluded that CROs should be permitted to perform credit service activities, but that some regulation of the

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119. See, e.g., *1990 FCRA Hearing*, *supra* note 7, at 682-83 (statement of Hubert H. Humphrey, III, Attorney General, State of Minnesota).

120. See *1988 CRO Hearing*, *supra* note 13, at 9, 11 (statement of Jeffrey Roberts, former co-owner of Credit-Rite, Inc.).

121. See GA. CODE ANN. § 16-9-59 (Michie 1988).

122. See *1988 CRO Hearing*, *supra* note 13, at 9-11 (statement of Jeffrey Roberts, former co-owner of Credit-Rite, Inc.); Kathleen A. Hughes, *Credit Clinics May Make It Sound Too Easy to Clean Up a Bad Record*, WALL ST. J., June 16, 1986, at 35; Leonard Sloane, *Pros, Cons of Credit Clinics; Repair Claims Draw Scrutiny*, N.Y. TIMES, Nov. 12, 1985, at D4.

123. See *1989 FCRA Hearing*, *supra* note 3, at 946 (statement of Janet D. Steiger, Chairperson, FTC); *id.* at 576-80 (reproduction of letter from James M. Shannon, Attorney General, Commonwealth of Massachusetts, to Rep. Richard H. Lehman, Chairperson, Subcommittee on Consumer Affairs and Coinage (Sept. 26, 1989)); *1988 CRO Hearing*, *supra* note 13, at 11 (statement of Rep. John Hiler).

124. Indeed, lawyers routinely charge fees for consulting on FCRA issues. See *1988 CRO Hearing*, *supra* note 13, at 27 (statement of George L. Rayburn, Assistant Commissioner of Consumer Credit, State of Maryland). The legal profession, however, is policed by ethical rules and standards, and an attorney likely would lose his license for taking advantage of the public as some CROs have. See *Milbauer v. TRW, Inc.*, 707 F. Supp. 92, 95 (E.D.N.Y. 1989). Some CROs might be operated in such a way as to be deemed the practice of law. See 1985 Op. Va. Att'y Gen. 75, 76.

industry is needed, given the extraordinary history of CROs perpetrating consumer fraud. While state laws can be helpful in reducing the likelihood of consumer injury, the case for national legislation is also strong. CRO fraud is a nationwide problem. Consumers are being injured by CRO misrepresentations throughout the United States, often by companies operating across state boundaries.<sup>125</sup> Many states have no law governing CRO activity, and federal legislation would provide a base level of protection—through mandatory disclosures and prohibitions of certain predatory sales tactics—to consumers in those states. Congress enacted the FCRA under similar circumstances. In 1970 consumers were expressing widespread dissatisfaction with the activities of credit bureaus,<sup>126</sup> and although interstate bureaus existed, most bureaus conducted business on a local level.<sup>127</sup> Federal legislation created a minimum level of consumer protection for all consumers and served as a model for legislation in states where no protection previously existed.<sup>128</sup>

More important, however, the benefits to consumers in states where CRO legislation does exist can be diluted if out-of-state CROs solicit business through advertisements in local newspapers or on television listing toll-free long distance numbers.<sup>129</sup> The entire CRO transaction can take place through the mails and telephone lines. State and local law-enforcement officials may suspect a violation of their state's CRO law, but they may find it difficult to conduct investigations and prosecute wrongdoers across state boundaries.<sup>130</sup> Thus, even if a state has attempted to protect its residents by enacting a CRO law, injury to its residents can continue because the law is difficult to enforce against

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125. See *1988 CRO Hearing*, *supra* note 13, at 125-26 (statement of the FTC); *id.* at 23 (statement of George L. Rayburn, Assistant Commissioner of Consumer Credit, State of Maryland).

126. See *Fair Credit Reporting, 1969: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Banking and Currency Comm.*, 91st Cong., 1st Sess. 82-90 (1969) (statement of Professor Alan F. Westin, Columbia University); *id.* at 108-12 (statement of Wendell G. Lindsay, Jr., Louisiana Consumers' League); *id.* at 112-18 (statement of Erma Angevine, Executive Director, Consumers' Federation of America); *id.* at 123-32 (joint statement of Sarah H. Newman, General Secretary, National Consumers' League, and Benny L. Kass, Consultant, National Legal Aid and Defender Association).

127. See *1989 FCRA Hearing*, *supra* note 3, at 227 (statement of Walter R. Kurth, President, Associated Credit Bureaus, Inc.); Note, *The Fair Credit Reporting Act*, 56 MINN. L. REV. 819, 820 (1972).

128. Oklahoma may have been the only state regulating the credit reporting industry before 1970. 2 ALPERIN & CHASE, *supra* note 31, § 531, at 220 n.4.

129. See *1988 CRO Hearing*, *supra* note 13, at 74, 75, 78 (newspaper advertisements); *id.* at 23 (statement of George L. Rayburn, Assistant Commissioner of Consumer Credit, State of Maryland).

130. *Id.* at 23 (statement of George L. Rayburn, Assistant Commissioner of Consumer Credit, State of Maryland).

nonresident CROs. The FTC currently can police CROs in any state by proving that certain practices are "unfair or deceptive" under the FTC Act, but its resources are limited and its enforcement powers under the Act are weak, often restricted to the issuance of a "cease and desist" order.<sup>131</sup> Federal CRO legislation would not solve these enforcement problems entirely, but it could provide a mechanism that allows federal and state consumer protection authorities to prosecute CRO scams more easily wherever they are located. By enacting national legislation that makes specific conduct of CROs illegal wherever it occurs, and subjecting such conduct to civil penalties as well as statutory damages for affected consumers, Congress could empower the FTC, state attorneys general, and individual consumers to police CRO activities more vigorously.

An additional benefit of national CRO legislation would be the promotion of standard disclosures in CRO solicitations and contracts. Standard disclosures could benefit both the industry and consumers. The industry would benefit by a law that requires unscrupulous CROs to play by the same rules as lawful businesses, and by the improved image of the industry in the eyes of the public. Consumers would benefit from standard disclosures that provide critical information and make it easier to compare the advertised services of competing CROs. The federal statute need not preempt state laws entirely; the state laws could continue to apply if they are consistent with the federal statute,<sup>132</sup> but the federal law and its mandated minimum disclosures would ensure a large measure of similarity in CRO transactions. The FTC, credit bureaus, consumer groups,<sup>133</sup> and even CRO representatives, who are interested in standardization and improving the industry's image,<sup>134</sup> all support congressional efforts to enact legislation regulating the industry. This is one subject on

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131. Under § 5 of the FTC Act, the FTC has authority to enjoin future unlawful conduct through a consent decree or cease-and-desist order. 15 U.S.C. § 45(b) (1988). Except for violations of specific trade regulation rules or an existing cease-and-desist order, the FTC cannot impose civil penalties for deceptive conduct. *See id.* at § 45(j), (m). The Commission has been seeking to expand its enforcement powers with respect to the FCRA and has requested authority to impose civil penalties on businesses committing CRO deception. *See 1990 FCRA Hearing, supra* note 7, at 548 (statement of Jean Noonan, Associate Director for Credit Practices, FTC).

132. In enacting the FCRA, Congress provided that credit bureaus must also comply with consistent state laws regulating reporting activities. 15 U.S.C. § 1681t (1988). States are authorized to provide greater consumer protection than the minimum standards imposed by the FCRA. *See* Lucinda A. Low, Comment, *Preemption of State Credit Reporting Legislation: Toward Validation of State Authority*, 24 UCLA L. REV. 83, 99-101 (1976).

133. *See, e.g., 1989 FCRA Hearing, supra* note 3, at 98 (statement of Elgie Holstein, Executive Director, Bankcard Holders of America).

134. *See 1988 CRO Hearing, supra* note 13, at 107 (statement of Elena Halford, President, American Association of Credit, Inc.).

which Congress can, with relatively little opposition, enact a law that simultaneously will help consumers and not unduly burden the business community. Under these circumstances, Congress should seize the opportunity.

The experience of state legislatures can be useful to Congress as it considers a national regulatory scheme.<sup>135</sup> State laws contain several provisions that may reduce the likelihood of deception while allowing CROs to provide lawful assistance to consumers in need. These laws generally provide three types of consumer protection: prohibitions against certain unfair or deceptive conduct, mandatory disclosures prior to consummation of the credit services contract, and certain ameliorative provisions, including a right of rescission, required in the contract itself.

#### A. *Prohibited Activities*

Many state CRO laws prohibit certain fraudulent practices that have been the subject of consumer complaints in the past. Most of these provisions are not objectionable, even to many credit repair dealers,<sup>136</sup> and may provide the consumer with rights not available at common law or under other state consumer-protection legislation. Not surprisingly, nearly all of the acts prohibit misrepresentation in the advertising or promotion of credit services, but several extend beyond common-law fraud and prohibit "misleading" statements<sup>137</sup> or "indirect" misrepresenta-

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135. In recent years, Congress has considered several bills that would regulate CROs. See H.R. 194, 102d Cong., 1st Sess. (1991); H.R. 4213, 101st Cong., 2d Sess. (1990); H.R. 458, 100th Cong., 1st Sess. (1987).

136. See 1988 CRO Hearing, *supra* note 13, at 107 (statement of Elena Halford, President, American Association of Credit, Inc.).

137. See ARIZ. REV. STAT. ANN. § 44-1703(4) (Supp. 1991); ARK. CODE ANN. § 4-91-106(4) (Michie Supp. 1991); CAL. CIV. CODE § 1789.13(d) (West 1985); COLO. REV. STAT. § 12-14.5-104(1)(c) (1991); D.C. CODE ANN. § 28-4603(4) (1991); FLA. STAT. ANN. § 817.7005(4) (West Supp. 1991); HAW. REV. STAT. § 481B-12(a)(1) (Supp. 1990); ILL. ANN. STAT. ch. 121½, para. 2105(4) (Smith-Hurd Supp. 1991); IND. CODE ANN. § 24-5-15-5(4) (Burns 1991); IOWA CODE ANN. § 533C.3(3),(4) (West Supp. 1991); Act of April 18, 1991, ch. 156, § 3(c), 1991 Kan. Sess. Laws 1037, 1038; LA. REV. STAT. ANN. § 9:3573.3(4) (West 1991); ME. REV. STAT. ANN. tit. 9-A, § 10-304(1) (West Supp. 1990); MD. COM. LAW II CODE ANN. § 14-1902(4), (5) (Supp. 1991); MASS. ANN. LAWS ch. 93, § 68B(4) (Law. Co-op. Supp. 1991); MICH. COMP. LAWS ANN. § 445.1703(c) (West Supp. 1991) (MICH. STAT. ANN. § 23.1123(93)(c) (Callaghan 1991)); Act of May 20, 1991, ch. 314, § 5(4), 1991 Minn. Sess. Law Serv. 1494, 1496 (West); Credit Services Organization Act, ch. 292, § 4(4), (5), 1991 Neb. Laws 902, 904; NEV. REV. STAT. § 598.282(4) (1987); N.H. REV. STAT. ANN. § 359-D:3(IV) (Supp. 1990); N.Y. GEN. BUS. LAW § 458-h(1) (McKinney Supp. 1991); OKLA. STAT. ANN. tit. 24, § 133(4) (West Supp. 1992); TENN. CODE ANN. § 47-18-1003(4) (1988); TEX. BUS. & COM. CODE ANN. § 18.03(3), (4) (West Supp. 1991); VA. CODE ANN. § 59.1-335.5(4) (Michie Supp. 1991); WASH. REV. CODE ANN. § 19.134.020(4) (West 1989 & Supp. 1991); W. VA. CODE § 46A-6C-3(3), (4) (Supp. 1991).

tions<sup>138</sup> as well. One law also provides that the consumer need not prove reliance on the fraudulent or misleading statement,<sup>139</sup> thereby removing one of the obstacles to consumer deception cases under common law.<sup>140</sup> Although these general prohibitions overlap to some extent with the prescriptions against deceptive conduct in the FTC Act and state unfair trade practices acts,<sup>141</sup> some of the state laws also set forth specific examples of misleading promises that might otherwise be considered "puffing," such as guaranteeing to erase bad credit records or to extend credit regardless of credit history.<sup>142</sup> Nearly all of the acts also prohibit CROs from advising consumers to make any statement to a credit bureau or a prior creditor if the consumer should realize that the statement is false or misleading.<sup>143</sup> These provisions are intended to curb the "shotgun" approach of counseling consumers to dispute virtually every item in their files, hoping that the bureau will delete negative items when the time for investigating the disputes has expired.

One fairly standard state-law prohibition that may not be justified is

138. See, e.g., N.Y. GEN. BUS. LAW § 458-h(1) (McKinney Supp. 1991).

139. See FLA. STAT. ANN. § 817.7005(4) (West Supp. 1991).

140. See *Williams v. Rank & Son Buick, Inc.*, 44 Wis. 2d 239, 245-47, 170 N.W.2d 807, 810-11 (1969); MICHAEL M. GREENFIELD, CONSUMER TRANSACTIONS 6 (2d ed. 1991).

141. The FTC issued a policy statement in 1983 listing three elements of deceptive conduct: (1) there must be a representation, practice, or omission likely to mislead consumers; (2) consumers must interpret the message reasonably under the circumstances; and (3) the misleading effects must be material. See *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 175 (1984). Several state unfair trade practices laws are modeled after the FTC Act, and courts applying such laws look to FTC precedents for guidance. See, e.g., MASS. ANN. LAWS ch. 93A, § 2 (Law. Co-op. Supp. 1991).

142. See HAW. REV. STAT. § 481B-12(a)(1) (Supp. 1990); ILL. ANN. STAT. ch. 121½, para. 2105(4) (Smith-Hurd Supp. 1991); IND. CODE ANN. § 24-5-15-5(4) (Burns 1991); Act of April 18, 1991, ch. 156, § 3(c)(1), (2), 1991 Kan. Sess. Laws 1037, 1038; Credit Services Organization Act, ch. 292, § 4(4), 1991 Neb. Laws 902, 904; W. VA. CODE § 46A-6C-3(3) (Supp. 1991).

143. See ARIZ. REV. STAT. ANN. § 44-1703(3) (Supp. 1991); ARK. CODE ANN. § 4-91-106(3) (Michie Supp. 1991); CAL. CIV. CODE § 1789.13(c) (West 1985); COLO. REV. STAT. § 12-14.5-104(1)(b) (1991); D.C. CODE ANN. § 28-4603(3) (1991); FLA. STAT. ANN. § 817.7005(3) (West Supp. 1991); HAW. REV. STAT. § 481B-12(a)(3) (Supp. 1990); ILL. ANN. STAT. ch. 121½, para. 2105(3) (Smith-Hurd Supp. 1991); IND. CODE ANN. § 24-5-15-5(3) (Burns 1991); Act of April 18, 1991, ch. 156, § 3(e), 1991 Kan. Sess. Laws 1037, 1038; LA. REV. STAT. ANN. § 9:3573.3(3) (West 1991); MD. COM. LAW II CODE ANN. § 14-1902(3) (Supp. 1991); MASS. ANN. LAWS ch. 93, § 68B(3) (Law. Co-op. Supp. 1991); MICH. COMP. LAWS ANN. § 445.1703(b) (West Supp. 1991) (MICH. STAT. ANN. § 23.1125(93)(b) (Callaghan 1991)); Act of May 30, 1991, ch. 314, § 5(3), 1991 Minn. Sess. Laws 1494, 1496 (West); Credit Services Organization Act, ch. 292, § 4(6), 1991 Neb. Laws 902, 904; NEV. REV. STAT. § 598.282(3) (1987); N.H. REV. STAT. ANN. § 359-D:3(III) (Supp. 1990); N.Y. GEN. BUS. LAW § 458-h(2) (McKinney Supp. 1991); OKLA. STAT. ANN. tit. 24, § 133(3) (West Supp. 1992); TENN. CODE ANN. § 47-18-1003(3) (1988); VA. CODE ANN. § 59.1-335.5(3) (Michie Supp. 1991); WASH. REV. CODE ANN. § 19.134.020(3) (West 1989 & Supp. 1991); W. VA. CODE § 46A-6C-3(5) (Supp. 1991).

a ban against CROs receiving compensation for referring consumers to a retail seller who may extend credit to the client on the same terms as those available to the general public.<sup>144</sup> One rationale for prohibiting such a provision is that consumers receive little or no value for such advice because they could have contacted the retailer themselves and obtained the credit without the assistance of the CRO. Yet many consumers can benefit from such information because they are not likely to have wide access to the credit policies of many retailers and therefore may be unaware of available credit opportunities. Providing information on credit alternatives traditionally has been a legitimate function of credit counselors and need not be discouraged so long as the information is complete and accurate. A CRO that misleads a consumer into believing that the referral is a special offer not available to the general public usually runs afoul of one of the other statutory prohibitions dealing with deceptive conduct. Straightforward advice on credit availability can be valuable to consumers who have contacted CROs because they perceive no credit alternatives. Congress should think twice before following the various state laws on this point.

Most of the state CRO laws attempt to address the problem of consumers paying large sums of money, receiving few or no services in return, and being unable to obtain a refund because the CRO has moved or gone out of business. One approach has been to prohibit CROs from accepting any fee until the contracted services have been completed.<sup>145</sup>

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144. See ARIZ. REV. STAT. ANN. § 44-1703(2) (Supp. 1991); ARK. CODE ANN. § 4-91-106(2) (Michie Supp. 1991); CAL. CIV. CODE § 1789.13(b) (West 1985); D.C. CODE ANN. § 28-4603(2) (1991); FLA. STAT. ANN. § 817.7005(2) (West Supp. 1991); HAW. REV. STAT. § 481B-12(a)(2) (Supp. 1990); ILL. ANN. STAT. ch. 121½, para. 2105(2) (Smith-Hurd Supp. 1991); IND. CODE ANN. § 24-5-15-5(2) (Burns 1991); IOWA CODE ANN. § 533C.3(2) (West Supp. 1991); Act of April 18, 1991, ch. 156, § 3(b), 1991 Kan. Sess. Laws 1037, 1038; LA. REV. STAT. ANN. § 9:3573.3(2) (West 1991); MD. COM. LAW II CODE ANN. § 14-1902(2) (Supp. 1991); MASS. ANN. LAWS ch. 93, § 68B(2) (Law. Co-op. Supp. 1991); MICH. COMP. LAWS ANN. § 445-1703(a) (West Supp. 1991) (MICH. STAT. ANN. § 23.1125(93)(a) (Callaghan 1991)); Act of May 30, 1991, ch. 314, § 5(2), 1991 Minn. Sess. Law Serv. 1494, 1496 (West); Credit Services Organization Act, ch. 292, § 4(3), 1991 Neb. Laws 902, 904; OKLA. STAT. ANN. tit. 24, § 133(2) (West Supp. 1992); TENN. CODE ANN. § 47-18-1003(2) (1988); TEX. BUS. & COM. CODE ANN. § 18.03(2) (West Supp. 1991); VA. CODE ANN. § 59.1-335.5(2) (Michie Supp. 1991); WASH. REV. CODE ANN. § 19.134.020(2) (West 1989 & Supp. 1991); W. VA. CODE § 46A-6C-3(2) (Supp. 1991).

145. See Act of May 30, 1991, ch. 314, § 5(1), 1991 Minn. Sess. Law Serv. 1494, 1496 (West); Credit Services Organization Act, ch. 292, § 4(2), 1991 Neb. Laws 902, 904 (only if service is obtaining extension of credit); N.Y. GEN. BUS. LAW § 458-e (McKinney Supp. 1991); TENN. CODE ANN. § 47-18-1003(1) (1988); VA. CODE ANN. § 59.1-335.5(1) (Michie Supp. 1991). This approach is supported by the major credit bureaus, which believe that CROs will not survive if prohibited from collecting fees at the outset of the transaction. See 1990 FCRA Hearing, *supra* note 7, at 189 (statement of Walter R. Kurth, President, Associated Credit Bureaus).

Other states have recognized that such a prohibition may be too harsh and could result in unscrupulous or impoverished consumers withholding earned fees from legitimate CROs. Some laws therefore allow CROs to collect payment prior to the completion of services, but only if the CRO has secured a bond to serve as a fund for aggrieved consumers, usually in the amount of \$10,000.<sup>146</sup>

Three problems with these bond requirements have surfaced. First, while a \$10,000 bond may sufficiently cover the damages of a handful of defrauded consumers, it hardly suffices if a CRO engages in widespread fraud and then disappears without a trace.<sup>147</sup> Second, some CROs have complained that the adverse publicity surrounding the industry in recent years has made it difficult, if not impossible, to obtain bonds from licensed sureties.<sup>148</sup> In response to this concern, some states now permit

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146. See ARIZ. REV. STAT. ANN. §§ 44-1703(1), -1708(e) (Supp. 1991) (bond or trust equal to 5% of total fees of last 12 months; \$5,000 minimum and \$25,000 maximum); ARK. CODE ANN. § 4-91-106(a)(1) (Michie Supp. 1991) (bond of \$10,000 required); CAL. CIV. CODE §§ 1789.13(a), .18(d) (West 1985) (bond or trust equal to 5% of total fees of last 12 months; \$5,000 minimum and \$25,000 maximum); COLO. REV. STAT. § 12-14.5-104(1)(a) (1991) (bond, \$10,000); D.C. CODE ANN. §§ 28-4603(1), -4604(a) (1991) (bond or trust, \$25,000); FLA. STAT. ANN. § 817.7005(1) (West Supp. 1991) (bond, \$10,000); IDAHO CODE §§ 26-2232, -2232A (1990 & Supp. 1991) (must have bond to operate); ILL. ANN. STAT. ch. 121½, paras. 2105(1), 2110 (Smith-Hurd Supp. 1991) (bond amount \$100,000); IND. CODE ANN. §§ 24-5-15-5(1), 24-5-15-8(a) (Burns 1991) (bond, \$10,000); IOWA CODE ANN. §§ 533C.3(1), 533C.4(6) (West Supp. 1991) (bond, \$10,000); Act of April 18, 1991, ch. 156, §§ 3(a), 4(e), 1991 Kan. Sess. Laws 1037, 1038, 1039 (bond amount \$25,000); LA. REV. STAT. ANN. § 9:3573.3(1) (West 1991) (bond amount \$5,000); ME. REV. STAT. ANN. tit. 9-A, § 10-202 (West Supp. 1990) (must have bond to operate); MASS. ANN. LAWS ch. 93, § 68B(1) (Law. Co-op. Supp. 1991) (bond, \$10,000); MICH. COMP. LAWS ANN. § 445.1703c (West Supp. 1991) (MICH. STAT. ANN. § 23.1125(93)(c) (Callaghan 1991)) (must have bond and financial statement to operate); Act of May 30, 1991, ch. 314, § 4, 1991 Minn. Sess. Law Serv. 1494, 1495 (West) (must have bond to operate); Credit Services Organization Act, ch. 292, §§ 4(1), 5(1), 1991 Neb. Laws 902, 903, 904 (bond amount \$100,000); NEV. REV. STAT. §§ 598.282(1), 598.285(2) (1987) (bond amount \$50,000); N.H. REV. STAT. ANN. §§ 359-D:3(I), 359-D:8(IV) (Supp. 1990) (bond amount equal to 5% total fees of previous 12 months; \$5,000 minimum and \$25,000 maximum); OKLA. STAT. ANN. tit. 24, § 133(1) (West Supp. 1992); TEX. BUS. & COM. CODE ANN. § 18.03(1) (West Supp. 1991); VA. CODE ANN. § 59.1-335.4 (Michie Supp. 1991) (bond or letter of credit required to operate; valued at 100 times standard fee; \$5,000 minimum and \$50,000 maximum); WASH. REV. CODE ANN. § 19.134.020(1) (West Supp. 1991) (bond, \$10,000); W. VA. CODE §§ 46A-6C-3(1), -4(e) (Supp. 1991) (\$15,000 bond).

147. This is one reason why the FTC opposes the bond requirement in federal legislation. See 1989 FCRA Hearing, *supra* note 3, at 954-55 (reproduction of letter from Daniel Oliver, Chairman, FTC, to Rep. Frank Annunzio (May 11, 1987)). An alternative is to increase the bond requirement to, for example, \$50,000 for each state in which the CRO does business. See 1990 FCRA Hearing, *supra* note 7, at 683-84 (reproduction of letter from Hubert H. Humphrey, III, Attorney General, State of Minnesota, to Rep. Richard H. Lehman (June 7, 1990)).

148. See 1988 CRO Hearing, *supra* note 13, at 27 (statement of Elena Halford, President,

CROs to establish trust accounts at independent financial institutions,<sup>149</sup> or allow the CROs to collect fees up front if they are deposited in a segregated escrow account until the services are completed.<sup>150</sup> Third, the statutes do not set forth a method for determining how the bond or trust account will be distributed among competing claimants if the judgments exceed the principal amount in the fund.

The pervasive problem of CROs disappearing after defrauding consumers in several states highlights one area in which federal legislation can fill the gaps left by the state laws. Given the interstate nature of many CROs, any pattern of deception likely will result in claims being made by a large number of consumers from several states. There should be a bond or trust account sufficient to satisfy the injured parties, or at least a predictable, orderly way of allocating the limited funds among defrauded consumers. Leaving the issue to be resolved by individual states may result in a disproportionate number of CROs locating in the states with lenient bonding requirements, or no requirement at all.

The principal obstacle to a federal bonding or trust requirement is the bureaucracy needed to administer the fund. To be effective, the law must provide for administration by some authority, and it is unlikely that the FTC, the principal federal consumer protection agency, would welcome the additional workload.<sup>151</sup> The law could provide that the bond or trust be administered by a consumer protection agency designated by the state in which the CRO is licensed. An efficient alternative would be to follow the lead of those states which allow CROs to collect fees up

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American Association of Credit, Inc.); *id.* at 23 (statement of George L. Rayburn, Assistant Commissioner of Consumer Credit, State of Maryland).

149. See ARK. CODE ANN. § 4-91-106(a)(1) (Michie Supp. 1991) (requiring trust in addition to bond); CAL. CIV. CODE § 1789.13(a) (West 1985) (requiring surety bond or trust account); D.C. CODE ANN. § 28-4603(1) (1991) (same); FLA. STAT. ANN. § 817.7005(1) (West Supp. 1991) (requiring bond and trust); IND. CODE ANN. § 24-5-15-5(1) (Burns 1991) (irrevocable letter of credit as alternative); IOWA CODE ANN. § 533C.3(1) (West Supp. 1991) (surety account as alternative); Act of April 18, 1991, ch. 156, § 3(a), 1991 Kan. Sess. Laws 1037, 1038 (surety account as alternative); LA. REV. STAT. ANN. § 9:3573.3(1) (West 1991) (bond and trust); MASS. ANN. LAWS ch. 93, § 68B(1) (Law. Co-op. Supp. 1991) (bond and trust); Act of May 30, 1991, ch. 314, § 4, 1991 Minn. Sess. Law Serv. 1494, 1495 (West) (cash or securities as alternative); Credit Services Organization Act, ch. 292, § 4(1), 1991 Neb. Laws 902, 903 (surety account as alternative); OKLA. STAT. ANN. tit. 24, § 133(1) (West Supp. 1992) (bond and trust); TEX. BUS. & COM. CODE ANN. § 18.03(1) (West Supp. 1991) (surety account as alternative); VA. CODE ANN. § 59.1-335.4 (Michie Supp. 1991) (letter of credit as alternative); WASH. REV. CODE ANN. § 19.134.020(1) (West 1989 & Supp. 1991) (bond and trust); W. VA. CODE § 46A-6C-3(1) (Supp. 1991) (surety account as alternative).

150. See FLA. STAT. ANN. § 817.7005(1) (West Supp. 1991); ME. REV. STAT. ANN. tit. 9-A, § 10-301 (West Supp. 1990).

151. Indeed, this is an objection of the FTC to bond requirements. See 1990 FCRA Hearing, *supra* note 7, at 548 (statement of Jean Noonan, Associate Director for Credit Practices, FTC).



front, but only if the money is held in escrow at a licensed financial institution until the completion of services.<sup>152</sup> This solution provides some assurance to both the consumer and the CRO that their interests will be protected, and it avoids the creation of a government bureaucracy to administer a bond or trust account. One potential problem with this approach, however, is that unlike the lump-sum bond or trust account, which can be verified by a state licensing agency before the CRO begins operation, an escrow account may require regular supervision by the agency to ensure that the CRO is complying with the law on a case-by-case basis and is not simply depositing the consumer's money in its own operating account. To encourage compliance on a regular basis through private enforcement, CRO customers should be notified of the escrow requirement, either in the CRO contract itself or in precontract disclosures.

### B. Pre-Contract Disclosures

Most states require CROs to issue disclosure statements to potential customers prior to signing the contract, and to retain copies of the statements for a number of years thereafter. Required disclosures typically include a complete and detailed description of the services to be performed, the total fees the consumer will be obligated to pay, and the consumer's right to proceed against a bond, trust, or escrow account, if applicable.<sup>153</sup> Experience from other consumer protection statutes, such as the federal Truth-in-Lending Act,<sup>154</sup> shows that consumers often view

152. See *supra* notes 149-50 and accompanying text.

153. See ARIZ. REV. STAT. ANN. §§ 44-1704, -1705 (Supp. 1991); ARK. CODE ANN. §§ 4-91-107, -108 (Michie Supp. 1991); CAL. CIV. CODE §§ 1789.14, .15 (West 1985); COLO. REV. STAT. §§ 12-14.5-106, -107 (1991); CONN. GEN. STAT. ANN. § 36-435f (b) (disclosures included in contract) (West Supp. 1991); D.C. CODE ANN. § 28-4605(a),(b) (1991); FLA. STAT. ANN. §§ 817.702, .703 (West Supp. 1991); ILL. ANN. STAT. ch. 121½, para. 2106 (Smith-Hurd Supp. 1991); IND. CODE ANN. § 24-5-15-6 (Burns 1991); IOWA CODE ANN. § 533C.6 (West Supp. 1991); Act of April 18, 1991, ch. 156, § 6, 1991 Kan. Sess. Laws 1037, 1040-41; LA. REV. STAT. ANN. § 9:3573.6 (West 1991); ME. REV. STAT. ANN. tit. 9-A, § 10-303 (West Supp. 1990); MD. COM. LAW II CODE ANN. §§ 14-1904, -1905 (1990 & Supp. 1991); MASS. ANN. LAWS ch. 93, § 68C (Law. Co-op. Supp. 1991); MICH. COMP. LAWS ANN. §§ 445.1704, .1705 (West Supp. 1991) (MICH. STAT. ANN. § 23.1125(95) (Callaghan 1991)); Act of May 30, 1991, ch. 314, § 6, 1991 Minn. Sess. Law Serv. 1494, 1496-97 (West); Credit Services Organization Act, ch. 292, § 7, 1991 Neb. Laws 902, 906-07; NEV. REV. STAT. § 598.283 (1987); N.H. REV. STAT. ANN. §§ 359-D:4 to -D:5 (Supp. 1990); N.Y. GEN. BUS. LAW §§ 458-c, -d (McKinney Supp. 1991); OKLA. STAT. ANN. tit. 24, §§ 135, 136 (West Supp. 1992); TENN. CODE ANN. §§ 47-18-1004, -1005 (1988); TEX. BUS. & COM. CODE ANN. § 18.06 (West 1987 & Supp. 1991); UTAH CODE ANN. §§ 13-21-5, -6 (1986); VA. CODE ANN. §§ 59.1-335.6, -335.7 (Michie Supp. 1991); WASH. REV. CODE ANN. §§ 19.134.040, .050 (West 1989); W. VA. CODE § 46A-6C-6 (Supp. 1991).

154. Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, tit. VI, § 601, 94 Stat. 168 (codified as amended in scattered sections of 15 U.S.C.).

disclosures of this nature as boilerplate and seldom read them or understand their import.<sup>155</sup> Their influence on consumer behavior therefore will likely be small, but there is little harm in imposing such provisions, and they may prove helpful subsequently in litigation over an alleged breach of contract or misrepresentation.

Several states, however, require disclosures that may have an effect on consumers' decisionmaking processes. More than half of the state laws mandate disclosure of the basic consumer rights under the FCRA, such as the right to review one's credit file (free of charge in some circumstances) and to dispute information in the file.<sup>156</sup> Upon learning of this information, some consumers may decide to forgo the services of a CRO and try to correct erroneous credit information themselves. A few states go further and require CROs to provide a conspicuous statement that accurate information in credit reports cannot be removed permanently and that adverse information lawfully can be reported for seven to ten years.<sup>157</sup> After learning these facts, some consumers may realize that there is little, if anything, to gain from engaging the services of a CRO if their credit problems stem from accurate, albeit negative, reports.<sup>158</sup>

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155. See Ndiva Kofele-Kale, *The Impact of Truth-in-Lending Disclosures on Consumer Market Behavior: A Critique of the Critics of Truth-in-Lending Law*, 9 OKLA. CITY U. L. REV. 117, 120-21 (1984); Jonathan M. Landers & Ralph J. Rohner, *A Functional Analysis of Truth in Lending*, 26 UCLA L. REV. 711, 727-28 (1979); James P. Nehf, *Effective Regulation of Rent-to-Own Contracts*, 52 OHIO ST. L.J. 751, 777-845 (1991).

156. See ARIZ. REV. STAT. ANN. § 44-1705(1), (2) (Supp. 1991); ARK. CODE ANN. § 4-91-108(1) (Michie Supp. 1991); CAL. CIV. CODE § 1789.15(a), (b) (West 1985); COLO. REV. STAT. § 12-14.5-107(1) (1991); CONN. GEN. STAT. ANN. § 36-435f (b) (West Supp. 1991); D.C. CODE ANN. § 28-4605(b)(1)-(4), (8) (1991); FLA. STAT. ANN. § 817.703(1), (2) (West Supp. 1991); ILL. ANN. STAT. ch. 121½, para. 2106(1)-(3) (Smith-Hurd Supp. 1991); IND. CODE ANN. § 24-5-15-6(4) to (6) (Burns 1991); Act of April 18, 1991, ch. 156, § 6(4)-(6), 1991 Kan. Sess. Laws 1037, 1040-41; LA. REV. STAT. ANN. § 9:3573.6(1), (2) (West 1991); MD. COM. LAW II CODE ANN. § 14-1905(1)-(4) (Supp. 1991); MASS. ANN. LAWS ch. 93, § 68C(1)-(4) (Law. Co-op. Supp. 1991); MICH. COMP. LAWS ANN. § 445.1705(a), (b) (West Supp. 1991) (MICH. STAT. ANN. § 23.1125(95)(a), (b) (Callaghan 1991)); Act of May 30, 1991, ch. 314, § 6(2), 1991 Minn. Sess. Law Serv. 1494, 1496-97 (West); Credit Services Organization Act, ch. 292, § 7(1)(d)-(f), 1991 Neb. Laws 902, 906-07; NEV. REV. STAT. § 598.283(1) (1987); N.H. REV. STAT. ANN. § 359-D:5 (I), (II) (Supp. 1990); N.Y. GEN. BUS. LAW § 458-d (McKinney Supp. 1991); OKLA. STAT. ANN. tit. 24, § 136(1), (2) (West Supp. 1992); TENN. CODE ANN. § 47-18-1005 (1), (2) (1988); UTAH CODE ANN. § 13-21-6(1)-(4) (1986); VA. CODE ANN. § 59.1-335.7(1), (2) (Michie Supp. 1991); WASH. REV. CODE ANN. § 19.134.050(1), (2) (West 1989); W. VA. CODE § 46A-6C-6(a)(4)-(6) (Supp. 1991).

157. COLO. REV. STAT. § 12-14.5-107(1)(a) (1991); FLA. STAT. ANN. § 817.703(3) (West Supp. 1991); IND. CODE ANN. § 24-5-15-6(4) (Burns 1991); Act of April 18, 1991, ch. 156, § 6(7), 1991 Kan. Sess. Law 1037, 1041; MD. COM. LAW II CODE ANN. § 14-1905(6) (Supp. 1991); Act of May 30, 1991, ch. 314, § 6(2), 1991 Minn. Sess. Law Serv. 1494, 1496-97 (West); Credit Services Organization Act, ch. 292, § 7(1)(g), (h), 1991 Neb. Laws 902, 907; W. VA. CODE § 46A-6C-6(a)(7) (Supp. 1991).

158. The FTC favors such disclosure in federal CRO legislation. See 1990 FCRA Hearing,

Moreover, in several states CROs are required to inform consumers that nonprofit credit counseling is available from other sources.<sup>159</sup> All of these provisions are intended to discourage the use of CROs by highlighting the alternatives. While it may be unprecedented to require a business to inform potential customers of ways to avoid using the offered service, the checkered history of CROs may justify market interference. Each of these disclosures fosters greater understanding of the vastly misunderstood consumer reporting system, and many consumers may benefit if such information is mandated in CRO transactions across the country. Indeed, because consumers who contact CROs are likely to be in the greatest need of information about the FCRA,<sup>160</sup> requiring these contract disclosures may result in a successful national educational campaign where past efforts have failed.

### C. *Mandatory Contract Provisions*

All state laws require contracts for CRO services to be written, signed, and dated, with copies given to the consumer at the time of contracting. The laws require disclosure of standard provisions, such as the terms and conditions of all payments to be made by the consumer, a full and detailed description of services to be performed, promises of guarantees, refund policies, and an estimate of the time of completion.<sup>161</sup> Al-

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*supra* note 7, at 584-86 (statement of Jean Noonan, Associate Director for Credit Practices, FTC).

159. See IND. CODE ANN. § 24-5-15-6(9) (Burns 1991); Act of April 18, 1991, ch. 156, § 6(9), 1991 Kan. Sess. Laws 1037, 1041; Credit Services Organization Act, ch. 292, § 7(1)(i), 1991 Neb. Laws 902, 907; W. VA. CODE § 46A-6C-6(a)(9) (Supp. 1991).

160. CRO customers are often economically disadvantaged and especially vulnerable to high-pressure sales tactics. See 1990 FCRA Hearing, *supra* note 7, at 682-83 (statement of Hubert H. Humphrey, III, Attorney General, State of Minnesota).

161. See ARIZ. REV. STAT. ANN. § 44-1706 (Supp. 1991); ARK. CODE ANN. § 4-91-109 (Michie Supp. 1991); CAL. CIV. CODE § 1789.16 (West 1985); COLO. REV. STAT. § 12-14.5-108 (1991); CONN. GEN. STAT. ANN. § 36-435I (b), (c) (West Supp. 1991); D.C. CODE ANN. § 28-4605(c) (1991); FLA. STAT. ANN. § 817.704 (West Supp. 1991); ILL. ANN. STAT. ch. 121½, para. 2107 (Smith-Hurd Supp. 1991); IND. CODE ANN. § 24-5-15-7 (Burns 1991); IOWA CODE ANN. § 533C.7 (West Supp. 1991); Act of April 18, 1991, ch. 156, § 7, 1991 Kan. Sess. Laws 1037, 1041-42; LA. REV. STAT. ANN. § 9:3573.7 (West 1991); ME. REV. STAT. ANN. tit. 9-A, § 10-302 (West Supp. 1990); MD. COM. LAW II CODE ANN. § 14-1906 (1990); MASS. ANN. LAWS ch. 93, § 68D (Law. Co-op. Supp. 1991); MICH. COMP. LAWS ANN. § 445.1706 (West Supp. 1991) (MICH. STAT. ANN. § 23.1125(96) (Callaghan 1991)); Act of May 30, 1991, ch. 314, § 7, 1991 Minn. Sess. Law Serv. 1494, 1497 (West); Credit Services Organization Act, ch. 292, § 8, 1991 Neb. Laws 902, 907-08; NEV. REV. STAT. § 598.283 (1987); N.H. REV. STAT. ANN. § 359-D:6 (Supp. 1990); N.Y. GEN. BUS. LAW § 458-f (McKinney Supp. 1991); OKLA. STAT. ANN. tit. 24, § 137 (West Supp. 1992); TENN. CODE ANN. § 47-18-1006 (1988); TEX. BUS. & COM. CODE ANN. § 18.07 (West 1987 & Supp. 1991); UTAH CODE ANN. § 13-21-7 (1986); VA. CODE ANN. § 59.1-335.8 (Michie Supp. 1991); WASH. REV. CODE ANN. § 19.134.060 (West 1989); W. VA. CODE § 46A-6C-7 (Supp. 1991).

most without exception, they also require that the consumer be afforded an opportunity to cancel the contract within three or five days after its consummation.<sup>162</sup> Like other consumer protection statutes, such as those governing home solicitation sales and home equity loans,<sup>163</sup> the CRO laws generally dictate the precise language the CRO must use to describe the cancellation right and require the CRO to provide the consumer with a separate form to be used when cancelling the contract. The cancellation right can be effective in curbing CRO abuses, especially when combined with disclosure of a consumer's rights under the FCRA, because informed consumers may, upon reflection, decide that the CRO's services are not worth the price.

The only mandatory contract provision in state CRO acts with questionable merit is the requirement in a few states that the CRO attach a copy of the consumer's credit report to the contract, along with notations of any adverse or negative entries found in the report.<sup>164</sup> This provision seems unwarranted because it forces the CRO to perform substantial services for the consumer before the consumer has agreed to pay anything. The requirement has potential for the greatest unfairness when coupled with a consumer's right to cancel the agreement several days

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162. See ARIZ. REV. STAT. ANN. § 44-1706(A)(1), (B) (Supp. 1991); ARK. CODE ANN. § 4-91-109(a)(1)(A), (2) (Michie Supp. 1991); CAL. CIV. CODE § 1789.16(a)(1), (b) (West 1985); COLO. REV. STAT. § 12-14.5-108(1)(a), (2) (1991); D.C. CODE ANN. § 28-4605(d) (1991); FLA. STAT. ANN. § 817.704(1)(a), (2) (West Supp. 1991); ILL. ANN. STAT. ch. 121½, para. 2107(a)(1), (b) (Smith-Hurd Supp. 1991); IND. CODE ANN. § 24-5-15-7(a)(1), (b) (Burns 1991); IOWA CODE ANN. § 533C.7(1)(a), (2) (West Supp. 1991); Act of April 18, 1991, ch. 156, § 7(a)(1), (b), 1991 Kan. Sess. Laws 1037, 1041, 1041-42; LA. REV. STAT. ANN. § 9:3573.7(A)(1), (B) (West 1991); MD. COM. LAW II CODE ANN. § 14-1906(a)(1), (b) (1990); MASS. ANN. LAWS ch. 93, § 68D(a), (b) (Law. Co-op. Supp. 1991); MICH. COMP. LAWS ANN. § 445.1706(1)(a), (2) (West Supp. 1991) (MICH. STAT. ANN. § 23.1125(96)(1)(a), (2) (Callaghan 1991)); Act of May 30, 1991, ch. 314, § 7(1), (2), 1991 Minn. Sess. Law Serv. 1494, 1497-98 (West); Credit Services Organization Act, ch. 292, § 8(1)(a), (3), 1991 Neb. Laws 902, 907, 908; NEV. REV. STAT. § 598.284(4) (1987); N.H. REV. STAT. ANN. § 359-D:6(I)(a), (II) (Supp. 1990); N.Y. GEN. BUS. LAW § 458-f(1)(a), (2) (McKinney Supp. 1991); OKLA. STAT. ANN. tit. 24, § 137(A)(1), (B) (West Supp. 1992); TENN. CODE ANN. § 47-18-1006(a)(1), (b) (1988); TEX. BUS. & COM. CODE ANN. § 18.07(a)(1), (b) (West 1987 & Supp. 1991); UTAH CODE ANN. § 13-21-7(1)(a), (2) (1986); VA. CODE ANN. § 59.1-335.8(A)(1), (B) (Michie Supp. 1991); WASH. REV. CODE ANN. § 19.134.060(1)(a), (2) (West 1989); W. VA. CODE § 46A-6C-7(a)(1), (b) (Supp. 1991).

163. See 15 U.S.C. § 1635(a) (1988) (loans secured by residence); UNIFORM CONSUMER CREDIT CODE § 3.501, 7A U.L.A. 133 (1974) (home solicitation sales).

164. See COLO. REV. STAT. § 12-14.5-108(1)(c)(III) (1991) (list of adverse information appearing in credit report that CRO proposes to modify); CONN. GEN. STAT. ANN. § 36-435/(c) (West Supp. 1991) (copy of report with adverse entries clearly marked); D.C. CODE ANN. § 28-4605(c)(2)(A) (1991) (list of adverse information in credit report that CRO proposes to modify); IND. CODE ANN. § 24-5-15-7(a)(3) (Burns 1991) (same); N.Y. GEN. BUS. LAW § 458-f(1)(a) (McKinney Supp. 1991) (same); TENN. CODE ANN. § 47-18-1006(a)(3) (1988) (same); VA. CODE ANN. § 59.1-335.8(A)(3) (Michie Supp. 1991) (same).

later, because the consumer can cancel the contract and still receive, free of charge, the benefit of work already performed.<sup>165</sup> The supposed justification for the provision is to aid the consumer's understanding of the areas in which the CRO might lend some assistance, thereby helping the consumer to judge whether the service is worth the price. In this sense, it is arguably analogous to a free estimate of work to be accomplished by a home repair company. Yet free estimates are seldom, if ever, required by law. Investing time and effort with no guarantee of payment may be a sound business practice, but it is difficult to justify a law, particularly on a national level, that requires businesses to provide significant services without compensation.

#### IV. IMPROVING THE FCRA TO REDUCE RELIANCE ON CROS

Although state and federal regulation of CROs may be warranted to remedy an apparent pattern of interstate deceptive practices, Congress also should address the FCRA's more fundamental problems. To help reduce fraud in the CRO industry and to benefit consumers, Congress should strengthen the FCRA to decrease the likelihood that consumers will need outside assistance when confronted with credit problems.<sup>166</sup> Legislation should focus on long-overdue amendments that further two goals: (1) improving consumer understanding of their credit reports and their rights under the FCRA, and (2) requiring that credit bureaus and users of credit reports be more responsive to consumer inquiries and disputes over incorrectly reported information. Enhancing the FCRA in these areas would be the most effective way to combat the fraudulent practices of CROs because it would strike at the very conditions that make consumers vulnerable to CRO solicitations.

##### A. *Improving Consumer Understanding of the FCRA*

Consumers usually have little interest in their credit reports until a credit application has been denied or some other adverse action has been taken due to a poor credit report. The potential creditor's rejection no-

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165. See COLO. REV. STAT. § 12-14.5-108(1)(c)(III), (2) (1991); D.C. CODE ANN. § 28-4605(c)(2)(A), (d) (1991); IND. CODE ANN. § 24-5-15-7(a)(3), (b) (Burns 1991); N.Y. GEN. BUS. LAW § 458-f(1)(a), (2) (McKinney Supp. 1991); TENN. CODE ANN. § 47-18-1006(a)(3), (b)(1) (1988); VA. CODE ANN. § 59.1-335.8(A)(3), (B) (Michie Supp. 1991).

166. See 1989 FCRA Hearing, *supra* note 3, at 914 (reproduction of letter from Jane Jansen, President of the National Association of Consumer Agency Administrators, to Bonnie Guiton, Special Advisor to the President (September 1, 1989)) (stating that there would be no reason for CROs if credit bureaus were better oriented toward assisting consumers with disputes). See generally Charles M. Ullman, *Liability of Credit Bureaus After the Fair Credit Reporting Act: The Need for Further Reform*, 17 VILL. L. REV. 44, 58-71 (1971) (discussing the shortcomings of the FCRA and similar state laws).

tice will often be the consumer's first encounter with the credit reporting system and the procedures of the FCRA. Under the current system, a creditor who used the report to deny an application for credit need only inform the consumer that a credit report was used and provide the consumer with the name and address of the bureau supplying the report.<sup>167</sup> The consumer must then contact the bureau, which, upon the consumer's written request and showing of proper identification,<sup>168</sup> will either explain the contents of the report or send a copy of the file. This additional step may seem trivial, but it can be time-consuming at a point when immediate action may be necessary, and can result in the consumer losing an opportunity to correct quickly an erroneous report and obtain the credit for which she applied.

With relatively little additional effort and expense, the creditor who denied the application could provide much more information to the consumer. Since many creditors will have reviewed a hard copy of the report, they could include a copy along with the rejection notice.<sup>169</sup> If the creditor reviewed the file electronically and could not easily obtain a hard copy, it could notify the issuing bureau and immediately request that a copy be sent to the consumer.<sup>170</sup> Creditors and bureaus may object to such a requirement on the ground that most consumers will not understand a report sent without explanatory documentation.<sup>171</sup> If consumers need further explanation, however, they can contact the issuing bureau, which is already required under current law to explain the nature and substance of the document.<sup>172</sup>

More important, the creditor who denied the application should be required to include a brief form notice, perhaps drafted in plain language

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167. 15 U.S.C. § 1681m(a) (1988). If a creditor takes adverse action against a consumer based upon information obtained from a person other than a credit bureau, the creditor may also have to disclose the nature and substance of that information. *Id.* § 1681m(b).

168. Under § 609 of the FCRA, the credit bureau can require identification before disclosing the report to the consumer. *Id.* § 1681g(a). According to the FTC, the bureau can require the consumer to make the request in writing and on a form provided by the agency. STATEMENT OF GENERAL POLICY, *supra* note 4, cmt. 3 to § 609 (codified at 15 U.S.C. § 1681g (1988)), at 18,822. This exchange of correspondence can take a considerable amount of time. *See* Martin, *supra* note 38, at 3 (observing that clearing up errors in report can take weeks or months).

169. At least one bill recently introduced in Congress requires that a user of a consumer report who denies a credit application must provide a copy of the report to the consumer along with the rejection letter. *See* H.R. 4122, 101st Cong., 2d Sess. § 7(a)(2)(c) (1990).

170. *See* 1990 FCRA Hearing, *supra* note 7, at 324 (statement of Elgie Holstein, Executive Director, Bankcard Holders of America).

171. *See id.*, *supra* note 7, at 707-08 (statement of Timothy Ryan, Office of Thrift Supervision, Department of the Treasury).

172. 15 U.S.C. § 1681g(a) (1988).

by the FTC, explaining the consumer's rights under the FCRA.<sup>173</sup> The notice should not only outline the procedure for correcting erroneous items, but also should explain that correct information cannot be erased from the files and can lawfully be reported for a certain number of years. Armed with this information and a copy of the negative report, many consumers will be able immediately to begin the process of correcting any incomplete or erroneous information. These changes alone quickly would provide consumers with more information about their reports and statutory rights than is currently mandated under all of the notice provisions of the FCRA. The procedures not only would save consumers time and effort, but would immediately give consumers critical information about their options (or in the case of correct, complete information, their lack of recourse) under the law.

The standard notice from the creditor also should include the names and addresses of the three national credit bureaus,<sup>174</sup> along with a statement that the files of these bureaus may contain similar or different information about the consumer, and that consumers should contact each of the bureaus to verify the accuracy of their reports. To facilitate consumer access to these files, the law should provide that a consumer is entitled to a free copy of the report from each of the three bureaus when credit has been denied. These simple procedures will help resolve the current problem of consumers correcting information in the files of one bureau without even being aware that the same mistake, or other errors, could be present in the other large data bases.

### *B. Responding to Consumer Inquiries*

Increased consumer understanding of the contents of their credit reports and of their FCRA rights should lead to less reliance on CROs. If the credit reporting system remains relatively inhospitable to consumer inquiries and disputes over the accuracy of information, however, frustrated consumers will continue to seek outside assistance. The FCRA therefore should be strengthened to reduce the incidence of erroneous and misleading reporting and to encourage more effective corrective measures when consumers question the contents of their reports.

The FCRA currently focuses primarily on credit bureaus and their procedures for maintaining accurate reports and effective corrective practices. Nevertheless, the heart of the reporting system is the creditor who

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173. See 1989 FCRA Hearing, *supra* note 3, at 201, 204 (statement of Bonnie Guiton, Special Advisor to the President). Several congressional proposals have included a required notice of consumer rights. See H.R. 4213, 101st Cong., 2d Sess. § 109(a)(4) (1990); H.R. 4122, 101st Cong., 2d Sess. § 7(a)(2)(D) (1990).

174. See H.R. 4213, 101st Cong., 2d Sess. § 109(a)(3) (1990).

supplies the credit data or loads payment information into the bureau's data bases. The accurate loading of information is essential to accurate reporting, yet the FCRA imposes virtually no constraints on creditors and others who provide information to the credit bureaus. At a minimum, the law should apply the same standard of care to both the bureaus and the providers, requiring both to maintain reasonable procedures to ensure maximum possible accuracy.<sup>175</sup> Consumers currently have no effective recourse against creditors who carelessly report mistaken information to credit bureaus.<sup>176</sup>

In addition, the investigation procedures of the FCRA must be reformed to encourage more effective responses to consumer disputes. Under current law and practice, credit bureaus attempt to complete investigations within thirty days,<sup>177</sup> but consumers complain that the investigations are often cursory and incomplete, sometimes nothing more than a perfunctory confirmation of the information from the original source with little or no feedback to the consumer on the results.<sup>178</sup> Consumers probably would be better served by credit bureaus taking more time and completing the inquiry more frequently. The Fair Credit Billing Act (FCBA),<sup>179</sup> which governs consumer disputes over erroneous entries in credit bills, may provide an instructive model. Under the FCBA, a creditor must complete its investigation of a disputed item within two billing cycles after notification of the error, not to exceed ninety days.<sup>180</sup> Dur-

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175. See 15 U.S.C. § 1681e (1988). Banks, retailers, and others who report information to credit bureaus often do so inaccurately, fail to notify bureaus of closed accounts, and re-report information previously deleted from consumer reports. Gerri Detweiler & Mary Beth Butler, *Check Your Credit! BHA Takes Aim Against Credit Bureau Practices*, 11 *BANKCARD CONSUMER NEWS*, July-Aug. 1991, at 3; see also H.R. 4213, 101st Cong., 2d. Sess. § 112 (1990) (proposed bill requiring extensive notice to consumer when information about the consumer is provided to a credit agency, and establishing procedures to ensure accuracy of reported information).

176. If a creditor conveys erroneous information to a credit bureau, the only recourse under common law may be an action for defamation; even then the creditor in most cases would be insulated by a qualified privilege. See, e.g., *Ford Motor Credit Co. v. Holland*, 367 A.2d 1311, 1313 (D.C. 1977).

177. See STATEMENT OF GENERAL POLICY, *supra* note 4, at 18,805; see also *The Wrong Way to Rewrite Your Credit History*, *CONSUMER REP.*, Oct. 1988, at 610 (warning consumers with poor credit ratings that CROs cannot use the 30-day limit to keep negative but correct information out of credit report). According to one source, 20% of all investigations take longer than 30 days to complete. See *1989 FCRA Hearing*, *supra* note 3, at 832 (statement of Scott Dix, Director, Federal Government Relations, Equifax, Inc.).

178. See *supra* notes 81-84 and accompanying text .

179. 15 U.S.C. §§ 1666-1666j (1988). Congress enacted the FCBA on October 28, 1974. Fair Credit Billing Act, Pub. L. 93-495, § 306, 88 Stat. 1516 (codified as amended at 15 U.S.C. §§ 1666-1666j (1988)). The Act covers billing errors and includes other provisions regulating credit cards.

180. 15 U.S.C. § 1666(a)(B).



ing that period, the creditor must either correct the item or conduct an investigation; the creditor can neither attempt to collect the disputed amount<sup>181</sup> nor report the disputed item in a negative way to a credit bureau<sup>182</sup> until the investigation is completed. Following the investigation, the creditor must either correct the bill or send a written explanation to the consumer setting forth the reasons why the original bill correctly stated the account, and upon request by the consumer, must provide copies of documentary evidence in support of its findings.<sup>183</sup>

An analogous procedure would improve the FCRA. To encourage more thorough investigations, the reasonable time for investigating disputes could be increased, perhaps to sixty days, with the provision that during this period the bureau would have to note the existence of an ongoing investigation on any credit reports issued. To facilitate timely completion of the investigation, the law should further require that the original source of the disputed information respond promptly to the bureau's request for verification of data.<sup>184</sup> Credit bureaus also should be required, at a minimum, to inform the original source that the consumer has a specific contention regarding the disputed item, to request a response to that contention, and to report back to the consumer with an explanation of the dispute's outcome and with copies of any supporting documents.<sup>185</sup> These procedures would impose an additional burden on the credit reporting system, but they are not unprecedented and likely would result in more meaningful investigations and ultimately more accurate reports.

Congress also should make it easier for consumers to ensure that erroneous information, once corrected, will be accurately reflected in the files of all three major credit bureaus. This could be accomplished most efficiently by requiring either the investigating credit bureau or the initial source of the information to transmit the correction to each of the bureaus. Because the credit reporting system is already substantially automated and will become increasingly computerized in the future,<sup>186</sup> it makes sense to mandate the sharing of corrected information by the businesses operating within the system, rather than requiring the consumer to institute similar investigation procedures separately with each bureau.

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181. *Id.*

182. *Id.* § 1666a.

183. *Id.* § 1666(a)(B)(i)-(ii).

184. Approximately 75% of providers of information apparently respond to credit bureau investigations within 30 days. See 1989 FCRA Hearing, *supra* note 3, at 257 (statement of Walter R. Kurth, President, Associated Credit Bureaus, Inc.).

185. See 1990 FCRA Hearing, *supra* note 7, at 678 (statement of Hubert H. Humphrey, III, Attorney General, State of Minnesota).

186. See *supra* note 7 and accompanying text.

Perhaps the burden could be shared by the bureaus and the original source of the information, with the party responsible for the error shouldering the burden of correcting it throughout the system. Thus, if the creditor made the error, it would be required to contact each of the three national bureaus as well as any local bureaus to which it reported the erroneous item.<sup>187</sup> The sources of credit information and the credit bureaus likely will be better equipped than the consumer to correct the item in an efficient manner.

## V. CONCLUSION

Reports of widespread deception by CROs have focused much-needed attention on the FCRA as the principal statute protecting consumer interests in the credit reporting system. The dominant response to CRO fraud in the state legislatures has been to regulate the activities of CROs, and some creative methods have been devised. As Congress considers CRO legislation, the existing state regulatory schemes can provide useful models. Perhaps more important, however, modifying the FCRA as suggested in this Article should reduce the incentive for consumers to use CROs, and thus could eliminate some of the deception. The credit reporting industry has undergone dramatic changes in the twenty years since the FCRA was enacted. It is time to reexamine the law and make it more useful to the consumers it was designed to protect.

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187. The Federal Deposit Insurance Corporation supports this proposal. *See 1990 FCRA Hearing, supra* note 7, at 755-56 (statement of L. William Seidman, Chairman, Federal Deposit Insurance Corporation).

