

LARGE-SCALE ENFORCEMENT OF THE FAIR CREDIT REPORTING ACT AND THE ROLE OF STATE ATTORNEYS GENERAL

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In 1970, Congress enacted the Fair Credit Reporting Act (FCRA) to address concerns that inadequate safeguards existed to protect consumers in their interactions with credit reporting agencies. Government regulation of credit reporting is critical because the structure of the credit reporting industry does not adequately incentivize credit reporting agencies to maintain accuracy in consumers' credit reports. Since the enactment of the FCRA, the role of credit in the modern consumer economy has expanded drastically to occupy a central role in consumer transactions. However, though technological advances have increased the ability of agencies to maintain accuracy in credit reports, credit reporting errors have remained surprisingly prevalent. This Note argues the continued prevalence of errors in credit reports stems largely from the inability of federal and state actors to meaningfully enforce the FCRA's requirements against credit reporting agencies. In light of the inadequacies of the FCRA's enforcement mechanisms, this Note suggests that both state attorneys general and the Consumer Financial Protection Bureau should eschew enforcement of credit reporting under the FCRA and instead seek to regulate credit reporting agencies through application of the new federal ban on abusive practices propounded by the Consumer Financial Protection Act.

INTRODUCTION

Since 1996, the credit reporting system of the United States has been regulated almost exclusively under the Fair Credit Reporting Act (hereinafter the FCRA or the Act),¹ the primary purpose of which is to safeguard the interests of consumers by ensuring credit reporting agencies (CRAs) maintain sufficient levels of accuracy within credit reports.² Government regulation of the credit reporting industry is critical because the structure of the industry does not adequately incentivize CRAs to maintain accuracy in consumers' credit reports.³ In recent years, commenta-

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1. 15 U.S.C. § 1681 (2012). The FCRA is the primary mechanism for regulating the credit reporting industry because state laws were, with some exceptions, preempted in 1996. See *id.* § 1681t (defining scope of state law preemption).

2. *Id.* § 1681 (setting forth purpose of FCRA).

3. See *infra* section I.A (examining structure of economic incentives within credit reporting industry).

tors have generally agreed that the FCRA has failed to adequately protect consumers in their interactions with the credit reporting industry.⁴

When Congress passed the Consumer Financial Protection Act (CFPA) in 2010,⁵ an alternative mechanism for regulation of credit reporting agencies emerged. The CFPA establishes a federal ban on unfair, deceptive, or abusive practices (UDAAPs), enforceable by both the Consumer Financial Protection Bureau (CFPB) and state attorneys general (SAGs).⁶ The UDAAP ban presents a potent means of supplementing inadequacies in current consumer protection statutes: Even if an act or practice conforms to the standards set forth in other pieces of federal legislation, the practice may nevertheless fall within the scope of the CFPA's UDAAP ban. In light of the inadequacies of credit reporting regulation under the FCRA, this Note argues that SAGs and the CFPB should eschew enforcement of CRAs through the FCRA, and instead seek to regulate CRAs through application of the new federal UDAAP prohibition propounded by the CFPA.

Part I of this Note proceeds by examining the need for regulation of the credit reporting industry and by summarizing the primary ways in which the FCRA seeks to regulate the industry. Part II examines the failure of actors to bring large-scale enforcement actions under the FCRA and posits this failure is primarily responsible for the FCRA's inability to adequately protect consumers in their interactions with the credit reporting industry. Part III proposes eschewing enforcement of the FCRA against CRAs and instead urges that both practical and normative considerations counsel in favor of regulating CRAs through the UDAAP provisions of the CFPA.

I. BACKGROUND

This Part begins by examining the formation of the credit reporting industry, focusing in particular on the ways in which economic incentives within the industry make governmental regulation a necessary prerequisite for the protection of consumers. It then assesses the mechanisms

4. See, e.g., Michael R. Guerrero, *Disputing the Dispute Process: Questioning the Fairness of § 1681s-2(a)(8) and § 1681j(a)(1)(A) of the Fair and Accurate Credit Reporting Act*, 47 Cal. W. L. Rev. 437, 439 (2011) ("Under current credit reporting legislation and regulation, consumers are provided few remedies for experienced wrongs [because of the] . . . system's failure to provide a framework of incentives and penalties to motivate CRAs and furnishers to adequately address disputes, or, more generally, to ensure the accuracy of consumer credit information.").

5. Pub. L. No. 111-203, 124 Stat. 1955 (codified at 12 U.S.C. § 5301 (2012)). As the CFPA is located at Title X within Dodd Frank, this Note uses "the CFPA" and "Title X" interchangeably.

6. See 12 U.S.C. § 5536(a)(1)(B) (rendering it unlawful for any person covered by Act to engage in any unfair, deceptive, or abusive act or practice); see also *id.* § 5531 (outlining CFPB power to enforce prohibition against UDAAPs); *id.* § 5552 (granting states power to directly enforce Act's provisions except against federal depositories).

through which the FCRA seeks to regulate accuracy in the credit reporting industry, as well as the actors responsible for the Act's enforcement. Finally, it analyzes the prevalence of errors within the credit reporting system, concluding that the FCRA has not effectively functioned to meaningfully increase accuracy in the credit reporting system.

A. *State of the Credit Reporting Industry Prior to Enactment of the FCRA*

The period before the enactment of the FCRA in 1970 witnessed a drastic expansion of the use of credit in the American economy. Between 1945 and 1975, outstanding household debt grew from roughly \$24 billion⁷ to \$736 billion.⁸ Consumers used this credit to obtain home mortgages, buy cars, and take out loans.⁹ Concomitantly, credit reporting agencies became increasingly important actors in the American economy.¹⁰ The proliferation of national credit bureaus provided a number of advantages over traditional methods¹¹ of assessing creditworthiness, as large aggrega-

7. Henry Hazlitt, *A Flood of Debt*, Newsweek, Nov. 7, 1955, reprinted in Henry Hazlitt, *Business Tides: The Newsweek Era of Henry Hazlitt* 400 (2011).

8. Bd. of Governors of the Fed. Reserve Sys., *Flow of Funds Accounts of the United States: Flows and Outstandings Fourth Quarter 2005*, at 8 (2006), <http://www.federalreserve.gov/releases/z1/20060309/z1.pdf> [<http://perma.cc/4SRB-8PZ2>]. The indebtedness of American consumers has continued to mount since the FCRA's inception, and as of 2015, total household indebtedness stood at \$11.85 trillion. Research & Statistics Grp., Fed. Reserve Bank of N.Y., *Quarterly Report on Household Debt and Credit: August 2015*, at 3 (2015), http://www.newyorkfed.org/householdcredit/2015-q2/data/pdf/HHDC_2015Q2.pdf [<http://perma.cc/RU57-653F>].

9. See Maureen Mahoney, Consumers Union, *Errors and Gotchas: How Credit Report Errors and Unreliable Credit Scores Hurt Consumers* 4 (2014), <http://consumersunion.org/wp-content/uploads/2014/04/Errors-and-Gotchas-report.pdf> [<http://perma.cc/5HA5-UZTR>] (listing uses of consumer credit); see also David Rameden, *When the Database Is Wrong . . . Do Consumers Have Any Effective Remedies Against Credit Reporting Agencies or Information Providers?*, 100 Com. L.J. 390, 390 (1995) ("Credit reports decide if we can finance a new car, buy a home, . . . rent an apartment, get a job, or even are considered for a promotion[,] [and as a result,] [o]ur lifestyles, our livelihood, our reputation can be seriously adversely affected by a bad credit report . . .") (quoting *Consumer Problems with Credit Reporting Bureaus: Hearings Before the Subcomm. on Consumers of the S. Comm. on Commerce, Sci. & Tech.*, 102d Cong. 2 (1992) (statement of Sen. Bryan, S. Comm. on Banking, Hous. & Urban Affairs)); G. Allan Van Fleet, Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability*, 76 Colum. L. Rev. 458, 458 (1976) (noting credit is "deeply ingrained in the way Americans acquire and secure the many high cost items which have come to be regarded as necessities of life," and "[w]ithout credit and insurance, most consumers could not own an automobile [or] purchase a dwelling").

10. Van Fleet, *supra* note 9, at 458–59 ("The maintainance [sic] of today's vast credit-granting system depends on the creditor's relatively easy access to dependable consumer information with which to evaluate the risks involved in extending credit . . . [and insofar as] they report accurately and fairly, they perform a vital function for both consumer and creditor.").

11. See Elizabeth D. De Armond, *Frothy Chaos: Modern Data Warehousing and Old-Fashioned Defamation*, 41 Val. U. L. Rev. 1061, 1063–64 (2007) (observing prior to advent of CRAs, credit reputations were built and verified through localized face-to-face interac-

tors of credit information were well-positioned to benefit from economies of scale in comparison with local lenders.¹² Credit reports also provide benefits to consumers, as lenders in competitive markets pass to consumers the cost savings resulting from efficient evaluation of creditworthiness.¹³

However, as use of credit reports accelerated,¹⁴ concerns about the accuracy of these reports burgeoned.¹⁵ The lack of economic incentives for CRAs to maintain accurate reports exacerbated these concerns.¹⁶ Credit reporting agencies derive revenue from selling consumer credit reports to creditors, which in turn allow creditors to evaluate the consumer's credit

tions); Edward Thrasher, *The Fair Credit Reporting Act: Deficiencies and Solutions*, 21 *Temp. Pol. & C.R.L. Rev.* 599, 599 (2012) (“[C]redit and reputation . . . have moved from local relationships within smaller communities, such as a local bank official and a local homeowner who regularly see one another, to a national scale where a consumer’s transactional history is stored forever in increasingly expanding databases.”).

12. See Virginia G. Maurer & Robert E. Thomas, *Getting Credit Where Credit Is Due: Proposed Changes in the Fair Credit Reporting Act*, 34 *Am. Bus. L.J.* 607, 628 (1997) (“By collecting and maintaining information on literally millions of subjects, credit reporting agencies are able to exploit economies of scale [by] focusing solely on information processing . . . efficiencies that no single credit provider can achieve.”); Rameden, *supra* note 9, at 392 (suggesting consolidation of credit reporting industry driven by economies of scale resulting from computerization and technology); Meredith Schramm-Strosser, Comment, *The “Not So” Fair Credit Reporting Act: Federal Preemption, Injunctive Relief, and the Need to Return Remedies for Common Law Defamation to the States*, 14 *Duq. Bus. L.J.* 165, 172 (2012) (arguing national credit bureaus expanded in part because economies of scale enabled disbursement of consumer reports at faster rate than smaller independent credit bureaus).

13. See Elizabeth Doyle O’Brien, *Minimizing the Risk of the Undeserved Scarlet Letter: An Urgent Call to Amend § 1681e(B) of the Fair Credit Reporting Act*, 57 *Cath. U. L. Rev.* 1217, 1221 (2008) (“Because of these well-developed consumer credit markets, consumers enjoy the benefits of increased competition among credit providers.”); Rameden, *supra* note 9, at 391 (“If the report is accurate and favorable ‘it can speed up [credit approval and] . . . provide quicker access to credit, to make purchases easier.’” (alterations in original)); see also TransUnion, *The Importance of Credit Scoring for Economic Growth 6–9* (2007), http://www.transunion.com/docs/interstitial/TransUnion_WhitePaper_CreditScoring.pdf [<http://perma.cc/YH9A-C25E>] (arguing credit scoring and credit reports increase competition among lenders and apply downward pressure to prices).

14. See Schramm-Strosser, *supra* note 12, at 172 (“During the post-World War II period, creditors seeking to determine a consumer’s creditworthiness started relying more heavily on credit report information managed by a nationally operated credit bureau, instead of relying on traditional methods such as turning to local sources who knew a consumer personally.”).

15. See Joanne Colombani, *The Fair Credit Reporting Act*, 13 *Suffolk U. L. Rev.* 63, 63 (1979) (noting industry-wide procedures enabling CRAs to take advantage of economies of scale “create a correspondingly large number of inaccurate reports”); De Armond, *supra* note 11, at 1099 (“[O]nce computers began to take over the chores of aggregating and sorting data, Congress began to recognize . . . the lack of power individuals had over . . . such data[] and the likelihood that some data could get assigned to the wrong person.”).

16. See Guerrero, *supra* note 4, at 455–56 (arguing CRAs can profit from inaccuracies given low level of resources channeled to dispute resolution and revenue received by furnishers for handling disputes).

risk.¹⁷ Thus, creditors comprise the customer base of CRAs, while consumers are merely the source of the product. To the extent that creditors privilege the quantity of information over its accuracy,¹⁸ there is little incentive for CRAs to protect the interests of consumers.¹⁹

Despite the increasingly central position of CRAs in the country's economic infrastructure, agencies remained unregulated prior to the enactment of the FCRA,²⁰ and as a result, consumers had no right to access their credit report files.²¹ The legal system proved ill equipped to provide

17. See Gretchen Morgenson, *Held Captive by Flawed Credit Reports*, N.Y. Times (June 21, 2014), <http://www.nytimes.com/2014/06/22/business/held-captive-by-flawed-credit-reports.html> (on file with the *Columbia Law Review*) (acknowledging credit providers, rather than consumers, are primary source of revenue for reporting bureaus).

18. See Fed. Trade Comm'n, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, at 47 (2004), <https://www.ftc.gov/sites/default/files/documents/reports/under-section-318-and-319-fair-and-accurate-credit-transaction-act-2003/041209factarpt.pdf> [<https://perma.cc/MK38-3HZ9>] [hereinafter 2004 FTC Report] (observing loss incurred when borrower defaults is much larger than profit earned when borrower repays loan and consequently "lenders may prefer to see all potentially derogatory information about a potential borrower, even if it cannot all be matched to the borrower with certainty"). This dynamic results in incentives to skew the matching algorithms used to compile credit reports towards greater inclusiveness, even when there is uncertainty as to who the information should be attributed to. See *id.* (cautioning "[t]his preference . . . could harm consumers to whom derogatory information is mistakenly assigned"); see also Maurer & Thomas, *supra* note 12, at 623 (positing creditor's preference for information volume over accuracy might also be explained by creditor's ability to shift burden for error detection to consumer); Schramm-Strosser, *supra* note 12, at 172–73 ("As a result of the creditor's strong interest in receiving as much information as possible to determine a consumer's risk of default, the CRAs responded by trading accuracy for volume." (internal quotation marks omitted) (quoting Maurer & Thomas, *supra* note 12, at 623)).

19. See *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs & Coinage of the H. Comm. on Banking, Fin. & Urban Affairs*, 102d Cong. 235–36 (1991) (statement of Dr. Mary J. Culnan, Assistant Professor, Georgetown University School of Business Administration) [hereinafter *Culnan Testimony*] ("When consumers are treated poorly by a credit bureau, they cannot vote with their feet by moving their credit reports to another credit bureau."); Chi Chi Wu, Nat'l Consumer Law Ctr., *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports 2* (2009), https://www.nclc.org/images/pdf/pr-reports/report-automated_injustice.pdf [<https://perma.cc/6GLZ-M3U6>] [hereinafter *Wu, Dispute System*] (noting credit bureaus have little economic incentive to address consumer concerns because "[c]onsumers are not the paying customers for credit bureaus . . . [but rather] represent an expense to the bureaus, which minimize the resources devoted to them by using automation that produces formalistic results").

20. See Robert M. McNamara, Jr., *The Fair Credit Reporting Act: A Legislative Overview*, 22 J. Pub. L. 67, 71 (1973) ("During the period of their phenomenal growth, credit bureaus have somehow escaped the focus of both state and federal inquiry and regulation in spite of the existence of serious abuses.").

21. See Schramm-Strosser, *supra* note 12, at 175 (observing CRA practice, prior to enactment of FCRA, of blocking consumers from challenging validity of consumer reports by withholding content of reports). Even after passage of the FCRA, consumers still lacked unimpeded access to the content of their reports. See Varda N. Fink, *Consumer Protection: Regulation and Liability of the Credit Reporting Industry*, 47 *Notre Dame L. Rev.* 1291,

remedies to those consumers who somehow managed to determine that there were errors in their reports.²² Although consumers had limited success bringing common law tort actions such as defamation and invasion of privacy against agencies that promulgated inaccurate reports, courts proved fairly unreceptive to such claims.²³

B. *Consumer Recourse Under the FCRA*

As a response to the increasing dependence of American commerce on credit reports²⁴ and the subsequent failure of the common law to afford adequate remedies to consumers seeking to correct inaccuracies,²⁵ Congress passed the FCRA in 1970. Though the FCRA regulates many aspects of the credit reporting process, its primary purpose is to “require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit . . . in a manner which is fair and equitable to the consumer.”²⁶ To accomplish this goal, the act creates “a system of ‘due process’ under which consumer subjects may learn of adverse reports, be confronted with the information therein, and [act] to correct or supplement false or misleading entries.”²⁷

1. *Dispute Resolution Process.* — Toward this end, the FCRA establishes a dispute-resolution infrastructure, which serves as a first level of recourse for consumers.²⁸ When a consumer wishes to initiate a dispute, he or she is required by CRAs to fill out a standardized form, known as a

1300 (1972) (observing FCRA granted consumer right to have “nature and substance” of information contained in file explained by CRA representative but did not allow consumer access to actual credit report).

22. See Fink, *supra* note 21, at 1298 (“[A] consumer injured by a faulty credit report is all but unprotected by the common law of most jurisdictions.”).

23. Augusta E. Wilson, *The Future of Common-Law Libel Actions Under the Fair Credit Reporting Act*, 21 *Cath. U. L. Rev.* 201, 201 (1971) (noting courts routinely used doctrine of qualified privilege to find public interest in facilitating commerce outweighed individual’s right to accurate report).

24. See 15 U.S.C. § 1681(a)(1) (2012) (finding banking system to be dependent on fair and accurate credit reporting and concluding “[i]naccurate credit reports directly impair the efficiency of the banking system”); Rameden, *supra* note 9, at 390 (finding consumer credit “plays ever-increasing role in the national economy”).

25. See Schramm-Strosser, *supra* note 12, at 170 (“In response to the difficulties consumers faced obtaining remedies under the common law, Congress passed the FCRA.”); cf. 15 U.S.C. § 1681(a)(1) (“[U]nfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.”).

26. 15 U.S.C. § 1681(b); see also Van Fleet, *supra* note 9, at 460–61 (“The primary concern . . . is that consumer reports may contain erroneous information which may effectively destroy a person’s ability to obtain credit, insurance or even meaningful employment.”).

27. Van Fleet, *supra* note 9, at 466.

28. See Guerrero, *supra* note 4, at 447 (suggesting legislative history positions dispute resolution process as lynchpin of efforts to achieve accuracy in reports).

Consumer Dispute Verification form (CDV).²⁹ Upon being notified that the completeness or accuracy of any item is disputed by the consumer, the agency is required to conduct a reasonable reinvestigation to determine the accuracy of the disputed information and to record the current status of the disputed information.³⁰ The agency is then required to delete the information promptly, if found to be inaccurate or unverified, or modify it as appropriate based on the results of the reinvestigation.³¹ If the agency fails to conduct a reasonable reinvestigation within thirty days of receiving notice of the dispute, it is required to delete the disputed item from the file.³² The agency is required to maintain reasonable procedures to prevent the reappearance of inaccurate deleted information.³³

In addition to submitting a CDV, consumers often submit documentation corroborating claims that their reports contain inaccurate information.³⁴ Upon receiving a CDV and any accompanying documentation forwarded by the consumer, the credit bureaus review the information forwarded by the consumer and summarize it by choosing one of twenty-six dispute codes.³⁵ This dispute code, along with identifying information

29. See Fed. Trade Comm'n & Bd. of Governors of the Fed. Reserve Sys., Report to Congress on the Fair Credit Reporting Act Dispute Resolution Process 14 (2006), <http://www.federalreserve.gov/boarddocs/rptcongress/fcradispute/fcradispute200608.pdf> [<http://perma.cc/6LR2-BVVT>] [hereinafter FTC Dispute Resolution Report] (reviewing process whereby consumer relays CDV information to CRA employee).

30. See 15 U.S.C. § 1681i(a)(1)(A).

31. *Id.* § 1681i(a)(5)(A) (describing steps consumer reporting agency must take if information disputed by consumer is “found to be inaccurate or incomplete or cannot be verified”). Following reinvestigation, the agency is required to provide to the consumer written notice of the results of the reinvestigation and a revised consumer report. *Id.* § 1681i(a)(6). The statement also provides notice that the consumer has the right to request a description of the procedure used to determine the accuracy and completeness of the report, including contact information of furnishers if reasonably available, as well as a notice that the consumer has a right to add a statement to the consumer’s file disputing the accuracy or completeness of the information. *Id.*

32. *Id.* § 1681i(a)(1)(A). This thirty-day period for reinvestigation can be marginally extended if CRA receives additional information from the consumer during the reinvestigation. See *id.* § 1681i(a)(1)(B) (providing for extension of up to fifteen days).

33. *Id.* § 1681i(a)(5)(C).

34. See FTC Dispute Resolution Report, *supra* note 29, at 16 (“[C]onsumers often supply CRAs with information and documentation sufficient to support their disputes . . .”).

35. See Wu, Dispute System, *supra* note 19, at 15 (observing eighty-four percent of disputes are characterized by one of five codes); see also De Armond, *supra* note 11, at 1104 (noting “reinvestigation process is nearly as automated as the transmission of the original information to the agency” and reduces consumer’s “detailed description of an error to a generalized code”).

about the consumer, is then forwarded to the furnisher³⁶ of the contested information.³⁷

The appearance of errors in consumer credit reports would be a considerably less pressing problem if the dispute resolution system established by the FCRA operated as a dependable avenue of recourse for consumers.³⁸ To the contrary, however, the manner in which CRAs have implemented the dispute resolution system has reduced the process to a “Kafkaesque no man’s land.”³⁹ In the large majority of cases, when CRAs receive a dispute from a consumer, the CRA investigative process consists of merely “forwarding the consumer’s dispute to the furnisher, and parroting whatever the furnisher states in response.”⁴⁰ Until 2013, CRAs did not even transmit any supporting documentation to furnishers, despite the fact that the FCRA requires CRAs to forward to furnishers “all relevant information” to assist in resolving the dispute.⁴¹ This practice effectively limited the furnisher’s investigation to an internal review of records and consideration of the dispute code provided by the CRA.⁴² Though

36. A furnisher is a third-party lender or entity that originates credit information gathered by CRAs. See 16 C.F.R. § 660.2(c) (2010) (defining “furnisher” in consumer reporting context). For example, a bank that reports a default on a loan to a CRA has “furnished” information on the loan to the agency.

37. See 15 U.S.C. § 1681i(a)(2) (requiring CRA to provide prompt notice of dispute to furnishers of disputed information).

38. See Wu, *Dispute System*, supra note 19, at 13 (“The dispute process is [supposed to be] the safety net when something goes wrong in the processing of billions of pieces of data for hundreds of millions of files.”).

39. Tara Siegel Bernard, *Credit Error? It Pays to Be on V.I.P. List*, N.Y. Times (May 14, 2011), <http://www.nytimes.com/2011/05/15/your-money/credit-scores/15credit.html> (on file with the *Columbia Law Review*) [hereinafter Bernard, VIP List]; see also Wu, *Dispute System*, supra note 19, at 13 (assessing automated dispute system and determining it is “fundamentally flawed”); Guerrero, supra note 4, at 438 (alleging dispute resolution process as implemented is “insufficient to ensure an accurate credit reporting system”). Notably, credit ratings agencies discreetly avoid subjecting to this process the policymakers who would otherwise be in a position to alter the status quo. See Bernard, VIP List, supra reporting CRA practice of maintaining VIP lists “consisting of celebrities, politicians, judges and other influential people” whose complaints are specially handled by company representatives while other consumers are shunted into automated process).

40. An Overview of the Credit Reporting System: Hearing Before the H. Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs., 113th Cong. 103 (2014) (statement of Chi Chi Wu, Staff Attorney, National Consumer Law Center) [hereinafter Wu Testimony].

41. 15 U.S.C. § 1681i(a)(2)(A) (requiring consumer notice to CRAs to include “all relevant information regarding the dispute”); see also Wu Testimony, supra note 40, at 103 (chronicling CRA history of failing to forward consumer documentation).

42. With respect to Experian, the largest of the three main agencies, the Seventh Circuit has acknowledged that the CRA appeared to have “a systematic problem in its limited categorization” of consumers’ inquiries. *Ruffin-Thompkins v. Experian Info. Sols., Inc.*, 422 F.3d 603, 610 (7th Cir. 2005). The Seventh Circuit was similarly unimpressed by the “cryptic” and “meaningless” communications consumers receive in response to their disputes. See *id.* (“Using the information provided the following item was not found: Grossinger City Toyota.” (quoting Experian response to consumer dispute)). Though this

CRAs began forwarding consumer documentation in 2013,⁴³ the dispute resolution system still fails to adequately fulfill its function under the FCRA because CRAs have persisted in parroting furnisher responses to investigative requests.⁴⁴ In this context, it is somewhat telling that a recent Federal Trade Commission (FTC) study found sixty-three percent of consumers who submitted a dispute continued to maintain that their report contained errors following the conclusion of the dispute resolution process.⁴⁵

2. *Enforcement Through Private Litigation.* — In the event that the FCRA’s dispute-resolution infrastructure fails to address the consumer’s concern, the FCRA also establishes a framework within which consumers can bring litigation to vindicate their rights. Although the dispute-resolution infrastructure serves as the first level of recourse for consumers, litigation remedies remain exceedingly important within the FCRA schema, as a function of legislative design⁴⁶ and as a practical consequence of the oft-

case involved Experian, all of the Big Three credit reporting agencies appear to process complaints through the same online system. See CFPB Puts Companies on Notice About Duty to Investigate Consumer Credit Report Disputes, Consumer Fin. Prot. Bureau (Sept. 4, 2013), <http://www.consumerfinance.gov/newsroom/cfpb-puts-companies-on-notice-about-duty-to-investigate-consumer-credit-report-disputes/> [<http://perma.cc/8WLY-Z88W>] (“An electronic system, known as ‘e-OSCAR,’ is used by the three largest nationwide consumer reporting companies . . .”). The “Big Three” credit reporting agencies are Experian, TransUnion, and Equifax. See Credit Reporting Agencies, Fed. Deposit Ins. Corp., <https://www.fdic.gov/consumers/consumer/ccc/reporting.html> [<https://perma.cc/F5B7-X7TG>] (last updated Nov. 10, 2014).

43. Wu Testimony, *supra* note 40, at 103. Notably, CRAs began forwarding consumer documentation to furnishers shortly following the CFPB’s assumption of supervisory authority over CRAs. *Id.* This suggests that while private actions aimed at enforcing compliance with the FCRA imposed insufficient incentives to motivate CRA compliance with the FCRA, the threat of government enforcement actions may be persuasive in effecting compliance.

44. See *id.* at 25 (concluding CRA forwarding of documentation to furnishers is “a necessary, but not a sufficient, measure to reform the credit reporting dispute system” and calling for congressional action to revise system). While this Note was in the process of publication, New York Attorney General Eric Schneiderman reached an agreement with Experian, Equifax, and TransUnion to begin to reform their dispute resolution systems nationwide, most notably by supplementing their automated dispute resolution process with trained employees who will review forwarded documentation. See Tara Siegel Bernard, TransUnion, Equifax and Experian Agree to Overhaul Credit Reporting Practices, *N.Y. Times* (Mar. 9, 2015), <http://www.nytimes.com/2015/03/10/business/big-credit-reporting-agencies-to-overhaul-error-fixing-process.html> (on file with the *Columbia Law Review*) (outlining proposed changes). The settlement is expected to be implemented over the next three years, and at present, the scope and impact of the changes remain uncertain. *Id.*

45. Fed. Trade Comm’n, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003, at vi (2012), <https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf> [<http://perma.cc/6G84-YKWW>] [hereinafter 2012 FTC Report].

46. See Van Fleet, *supra* note 9, at 505 (observing civil actions by consumers were intended “to help effect conformity with the operating procedures envisioned by the Act”); see also Hearings on S. 1840 to Amend the Fair Credit Reporting Act Before the

questioned adequacy of CRA incentives to make good faith efforts to resolve disputes.⁴⁷ Private litigants have authorization to bring suit to enforce a number of the Act's provisions.⁴⁸ Most importantly, they have the authority to enforce the FCRA's mandate that CRAs follow "reasonable procedures" to assure "maximum possible accuracy" in credit reports.⁴⁹

The Act establishes two tiers of liability for FCRA violations. First, under § 1681n, a CRA is liable to the consumer for willful noncompliance with any requirement of the FCRA.⁵⁰ Damages under § 1681n consist of actual damages sustained by the consumer or statutory damages between \$100 and \$1,000, as well as punitive damages and attorney's fees where appropriate.⁵¹ Second, § 1681o provides for civil liability for negligent noncompliance, but provides only for recovery of actual damages and attorney's fees.⁵² Both provisions provide that CRAs may recover attorney's fees if it is determined that the consumer filed the action in bad faith.⁵³ Finally, and perhaps most notably, neither section allows consumers to seek injunctive or declaratory relief.⁵⁴

Ostensibly, the FCRA's dispute resolution system should serve as the primary avenue of recourse for consumers, but as that system's inadequa-

Subcomm. on Consumer Affairs of the S. Comm. on Banking, Hous. & Urban Affairs, 94th Cong. 14 (1965) (statement of Christian S. White, Assistant Director for Special Statutes, Federal Trade Commission) (arguing success of FCRA is contingent on private litigation to ensure compliance).

47. See *supra* section I.B.I (assessing problems of dispute resolution system); see also Guerrero, *supra* note 4, at 439 (attributing widespread inaccuracies to "credit reporting system's failure to provide a framework of incentives and penalties to motivate CRAs and furnishers to adequately address disputes").

48. See 15 U.S.C. § 1681p (2012) ("An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy . . ."); see also *infra* notes 50–53 and accompanying text (outlining CRA liability to consumers).

49. 15 U.S.C. § 1681e(b).

50. *Id.* § 1681n.

51. *Id.* § 1681n(a).

52. *Id.* § 1681o.

53. *Id.* §§ 1681n(c), 1681o(b).

54. See, e.g., *Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263, 268–69 (5th Cir. 2000) (holding injunctive relief is unavailable under § 1681n of FCRA and further holding consumers cannot alternatively maintain class action under Fed. R. Civ. P. 23(b)(2) for declaratory relief); Schramm-Strosser, *supra* note 12, at 199 ("[F]ederal courts gradually developed a majority rule that individuals cannot seek injunctive relief . . . because it would violate Congress's intent to reserve the power to grant equitable relief only to the FTC."). But see *Engelbrecht v. Experian Info. Servs., Inc.*, No. EDCV 12-01547 VAP (OPX), 2012 WL 10424896, at *4 (C.D. Cal. Nov. 6, 2012) (finding *Washington* unpersuasive and holding purpose of FCRA and absence of federal agency suits seeking injunctions necessitate availability of injunctive relief absent clear congressional indication to the contrary). Acknowledging that injunctive relief is largely unavailable, Senator Elizabeth Warren has helped to introduce a bill in the Senate seeking to affirmatively grant consumers the right to seek equitable remedies for FCRA violations. See S. 2224, 113th Cong. § 2(a)(1)(C) (2014) (proposing availability of injunctive remedies for consumers in FCRA suits).

cies have come to light, private litigation has taken on increasing importance as a means of protecting consumer welfare in the credit reporting context.⁵⁵ Yet private litigation has proven an unreliable remedy for consumers attempting to vindicate their rights under the FCRA. For reasons explained below, consumers remain unlikely to bring an enforcement action when confronted with CRA violations of the FCRA. And even when consumers do bring enforcement actions for FCRA violations, it is very difficult for consumers to win such cases.

Consumers are unlikely to bring enforcement actions for FCRA violations for two reasons. First, consumers may not bring suit because they are unaware that an FCRA violation has occurred or, more troublingly, because they do not know their credit report contains a harmful error.⁵⁶ Second, consumers may not bring enforcement actions under the FCRA because the prospective costs of bringing a lawsuit may outweigh the benefits.⁵⁷ In many cases, the compensatory damages recovered by the consumer in a successful FCRA suit may be negligible.⁵⁸ When coupled with the fact that consumers who bring unsuccessful suits may be liable for attorney's fees,⁵⁹ the consumer may conclude that the time and effort of bringing a suit as well as the potential burden of paying attorney's fees render bringing a lawsuit undesirable. Though this decision might be rational from the perspective of a private litigant, from a broader perspective it deprives other nonlitigants of the benefits of a marginally more accurate credit reporting system.

In the event the consumer does bring an enforcement action against a CRA, several factors render it difficult for the consumer to achieve suc-

55. Even at the time of the FCRA's enactment, private litigation was viewed as an integral component of the Act's regulatory apparatus. See *supra* note 46 and accompanying text (describing role of private litigation in FCRA framework).

56. See Ann Carns, *Few Consumers Review Their Credit Reports*, N.Y. Times: Bucks (Dec. 13, 2014), <http://bucks.blogs.nytimes.com/2012/12/13/few-consumers-review-the-ir-credit-reports/> (on file with the *Columbia Law Review*) (reporting only one in five consumers review their credit reports each year). Though it can be argued that the burden of identifying credit report errors lies with the consumer, there are substantial externalities to credit reporting errors that may still merit enforcement action by government actors. See *infra* section II.A (describing externalities of credit reporting errors).

57. See Sheldon Feldman, *The Fair Credit Reporting Act—From the Regulators Vantage Point*, 14 Santa Clara Law. 459, 484 (1974) (discussing economic incentives of consumers and concluding “in most cases the consumer will decide that he cannot afford to bring suit” given low expected recovery). More broadly, consumers are unlikely to bring suits even when the expected recovery is significant. See Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698, 699 (2011) (“Studies show that only a fraction of people with litigable grievances sue.”).

58. See *Soutter v. Equifax Info. Servs., LLC*, 498 F. App'x 260, 267 (4th Cir. 2012) (arguing many FCRA claims will go without redress due to the small amounts recoverable in most private enforcement actions).

59. See 15 U.S.C. §§ 1681n(c), 1681o(b) (2012) (making consumers liable for CRA attorney's fees in unsuccessful FCRA actions when action is filed in bad faith or for purposes of harassment).

cess on the merits. First, by placing the burden of proof for negligence under § 1681o on the consumer, the FCRA “seriously weakens” enforcement efforts because, in nearly all cases, the information necessary for the consumer to prove his case is most likely in the sole possession of the CRA.⁶⁰ Second, CRAs have a substantial resource advantage over consumers in litigating FCRA cases.⁶¹ Third, actual damages can be exceedingly hard to prove in FCRA litigation,⁶² and though both statutory and punitive damages are available under § 1681n,⁶³ courts are reluctant to find willful noncompliance on the part of CRAs;⁶⁴ moreover, punitive damage awards are both rare and inadequate to motivate meaningful changes in compliance procedures.⁶⁵ As a result, consumers are unlikely to achieve a meaningful recovery through private litigation of individual FCRA claims.

In sum, private litigation has not generated sufficient economic incentives to motivate procedural changes in CRA operations,⁶⁶ and there is lit-

60. See Feldman, *supra* note 57, at 483–84 (acknowledging suggestion false reports should create rebuttable presumption of negligence but arguing approach would be ineffective unless coupled with statutory floor for damages). At the time, Feldman was Assistant Director for Special Statutes at the FTC, which had frequently stressed the need for private enforcement to effectuate the FCRA. See *supra* note 46 and accompanying text (discussing FTC position on role of private enforcement); see also Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 *Hastings L.J.* 1227, 1259–60 (2003) (criticizing placement of burden in context of identity theft prevention).

61. See Ira D. Moskatel, *Panacea or Placebo? Actions for Negligent Noncompliance Under the Federal Fair Credit Reporting Act*, 47 *S. Cal. L. Rev.* 1070, 1104–05 (1974) (emphasizing complexity of FCRA litigation and resource advantage of CRAs in light of substantial expenditures required to prove systematic negligence on part of CRA in § 1681o litigation).

62. See Thrasher, *supra* note 11, at 613–14 (observing § 1681o cases often dismissed for lack of evidence on question of damages); see also Guerrero, *supra* note 4, at 448 (highlighting difficulties faced by consumers in establishing but-for causation in FCRA claims).

63. 15 U.S.C. § 1681n(a)(1)–(2).

64. See Moskatel, *supra* note 61, at 1110 (arguing difficulty in assessing intent of CRAs is due in part to fact that FCRA was designed to be preventative rather than remedial measure); Thrasher, *supra* note 11, at 615–16 (arguing willful compliance standard difficult to achieve in context of FCRA legislation). Thrasher concludes that “even for severe violations, when there is a finding of willful non-compliance and punitive damages are awarded, there are insufficient incentives for agencies to diligently check a consumer’s objections.” *Id.* at 616.

65. See Thrasher, *supra* note 11, at 615–16 (characterizing willful noncompliance standard as “moving target” and finding punitive damages are likely insufficient as a deterrent mechanism given their infrequency).

66. See Feldman, *supra* note 57, at 484 (observing CRAs “will end up paying less in actual damages than the cost required to effectively preserve accuracy and confidentiality”); Lemos, *supra* note 57, at 706 (“[W]hen litigation will have a valuable deterrent effect but offer little reward to plaintiffs, private enforcement may lead to under-deterrence.”); Moskatel, *supra* note 61, at 1085 (arguing FCRA “provides inadequate protection to the consumer when seen in light of the mechanics and the economics of the credit investigation business”); Thrasher, *supra* note 11, at 614 (“Because the bar is so high for consumers

the indication this state of affairs will be altered in the near future. Absent alteration of CRA economic incentives, through litigation or otherwise,⁶⁷ it is unlikely that CRAs will take into account the interests of consumers when promulgating credit reports, given the structure of the credit reporting industry.⁶⁸

3. *Evolution of Governmental Enforcement of the FCRA.* — Because of the difficulties of enforcing the FCRA's requirements through private litigation, large-scale enforcement is crucial to ensuring the compliance of the credit reporting industry with the spirit of the FCRA. Concomitantly, government enforcers have a critical role to play in enforcing the FCRA⁶⁹ insofar as they are the only litigants capable of bringing large-scale enforcement actions outside of the class action context.⁷⁰ As the FCRA has evolved, three sets of government actors have assumed responsibility for its enforcement: the Federal Trade Commission (FTC), state attorneys general, and the Consumer Financial Protection Bureau (CFPB).

The FCRA as originally enacted positioned the FTC as the primary governmental regulator of CRAs.⁷¹ Section 1681s of the FCRA states that violation of any requirement of the Act is considered a per se unfair or deceptive act or practice (UDAP)⁷² subject to the FTC's enforcement authority as provided by the Federal Trade Commission Act (FTCA),⁷³ and significantly, until the passage of Title X, the FTC was the only federal actor capable of securing injunctive or declaratory relief on behalf of consumers.⁷⁴ FCRA violations prosecuted by the FTC are subject to the

seeking relief through the legal system from inaccurate information placed on their credit reports, credit agencies have little reason to change their procedures.”).

67. See Erin Dowe, Frustration Station: Attempting to Control Your Credit, 16 *Geo. Mason U. C.R.L.J.* 359, 361 (2006) (advocating in favor of consumer property right in credit information as means of aligning economic incentives of CRAs with those of consumers).

68. See Moskatel, *supra* note 61, at 1090 (“Many of the abuses of the credit reporting process arise out of the economics of [the] operation of a credit reporting agency.”); Morgenson, *supra* note 17 (pointing out consumers “cannot hold the ratings bureaus accountable by choosing to do business with other companies” because consumers have no rights to their information and because reports of Big Three credit bureaus are “ubiquitous”).

69. See Fink, *supra* note 21, at 1302 (arguing administrative agency such as FTC is in best position to ensure compliance with Act).

70. See *infra* section II.C (surveying difficulty of certifying FCRA class actions).

71. See Fink, *supra* note 21, at 1302 (noting FTC is governmental agency charged with enforcing FCRA but concluding “enforcement procedures used by the FTC are ineffective”).

72. 15 U.S.C. § 1681s(a)(1) (2012). As noted previously, the CFPB expands this prohibition by also prohibiting “abusive” acts or practices. See *supra* notes 5–6 and accompanying text (referencing addition of “abusive” by CFPB).

73. 15 U.S.C. § 45(a)–(b). In pursuing FCRA violations, the FTC can leverage such procedural, investigative, and enforcement powers as it possesses under the FTC Act. *Id.* § 1681s(a)(1).

74. See Van Fleet, *supra* note 9, at 468–69 (observing administrative enforcement of FCRA delegated to FTC with minor exceptions); see also *infra* notes 92–97 and accompanying text (outlining CFPB's role in enforcing Act following passage of Title X).

penalties provided for in the FTCA,⁷⁵ although the FCRA provides supplemental authorization of substantial civil penalties for knowing violations.⁷⁶

Unfortunately, the FTC has proved to be a lackluster enforcer of the FCRA. The FTC's ineffectiveness in enforcing compliance with the FCRA stems from two factors. First, the FTC lacks rulemaking powers with respect to the central provisions of the FCRA.⁷⁷ This shortcoming has prevented the FTC from promulgating meaningful regulations under the FCRA, a tool that would be of some value given the broad and relatively ineffective drafting of the FCRA itself.⁷⁸

Second, and more importantly, the FTC has historically taken the position that private enforcement should be the primary mechanism for enforcing the FCRA.⁷⁹ Concededly, the FTC lacks the resources necessary to litigate the full panoply of small-scale FCRA violations that occur on a daily basis.⁸⁰ Yet the FTC has also been unwilling to bring enforcement actions against the main actors in the credit reporting ecosystem, CRAs, with respect to the FCRA's key provisions imposing civil liability: the "reasonable procedures" requirements.⁸¹ Since the FCRA was enacted in

75. 15 U.S.C. § 1681s(a)(1).

76. *Id.* § 1681s(a)(2)(A) (authorizing FTC to commence civil action to recover civil penalties of up to \$2,500 per violation where pattern or practice of violations exists). This limit has been raised to \$3,500 to account for inflation. See Federal Civil Penalties Inflation Adjustment Act, 16 C.F.R. § 1.98(m) (2015) (adjusting limit for inflation).

77. See Fink, *supra* note 21, at 1302 (observing FTC lacks rulemaking powers and consequently "even small changes in the regulations have to be made by Congress"). In 2003 the FTC gained specific rulemaking authority in discrete areas under the Fair and Accurate Credit Transactions Act (FACTA), but not with respect to the core provisions of the FCRA. See 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations 5–6 (2012) <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf> [<http://perma.cc/BNB5-VTA9>] [hereinafter FTC Staff Report] (noting scope of rulemaking powers).

78. See *infra* Part II (assessing effectiveness of FCRA as drafted). Partially ameliorating this shortcoming, the FTC was able to issue interpretations and informal staff opinions with regard to the FCRA, which courts have granted a measure of deference. Van Fleet, *supra* note 9, at 469. Yet the FTC has not issued interpretations effecting meaningful impact upon the "reasonable procedures" standards that form the crux of the FCRA. See FTC Staff Report, *supra* note 77, at 67–68 (summarizing reasonable procedures standards).

79. See Schramm-Strosser, *supra* note 12, at 183 ("[T]he agency's position is that private litigation best enforces the FCRA."); Van Fleet, *supra* note 9, at 506 (noting FTC argued consumers should serve role of private attorneys general and contended success of FCRA depends on private litigation to ensure compliance).

80. See Feldman, *supra* note 57, at 480–81 (acknowledging FTC enforcement of FCRA is inherently problematic from practical perspective given tremendous number of reports promulgated by CRAs).

81. See *supra* note 49 and accompanying text (introducing and emphasizing importance of § 1681e); see also Fink, *supra* note 21, at 1302 (arguing enforcement procedures granted to FTC are ineffective because "FTC relies mainly on the voluntary compliance of those industries under its regulation and has not been known to take swift action in processing complaints").

1970, the FTC has brought eighty-seven enforcement actions,⁸² none of which sought to enforce the FCRA's reasonable procedures requirements.⁸³ Moreover, almost all of these actions were brought against ancillary actors operating within the credit reporting industry, rather than against the CRAs themselves. Since 2000, the FTC has brought only one suit against the "Big Three" credit reporting agencies, alleging that the agencies failed to maintain a toll-free number for consumers during business hours.⁸⁴ The FTC's failure to meaningfully enforce the FCRA against the largest actors in the credit reporting industry is particularly troubling given suggestions that the agency may have fallen prey to agency capture.⁸⁵

Partially due to the FTC's reluctance to act as the FCRA's primary governmental enforcer,⁸⁶ the Consumer Credit Reporting Reform Act of 1996 altered the preexisting FCRA schema to provide for concurrent enforcement by state actors.⁸⁷ Section 1681s authorizes SAGs to bring an action on behalf of the residents of the state seeking to recover either damages as provided by § 1681n and § 1681o or statutory damages of up to \$1,000 for each willful or negligent violation.⁸⁸ States may also seek injunctive relief.⁸⁹ In filing suit, states must give prior notice to the FTC, and the FTC retains the right to intervene in any state action.⁹⁰ Offsetting these affirmative grants of power, however, the 1996 amendments also acted to preempt the vast majority of state credit reporting laws.⁹¹

82. FTC Staff Report, *supra* note 77, at 108–10.

83. *Id.* at 4–5 (listing provisions FTC has enforced, such as "permissible purpose" of use, reseller requirements, and adverse action notices but failing to mention reasonable procedures).

84. See *id.* at 108–10 (listing FTC enforcement actions); Press Release, Fed. Trade Comm'n, Nation's Big Three Consumer Reporting Agencies Agree to Pay \$2.5 Million to Settle FTC Charges of Violating Fair Credit Reporting Act (Jan. 13, 2000), <https://www.ftc.gov/news-events/press-releases/2000/01/nations-big-three-consumer-reporting-agencies-agree-pay-25> [<https://perma.cc/G854-TS9D>] (announcing \$2.5 million settlement against Big Three CRAs for blocking millions of consumer phone calls and keeping consumers on hold for unreasonably long periods of time).

85. See Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 *Iowa L. Rev.* 115, 120–21 (2013) (remarking growing concerns of agency capture of FTC were motivation for state adoption of UDAP laws mirroring federal standards).

86. See *supra* notes 76–85 and accompanying text (analyzing FTC reluctance to file suit against CRAs).

87. 15 U.S.C. § 1681s(c)(1) (2012). The statute provides that either a state's chief law enforcement officer or a state's designated agency or official may bring an action under the FCRA. *Id.* In practice, this places the burden for state enforcement of the FCRA on SAGs.

88. *Id.* § 1681s(c)(1)(B).

89. *Id.* § 1681s(c)(1)(A).

90. *Id.* § 1681s(c)(1)–(4). For an analysis of SAG enforcement of the FCRA through these provisions, see *infra* section II.D.

91. See 15 U.S.C. § 1681t (defining scope of preemption of state credit reporting laws); see also *infra* note 167 and accompanying text (highlighting SAG criticisms of preemption of state credit reporting laws).

Finally, following the passage of the Consumer Financial Protection Act, the CFPB gained significant authority with respect to supervision of the credit reporting industry. The CFPB has taken over regulatory and interpretive roles under the FCRA, which were formerly performed by the FTC,⁹² while with respect to enforcement of the FCRA, the CFPB now shares responsibility with the FTC.⁹³ In enforcing consumer financial protection laws, including the FCRA, the CFPB may bring either administrative enforcement proceedings or civil actions in federal district court and is empowered to obtain any legal or equitable relief with respect to a violation of federal consumer financial law.⁹⁴

Though the ramifications of the transfer of FCRA responsibilities from the FTC to the CFPB are not yet clear,⁹⁵ it appears the CFPB intends to take an active role in regulating the credit reporting industry.⁹⁶ It also appears that the CFPB is in a significantly better position than the FTC to regulate CRAs, given its advantage in resources.⁹⁷ Despite the relative

92. FTC Staff Report, *supra* note 77, at 1–2.

93. Some practitioners have suggested that the CFPB has enforcement authority under the FCRA only with respect to consumer reports used in offering a consumer financial product or service. See Andrew Smith & Nathan Taylor, *FTC Rescinds FCRA Commentary in Handoff to CFPB*, Morrison Foerster Client Alert 3 (July 22, 2011), <http://media.mofo.com/files/Uploads/Images/110722-FTC-Handoff-to-CFPB.pdf> [<http://perma.cc/8B3S-GWU8>] (arguing for narrow interpretation of CFPB authority to enforce FCRA). This definition would include credit reports as contemplated by this Note. However, the CFPB could also regulate all manner of consumer reports, such as employment reports and insurance underwriting reports, through application of its UDAAP authority. See *infra* Part III (discussing UDAAP authority of CFPB and SAGs).

94. Consumer Fin. Prot. Bureau, *CFPB Supervision and Examination Manual pt. I*, at 7 (2012), http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf [<http://perma.cc/A6TG-CRV4>] [hereinafter *CFPB Manual*]. Remedies available to the CFPB include restitution, disgorgement, damages, civil monetary penalties, and limitations on activities of the person or entity against whom the action is brought. *Id.*

95. See Schramm-Strosser, *supra* note 12, at 182 n.113 (“The effects of the creation of the Bureau of Consumer Financial Protection and the reduction of the FTC’s power on the FCRA . . . are not yet known.”).

96. See *Credit Reports: What Accuracy and Errors Mean for Consumers: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety & Ins. of the S. Comm. on Commerce, Sci. & Transp., 113th Cong. 15* (2013) (statement of Corey Stone, Assistant Director of Deposits, Cash, Collections, and Reporting Markets, Consumer Financial Protection Bureau) (stating credit reporting is “a priority” for CFPB in light of critical role in lives of consumers and economy as a whole); see also Richard Cordray, *Dir., Consumer Fin. Prot. Bureau, Prepared Remarks at a Consumer Advisory Board Meeting* (Feb. 20, 2013), <http://www.consumerfinance.gov/newsroom/prepared-remarks-by-richard-cordray-at-a-consumer-advisory-board-meeting/> [<http://perma.cc/U76T-7WYM>] (listing credit reporting industry as major focus of CFPB because of potential for consumers to become “collateral damage to the dynamics that actually drive the economics of [the market]”).

97. See *Creating a Consumer Financial Protection Agency: A Cornerstone of America’s New Economic Foundation: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs, 111th Cong. 28, 35* (2009) (statement of Michael S. Barr, Assistant Secretary for Financial Institutions, Department of the Treasury) (arguing structural deficiencies within FTC prevented meaningful supervision and examination of nonbanks in financial markets); Lemos, *supra* note 57, at 760–61 (noting FTC “charged with policing an enormous

superiority of the CFPB to the FTC as a regulator of credit reporting, this Note argues that enforcement under the FCRA remains an unpalatable endeavor. Correspondingly, the role of the CFPB in regulating credit reporting will be addressed more fully in Part III, in the context of applying the CFPB's UDAAP provisions to the credit reporting industry.

C. *Prevalence and Source of Credit Reporting Errors—Evidence of FCRA Regulation Failure*

Since the passage of the original FCRA, consumer credit has only grown in importance, to both consumers and the economy as a whole.⁹⁸ Correspondingly, demand for credit reports has increased as well: By 1994, credit bureaus received more than one and a half million requests for credit reports every day.⁹⁹ However, despite attempts to update the FCRA through periodic amendments,¹⁰⁰ the FCRA has had limited success in motivating CRAs to achieve compliance with the spirit of the FCRA.

By any metric, a large contingent of consumers is adversely affected by credit reporting errors every year, though the exact prevalence of errors in consumer credit reports has been the subject of a contentious back and forth between the credit reporting industry and consumer advocate groups.¹⁰¹ Consumer advocates such as the Public Interest Research Group (PIRG) generally allege that errors are pervasive throughout the credit reporting industry; PIRG itself concludes that roughly twenty-five percent of credit reports contain errors serious enough to result in a denial of credit.¹⁰² The industry, in contrast, claims that ninety-eight per-

amount of activity” but is “one of the smallest administrative agencies” (internal quotation marks omitted) (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 80 n.6 (2008)).

98. See Rameden, *supra* note 9, at 390 (asserting “importance of consumer credit to modern Americans cannot be overemphasized” insofar as “[u]pward economic mobility demands that a consumer attain and maintain a good credit rating”); see also Consumer Fin. Prot. Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System 2* (2012), http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf [<http://perma.cc/T2CQ-RCT6>] (listing spheres of decisionmaking in which credit reports play a role, including “eligibility for rental housing” and “determin[ations] of whether to hire an applicant for a job”); Guerrero, *supra* note 4, at 441 (listing situations in which consumer’s credit report may influence outcomes).

99. The Consumer Reporting Reform Act of 1993: Hearing on S. 783 Before the S. Comm. on Banking, Hous. & Urban Affairs, 103d Cong. 3–4 (1993) (statement of Sen. Bryan, S. Comm. on Banking, Hous. & Urban Affairs).

100. See generally FTC Staff Report, *supra* note 77, at 2–3 (providing broad overview of amendments to FCRA).

101. Compare Wu, *Dispute System*, *supra* note 19, at 1 (“Inaccuracies and errors plague the credit reporting systems.”), with 2004 FTC Report, *supra* note 18, at 25 (citing CRA-commissioned study finding reports to be ninety-eight percent accurate).

102. Alison Cassady & Edmund Mierzwinski, *Nat’l Ass’n of State PIRGs, Mistakes Do Happen: A Look at Errors in Consumer Credit Reports 4* (2004), http://www.uspirg.org/sites/pirg/files/reports/Mistakes_Do_Happen_2004_USPIRG.pdf [<http://perma.cc/2NBV->

cent of all reports are free of material errors.¹⁰³ The most recent (and least biased) study of credit reporting errors was conducted by the FTC in 2012.¹⁰⁴ The FTC found that twenty-six percent of study participants identified at least one potentially material error in their credit report. Under even the most conservative of these studies, credit report errors have the potential to negatively impact the lives of millions of Americans every year.¹⁰⁵

In part, the prevalence of errors in credit reports is a function of the sheer increase in the amount of information that comprises such reports.¹⁰⁶ Within this wider trend, there are several interrelated mechanisms precipitating credit reporting errors. First, CRAs often mismerge files.¹⁰⁷ Upon a subscriber's request for a credit report on a particular consumer, the credit reporting agency compiles credit reports by using matching algorithms to assemble records, supplied by data providers, which are linked to particular identifying information, such as name, date of birth, and social security number.¹⁰⁸ Errors in matching can occur as a result of either "undermatching"¹⁰⁹ or "fuzzy matching."¹¹⁰ Second,

H2JE]. The study also found that nearly eighty percent of the reports examined contained mistakes of some kind. *Id.*

103. See 2004 FTC Report, *supra* note 18, at 25–26 (citing Arthur Andersen study commissioned by CRAs which concluded fewer than three percent of reports were inaccurate). Temporarily assuming this number is correct, the industry has effectively conceded that the credit reports of millions of Americans contain material errors. For a criticism of the industry study's criteria, see Wu, *Dispute System*, *supra* note 19, at 6 (noting study only counted errors as inaccurate if consumers were denied credit, effectively ignoring all errors resulting in even significantly higher borrowing costs).

104. See 2012 FTC Report, *supra* note 45 (analyzing prevalence of errors in credit reports).

105. See Guerrero, *supra* note 4, at 445 (conservatively estimating at least eight million Americans are at risk of being mistakenly identified as subprime borrowers). More generally, these errors also impose negative externalities on the economy as a whole. See *id.* at 444 ("On a macro level, inaccuracies within the credit reporting system are generally detrimental to the economy.").

106. De Armond, *supra* note 11, at 1075 ("As businesses, governmental units, and others store more data and increase access to that data, they will also store more inaccurate data . . .").

107. See U.S. Pub. Interest Research Grp., *Credit Bureaus: Public Enemy #1* at the FTC (1993) (analyzing 140 complaints to FTC and concluding nearly half of complaints to FTC involved mismerged files). For an analysis of the costs and benefits of file merging as a method of credit report compilation, see 2004 FTC Report, *supra* note 18, at 46–53. In the 1990s the procedural safeguards employed by CRAs when merging files proved paltry enough to motivate action by both SAGs and the FTC, a relatively rare occurrence. See Thomas C. Hayes, *Making a Difference; A New Start at a TRW Hot Spot*, *N.Y. Times* (Dec. 15, 1991), <http://www.nytimes.com/1991/12/15/business/making-a-difference-a-new-start-at-a-trw-hot-spot.html> (on file with the *Columbia Law Review*) (citing existence of 1991 consent decree with SAGs from nineteen states); see also *infra* note 113 (detailing incident which led to SAG action).

108. See De Armond, *supra* note 11, at 1080 (summarizing matching process through which CRAs compile credit reports).

109. *Id.* at 1081 (defining undermatching as situation in which identifying information linked with event is insufficiently complete to avoid ambiguity but is nevertheless matched

misattribution may occur as a result of identity theft.¹¹¹ Third, misattribution may occur because of transcription errors.¹¹² For example, a transcription error is produced when one of the direct parties to a transaction incorrectly types information into a form. Transcription errors are also often present in public records, and can be introduced by outside companies hired to gather information for CRAs.¹¹³ Though either furnishers or CRAs may introduce such errors into the credit reporting system, CRAs remain best positioned to address the appearance of such errors in consumers' credit reports.¹¹⁴

II. THE PROBLEM—IMPAIRMENT OF LARGE-SCALE FCRA ENFORCEMENT

Because it is difficult to bring successful individual suits against CRAs,¹¹⁵ large-scale enforcement of the FCRA is crucial to ensuring that CRAs are adequately incentivized to comply with the letter and spirit of the law. However, large-scale enforcement of the reasonable procedures requirements of the FCRA has been lackluster as a result of several factors. Part II begins by emphasizing the importance of large-scale enforcement in motivating compliance with the FCRA. It then examines problems with

to particular individual). De Armond argues that because information is only valuable to data aggregators (such as CRAs) when it is matched with a particular individual, CRAs have an incentive to match information with individuals even in cases of tenuous connection, raising the risk of misattribution. *Id.* at 1083; see also 2004 FTC Report, *supra* note 18, at 47 (assessing CRA incentives to match information with consumers, even if it leads to incorrect matches); Wu, *Dispute System*, *supra* note 19, at 8 (arguing credit bureaus have chosen to be “excessively and unreasonably over-inclusive” in matching files).

110. De Armond, *supra* note 11, at 1085. Fuzzy matching encompasses the willingness of matching algorithm to match similar but distinct pieces of information (such as Jim Jones and Jimmy Jones), as well as the willingness to return matches when some, but not all of the information in a given record matches that of the consumer (for example, when names match, but dates of birth do not). See *id.* (explaining concept of fuzzy matching).

111. See generally Erin M. Shoudt, *Identity Theft: Victims “Cry Out” for Reform*, 52 *Am. U. L. Rev.* 339, 356–57 (2002) (surveying impact of identity theft on credit profiles of consumers).

112. See De Armond, *supra* note 11, at 1079 (setting forth examples of transcription errors).

113. The most noted example of reported mistranscription remains the attempt of Experian's predecessor to brand as deadbeats all 3,100 residents of a Vermont town for failure to pay their property taxes. See John O'Dell, *The Rebel's Way*, *L.A. Times* (Sept. 15, 1996), http://articles.latimes.com/1996-09-15/business/fi-45189_1_business-credit-reports [<http://perma.cc/JA6B-HF2E>] (describing incident as impetus for reform). It eventually came to light that an outside company hired by the CRA to review public records had mis-transcribed information from the wrong rolls. *Id.*

114. See Guerrero, *supra* note 4, at 453–54 (rejecting CRA argument that “[w]e're the library . . . [w]e don't write the book” (internal quotation marks omitted) (quoting Kadet, *supra* note 12)). The unwillingness of CRAs to remedy matching errors may be linked to the fact that information is only valuable to CRA customers insofar as it is linked to a consumer. See *supra* note 109 (discussing CRA incentives to match even inaccurate data).

115. See *supra* notes 55–68 and accompanying text (highlighting difficulties of bringing successful individual suit under FCRA).

drafting and interpretation of the FCRA's key provisions for ensuring accuracy, concluding that these problems have inhibited effective enforcement action by both government actors and private litigants. Third, it surveys the difficulties of certifying FCRA class actions, concluding that judicial decisions have foreclosed the possibility of effectively enforcing the FCRA through class action suits. Finally, it concludes by assessing the dearth of governmental actions enforcing the FCRA's key provisions and positing reasons for this inaction.

A. *Why Large-Scale Enforcement of the FCRA Is Important*

Large-scale enforcement of the FCRA is essential to achieving the purposes of the FCRA for two reasons. First, taking a broader view of the purposes of the FCRA, large-scale enforcement is crucial in mediating a proper balance between the benefits of accurate credit reports to consumers and the economy as a whole, and the costs of achieving accuracy. Second, large-scale enforcement of the FCRA is the primary mechanism through which the Act can effectively incentivize CRAs, through litigation costs and injunctive remedies, to meaningfully alter their procedures. Without large-scale enforcement, neither of these goals is likely to be achieved.

Turning to the first point, locating a proper balancing point between the benefits of accurate credit reports and the costs of achieving accuracy is of tremendous importance because there are externalities to credit reporting errors. As a general matter, accurate credit reports are valuable to the economy as a whole,¹¹⁶ and well-developed consumer credit markets have allowed the United States to enjoy a considerable macroeconomic growth advantage over other countries.¹¹⁷ Additionally, accurate credit reports are important to end users as well as consumers, insofar as accurate reports allow lenders to more efficiently judge lending risks and allocate resources. As a result, each time a consumer disputes an inaccurate item in a report, or sues alleging a lack of reasonable procedures on the part of a CRA, both users of credit reports and the economy as a whole benefit. But in deciding whether to take action, the consumer does not consider these external benefits, and to the extent that the FCRA's dispute resolution system fails¹¹⁸ and the consumer decides not to bring suit because of the difficulties of private litigation,¹¹⁹ this external benefit is lost.

116. See Michael E. Staten & Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* 20 (Credit Research Ctr., Working Paper No. 67, 2003) (on file with the *Columbia Law Review*) (“[C]redit reporting is arguably one of the key elements of the U.S. infrastructure that underpins the remarkable productivity growth of the past decade.”).

117. *Id.* at 7.

118. See *supra* notes 38–45 and accompanying text (detailing shortcomings of dispute resolution system).

119. See *supra* notes 50–54 and accompanying text (arguing FCRA provides insufficient incentives to motivate private suits).

Government actors, in contrast, are well positioned to take these externalities into account in deciding whether to bring enforcement actions.

Second, private litigants cannot secure injunctive relief or consent decrees. This problem is twofold. On a specific level, judicial interpretations of the FCRA have rendered it impossible for consumers to seek injunctive relief to prevent erroneous information from reappearing on their credit reports.¹²⁰ On a broader level, the unavailability of injunctive relief means that private litigants cannot leverage the judicial process to compel CRAs to adopt procedures aimed at achieving a higher degree of accuracy in reports. Consequently, the only tool available to private litigants in seeking to achieve higher levels of credit reporting accuracy is to hope they can impose upon CRAs litigation costs of such a magnitude that inaccurate credit reporting becomes unprofitable.¹²¹ Insofar as this approach remains ineffective, the burden of holding CRAs accountable for accuracy in credit reports falls upon government actors.

B. *The Proliferation of Unreasonable Procedures—Difficulties in Effectively Enforcing the FCRA*

When the FCRA was passed in 1970, it was widely acknowledged that litigation was integral to achieving basic changes in the general operations of consumer reporting agencies.¹²² Notwithstanding this fact, both the original drafting of the FCRA and subsequent judicial interpretation have repeatedly functioned to hamper the effectiveness of litigation as a method of inducing regulatory compliance. As noted in Part I, these obstacles have limited the ability of private litigants to impose upon CRAs sufficient incentives to maintain accuracy in consumer reports.¹²³ More importantly, they have also impeded the ability of government actors such as the FTC, CFPB, and SAGs to secure damages and injunctive relief on behalf of consumers.

120. See *supra* note 54 and accompanying text (analyzing availability of injunctive relief to private litigants).

121. But see *supra* section I.B.2 (suggesting private litigation unlikely to incentivize CRAs to improve accuracy of reports). The goal of motivating CRAs to maintain higher levels of accuracy in reports is further complicated by the fact that CRAs have managed to offset the costs of defending FCRA suits by deriving revenue from the inaccuracies they assist in perpetuating. See Guerrero, *supra* note 4, at 455–56 (observing furnishers pay CRAs to handle each disputed item and CRAs derive further revenue from inaccuracies by selling consumers products to monitor their credit).

122. See *supra* note 46 (discussing importance of private litigation in FCRA schema); see also Van Fleet, *supra* note 9, at 506–07 (urging courts to take expansive view of purpose of civil litigation under FCRA in consideration of “broad changes intended to be effected” by the FCRA and hands-off enforcement posture adopted by FTC).

123. See *supra* section I.B.2 (arguing FCRA supplies insufficient incentives to spur private actions by consumers); see also Thrasher, *supra* note 11, at 614 (“As long as the FCRA has relaxed requirements for agencies . . . credit agencies will feel authorized to include false negative information if it *could* be related.”).

At the time of passage there were substantial concerns that the FCRA might function to unduly protect CRAs at the expense of the ordinary consumer. As originally enacted, the FCRA sought to mediate a balance between the interests of consumers in avoiding credit reporting errors and those of businesses who depend upon credit reporting services in the course of their daily operations.¹²⁴ The FCRA was believed to be a necessary measure in achieving this balance because “creditors and credit reporting agencies, who deal with millions of credit reports each day” might be inclined in the absence of such legislation to sacrifice accuracy “in exchange for speed and low cost.”¹²⁵

A number of commentators believe that the FCRA failed to achieve its twin goals of balance and accurate credit reporting at the outset.¹²⁶ During hearings on the passage of the Act, Professor Arthur Miller commented, “I have the feeling about S. 823 that it really is an act to protect and immunize the credit bureaus rather than an act to protect the individual who has been abused by the credit information flow created by the bureaus.”¹²⁷ In particular, some commentators believed that the “reasonable procedures” standard lying at the heart of the act set too low a bar to achieve accuracy in the credit reporting system.¹²⁸ Moreover, substantial amendments to the FCRA in both 1996 and 2003 failed to remedy the inefficacy of the “reasonable procedures” section of the FCRA.¹²⁹

124. Michael Epshteyn, *The Fair and Accurate Credit Transactions Act of 2003: Will Preemption of State Credit Reporting Laws Harm Consumers?*, 93 *Geo. L.J.* 1143, 1150 (2005) (observing tension between “needs of consumers, who are the primary subjects of the credit reporting system (but not its principal paying customers)” and “requirements of the lenders, furnishers, and credit bureaus, who rely on the system for their day-to-day business operations”).

125. *Id.*

126. See Maurer & Thomas, *supra* note 12, at 637 (“Although many features of the FCRA are superior to prior law, the FCRA still does not efficiently balance the interests of the parties.”); Schramm-Strosser, *supra* note 12, at 188 (“[T]he FCRA has not exhibited the desired effect, likely because it was a product of compromise.”).

127. *Fair Credit Reporting: Hearings Before Subcomm. on Consumer Affairs of the H. Comm. on Banking & Currency on H.R. 16340*, 91st Cong. 190 (1970) (statement of Arthur R. Miller, Professor, University of Michigan School of Law).

128. See *Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, 45 (D.C. Cir. 1984) (“The reasonableness requirement . . . severely limits an agency’s duty to maximally assure precise and complete reporting.”); see also Fink, *supra* note 21, at 1299 (advocating imposition of strict liability on CRAs on grounds that reasonable procedures standard is ineffective to motivate compliance in practice and comparing CRA regulation to regulation of manufacturing industries and finding it inferior in scope and effect); Moskatel, *supra* note 61, at 1072 (“Present statutory provisions relieve only the grossest types of negligence.”); Schramm-Strosser, *supra* note 12, at 181 (“The FCRA only requires CRAs to abide by ‘reasonable procedures’ to ensure accuracy, which is a lax standard in practice.”).

129. 15 U.S.C. § 1681e(b) (2012); see also O’Brien, *supra* note 13, at 1219 (“Since its enactment in 1970, there has been no change to § 1681e(b) . . . despite massive overhauls in other parts of the FCRA.” (footnotes omitted)); Schramm-Strosser, *supra* note 12, at 188, 213 (alleging FCRA amendments have “favored the industry’s interest over consumers”).

Subsequent judicial interpretations have only magnified the difficulty of winning an action brought under the FCRA. As changes in technology have enabled CRAs to process ever-increasing quantities of personal data, courts have failed to consider that these same changes in technology also enable CRAs to achieve higher levels of accuracy. This argument has been made most forcefully by Elizabeth De Armond, who argues that although weak protections for misattribution and mismatching might have been appropriate in 1970 when computerization was still in its infancy and not fully reliable, they are no longer tenable given advances in computing power.¹³⁰

Thus, in *Crabhill v. Trans Union LLC*, the court found that although Trans Union could have programed its computers differently to match less loosely, thereby avoiding the error, Trans Union was nonetheless entitled to program its computers to match as loosely or as tightly as it wished.¹³¹ The *Crabhill* decision is remarkable insofar as it demonstrates a surprising willingness on the part of courts to defer to the policy choices of CRAs on issues of computerized credit reporting. Compounding the problem, CRAs themselves have claimed an inability to determine whether their systems comport with the requirements of the FCRA.¹³² The practical result is that as computerization has rendered increased accuracy attainable, static judicial interpretations of the FCRA have allowed CRAs to appropriate the marginal benefits of technological progress at the same time that broader economic shifts have rendered credit reporting more important and potentially more devastating to the consumer than ever before.¹³³ Moreover, to the extent that potential enforcers are limited to bringing actions under the FCRA, these conservative interpretations of

130. See De Armond, *supra* note 11, at 1107 (“Courts . . . continue to interpret the Act as if the records were arduously searched by hand, rather than easily by machine, and construe the already mild obligation of agencies to ‘use reasonable procedures to assure maximum possibly accuracy’ . . . in ways that wholly fail to promote identification accuracy.”).

131. See 259 F.3d 662, 663 (7th Cir. 2001) (noting Trans Union could have programmed computer differently to avoid mismatching but concluding such preferences resided within CRA’s discretion).

132. See Brief for Virginia Poverty Law Center et al. as Amici Curiae Supporting Appellee, *Soutter v. Equifax Info. Servs., LLC*, 498 F. App’x 260 (4th Cir. 2012) (No. 11-1564), 2011 WL 7017493, at *14 (“Essentially without proof about what can and cannot be done with its own systems, Equifax is claiming that no method exists to determine whether or when its inaccurate information . . . should have been updated.”); see also De Armond, *supra* note 11, at 1110–11 (observing though *Sarver* court ruled for CRA in part because it thought alternative would impose “enormous” increased costs, it “did not refer to any estimate of the costs or explain why an already complex system . . . could not inexpensively adjust to cross-checking data when reliability was at issue”).

133. De Armond, *supra* note 11, at 1111 (“The [*Sarver*] decision allows the agency all of the benefits of its database technology with none of the responsibilities.”).

the FCRA's key provisions thwart potential enforcement by government actors as well as private litigants.¹³⁴

C. *Difficulties in Certifying FCRA Class Actions*

Because private enforcement of the FCRA on an individual scale is ineffective in motivating CRA compliance with the Act's "reasonable procedures" and "maximum possible accuracy" requirements,¹³⁵ class actions have the potential to act as a potent enforcement mechanism, even in spite of the difficulty of making out a viable case under the FCRA. But even when private litigants manage to make a viable case against a CRA under the FCRA, large-scale private litigation is often foreclosed by judicial unwillingness to certify FCRA class actions.¹³⁶ Courts have proven reluctant to certify FCRA class actions on two grounds: that the individualized nature of an FCRA claim precludes class certification and, relatedly, that class actions should not be certified when seeking statutory damages.

There are two primary elements to a § 1681e(b) claim under the FCRA.¹³⁷ First, the plaintiff must show that the report was inaccurate.¹³⁸ Second, if the report is shown to be inaccurate, the plaintiff must show that the CRA in question did not use "reasonable procedures" aimed at achieving "maximum possible accuracy."¹³⁹

In assessing the feasibility of certifying a § 1681e(b) class action, courts have held that the question of whether a report is accurate under § 1681e(b) is an individualized inquiry.¹⁴⁰ This approach has foreclosed the ability of plaintiffs to bring a § 1681e(b) class action,¹⁴¹ because the

134. Yet government actors, unlike private litigants, have alternative enforcement mechanisms available. See *infra* Part III (arguing government actors should rely on UDAAAP provisions to bring enforcement actions against CRAs).

135. See *supra* section II.B (describing difficulty of bringing successful FCRA claim under "reasonable procedures" portions of Act).

136. See, e.g., *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 347–51 (N.D. Ill. 2002) (concluding statutory damages and class actions incompatible under FCRA but acknowledging result to be extremely anomalous insofar as statutory scheme provided for by Congress was very characteristic which, when combined with enormous size of putative class (because of widespread violations), resulted in class's denial). But see *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 719–23 (9th Cir. 2010) (holding in context of FACTA case that potential magnitude of statutory damages is not proper ground for denying class certification because Congress is aware of such concerns and has amended other statutes to address such problems as it has seen fit).

137. 15 U.S.C. § 1681e(b) (2012).

138. *Id.*

139. *Id.*

140. *Owner-Operator Indep. Drivers Ass'n v. USIS Commercial Servs., Inc.*, 537 F.3d 1184, 1194 (10th Cir. 2008) (affirming denial of class certification request under § 1681e(b) on grounds that question of "whether a report is accurate may involve an individualized inquiry").

141. See *Gomez v. Kroll Factual Data, Inc.*, No. 13-cv-0445-WJM-KMT, 2014 WL 1456530, at *4 (D. Colo. Apr. 14, 2014) ("The individualized nature of an FCRA claim . . . has led most courts to deny class certification in these types of cases."); see also *In re Visa*

necessity of launching an individualized inquiry into the accuracy of each credit report neutralizes the benefits of judicial economy offered by class actions.¹⁴² Moreover, as a practical matter, it can be difficult to show actual damages resulting from an FCRA violation even with respect to an individual plaintiff.¹⁴³ When a multiplicity of plaintiffs seeks to recover on the basis of a single, widely applied CRA procedure, this problem of proof has been viewed by courts as an obstacle sufficient to block class certification, even when the plaintiff class can point to a single, overarching procedure applied to a common class.¹⁴⁴

The problems of certifying an FCRA claim are magnified where the plaintiff class seeks statutory, rather than actual, damages. Under § 1681n,¹⁴⁵ statutory damages are available for FCRA violations if the plaintiff can show willfulness on the part of the CRA.¹⁴⁶ Statutory damages for willful conduct by CRAs are extremely rare in the class context, however, because the determination of willfulness also requires an individualized inquiry with respect to each potential class member.¹⁴⁷

This inability of plaintiffs to consolidate their grievances into the class action format has strongly inhibited the ability of the FCRA to encourage accuracy in credit reporting, not least because in the alternative, many of the individual suits encompassed within the class action are unlikely to be brought.¹⁴⁸ Even in relatively straightforward cases demonstrating a widely used and readily identifiable procedure, courts have refused to certify class actions seeking statutory damages. In *Soutter v. Equifax Information Services LLC*, the plaintiff brought a class action

Check/Mastermoney Antitrust Litig., 280 F.3d 124, 136–40 (2d Cir. 2001) (commenting nature of evidence sufficient to resolve question is dispositive in determining whether question is common or individual).

142. Cf. Fed. R. Civ. P. 23(b)(3) (requiring class action be “superior to other available methods for fairly and efficiently adjudicating the controversy”).

143. See supra note 62 and accompanying text (noting difficulties of showing actual damages in FCRA suits).

144. See *Gomez*, 2014 WL 1456530, at *3 (acknowledging whether CRA procedure in question was reasonable is factual question common to entire putative class.).

145. 15 U.S.C. 1681n (2012).

146. *Gomez*, 2014 WL 1456530, at *4 (noting recovery of statutory damages requires proof of willfulness with respect to each individual plaintiff).

147. *Id.*; see also *Stillmock v. Weis Markets, Inc.*, 385 F. App’x 267, 277 (4th Cir. 2010) (Wilkinson, J., concurring) (“[B]ecause statutory damages are intended to address harms that are small or difficult to quantify, evidence about particular class members is highly relevant . . .”).

148. See supra section I.B.2 (remarking on insubstantial incentives imposed on CRAs by individual suits); see also Epshteyn, supra note 124, at 1149 (“Most consumers are not fully aware of their rights under the Act and may not realize the extensive role played by credit reporting in areas of fundamental concern such as housing, employment, and insurance.”); Fink, supra note 21, at 1303 (arguing “consumers are probably the least effective group to enforce the Act” because “[t]hey may be hesitant to bring suit under the Act since attorney’s fees are borne by the consumer unless the suit is successful” and “suit is hardly worthwhile” if denial of credit relates to smaller purchase).

against Equifax alleging the CRA had employed unreasonable procedures in reporting the outcomes of civil judgments, resulting in a proliferation of incorrect reports of civil judgments.¹⁴⁹ The Fourth Circuit reversed certification of the class by the district court for abuse of discretion, holding that Soutter could not meet the requirements of Rule 23(a)(3)¹⁵⁰ because Soutter's proof of willfulness would not have advanced the claims of other members of the class and because willfulness is an individualized inquiry.¹⁵¹

The majority's holding in *Soutter* strongly inhibits the ability of consumers to bring class actions to vindicate their rights, especially given the difficulty of showing actual, rather than statutory, damages.¹⁵² In a strongly worded dissent, Judge Gregory argued that the majority ruling "greatly impede[d] the future of class actions against [CRAs] under the pertinent provisions of the [FCRA]."¹⁵³ The dissent rightly observed that to prove willfulness, the plaintiff should only need to establish that Equifax acted knowingly or recklessly in adopting a procedure that entailed "an unjustifiably high risk of harm that is either known or so obvious it should be known," and that such a finding "would advance the claims of the entire class."¹⁵⁴ Significantly, the dissent also recognized the importance of statutory damages class actions within the FCRA litigation scheme, lamenting that under the majority's reasoning, "little can be done to carry out the FCRA's purpose of eliminating CRA reports that 'are systematically biased against the consumer.'"¹⁵⁵

149. 498 F. App'x 260, 262–63 (4th Cir. 2012) Plaintiff originally attempted to certify a class seeking actual damages but later revised the definition of the class to seek solely statutory damages, in all likelihood because it is extraordinarily difficult to certify a class action for actual damages given the individualized nature of damages determinations in FCRA cases. See *id.* at 263 (chronicling plaintiff's revision of proposed class definition).

150. Fed. R. Civ. P. 23(a)(3).

151. *Soutter*, 498 F. App'x at 265 ("Soutter's claim is 'typical' only on an 'unacceptably general level.'").

152. See *supra* note 62 (examining difficulty of proving damages in FCRA cases).

153. *Soutter*, 498 F. App'x at 266 (Gregory, J., dissenting).

154. *Id.* at 267 (Gregory, J., dissenting) (internal quotation marks omitted).

155. See *id.* (Gregory, J., dissenting) ("CRAs will remain subject to only small individual claims . . . [and] because potential plaintiffs might not be aware of their claims or are otherwise unwilling to pursue such small amounts, it is likely that these claims will go without redress."). As a result of the widespread reluctance to certify such classes, FCRA class actions remain a viable option in an extremely small proportion of cases. See *Ramirez v. Trans Union, LLC*, 301 F.R.D. 408, 416–22 (N.D. Cal. 2014) (certifying class action on behalf of consumers denied credit because Trans Union indicated they potentially matched name on U.S. government watch list). The class was able to achieve certification because the conduct of Trans Union was so egregious as to support no counterargument: Though Trans Union tried to argue the accuracy element of plaintiff's claim should be an individual question rendering class certification inappropriate, Trans Union could not point to a single instance in which a person it had identified as a potential match was, in fact, a match. *Id.* at 422.

D. *Absence of State Enforcement of the FCRA*

As noted above, federal enforcement actions by the FTC have largely failed to enforce the FCRA's key "reasonable procedures" provisions with respect to CRAs.¹⁵⁶ Compounding these problems, SAGs have often failed to supplement this dearth of federal enforcement by exercising their concurrent enforcement powers under the FCRA. To date, the exercise of concurrent enforcement powers by SAGs has not been widely studied,¹⁵⁷ but this Note posits several reasons why SAGs may have been slow to exercise their concurrent enforcement powers under the FCRA.

States have had limited success in enforcing laws against credit reporting agencies since the passage of the FCRA. Prior to the enactment of the FCRA, states had free rein to pass laws regulating the credit reporting industry, though only Oklahoma had done so. After the enactment of the FCRA, states still maintained the ability to enact credit reporting laws which imposed regulations more stringent than those of the FCRA, and many did.¹⁵⁸ However, from 1996 to 2013, when the CFPA was passed, state credit reporting laws were preempted¹⁵⁹ following aggressive lobbying efforts on the part of the credit reporting industry.¹⁶⁰

As a result, SAGs were forced to litigate under the less-consumer-friendly FCRA, with limited success. The last major successful suit against a CRA occurred in 1991, prior to the preemption of relevant state laws, when six SAGs filed suit against the predecessor of Experian for particularly egregious violations of various credit reporting laws and secured a consent decree implementing safe procedures to which nineteen states were joined as parties.¹⁶¹ Since 1996, SAGs have only initiated four actions under the FCRA, a low number given the inefficacy of the private

156. See *supra* section I.B.3 (analyzing FTC enforcement of FCRA).

157. See Totten, *supra* note 85, at 117–18 (acknowledging scholars have not given substantial attention to role of SAGs in concurrent-enforcement regimes).

158. See Epshteyn, *supra* note 124, at 1154 (observing number of states had adopted credit reporting laws providing greater consumer protections than those established by FCRA).

159. *Id.* at 1144, 1154–56 (noting 1996 amendments preempting state law were made permanent in 2003 through FACTA). The CFPA has rolled back preemption of state laws in the arena of consumer protection and established federal regulation as a floor, rather than a ceiling. See generally Totten, *supra* note 85, at 119–28 (surveying history of preempting state consumer protection laws and subsequent reversal through Title X).

160. See Epshteyn, *supra* note 124, at 1154 (explaining credit reporting industry "fought hard for absolute preemption of state laws" and argued patchwork system of conflicting regulations would hurt commerce and consumers).

161. For a description of the factual posture of the case, see *supra* note 113 (describing CRA attempt to brand entire town delinquent on taxes). The FTC joined in the consent decree after the fact. See FTC Staff Report, *supra* note 77, at 108–10 (listing FTC FCRA cases and amusingly describing agency's role in case as "state omnibus, FTC 'me too'").

litigation and the pervasiveness of credit reporting errors. There are several possible reasons why SAGs have not brought suits under the FCRA.¹⁶²

First, despite their negative effects, credit reporting errors have not consistently been an issue of paramount concern in the public consciousness until recent years.¹⁶³ Because SAGs are predominately elected officials responding to the will of their respective electorates, consumers' failure to grasp the gravity of credit reporting errors may have led to a complacency among SAGs in taking enforcement actions except in particularly egregious cases.¹⁶⁴ To the extent credit reporting errors have become progressively important¹⁶⁵ and continue to garner media attention, SAGs are increasingly likely to bring FCRA suits in coming years.

Second, SAG decisions not to bring suit have likely been influenced in part by the difficulty of winning an action under the FCRA. As argued above, it is exceedingly difficult to enforce compliance with the FCRA under the enforcement provisions contained within the Act.¹⁶⁶ Signaling the difficulty of bringing enforcement actions against CRAs under the FCRA, SAGs fought vigorously (albeit unsuccessfully) in favor of allowing the 1996 preemption provisions to expire prior to passage of the Fair and Accurate Credit Transactions Act (FACTA) in 2003.¹⁶⁷ Given that SAGs were forced to continue litigating credit reporting actions within the FCRA frame-

162. See Amy Widman & Prentiss Cox, State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws, 33 *Cardozo L. Rev.* 53, 72-73 (2011) (surveying frequency of SAG concurrent enforcement actions under FCRA and other statutes).

163. In contrast, in recent years, a spate of articles has appeared chronicling the prevalence of credit reporting errors and the implications for American consumers. See, e.g., Morgenson, *supra* note 17 (chronicling proliferation of errors in credit reports); Ann Carns, Millions May Be Affected by Credit Report Errors, *N.Y. Times: Bucks* (Feb. 11, 2013, 11:58 AM), <http://bucks.blogs.nytimes.com/2013/02/11/millions-may-be-affected-by-credit-report-errors> (on file with the *Columbia Law Review*) (chronicling proliferation of errors in credit reports); Editorial, Victimized by Credit Reports, *N.Y. Times* (Feb. 12, 2013), <http://www.nytimes.com/2013/02/13/opinion/victimized-by-credit-reports.html> (on file with the *Columbia Law Review*) (same).

164. See *supra* note 113 (detailing Vermont incident).

165. See O'Brien, *supra* note 13, at 1217 (arguing credit reporting errors are of "paramount importance" given centrality of credit in consumer markets); Rameden, *supra* note 9, at 390 ("Consumer credit plays an ever-increasing role in the national economy . . .").

166. See *supra* sections II.B-II.C (examining difficulty of enforcing FCRA's key provisions against CRAs).

167. See Fair Credit Reporting Act: How It Functions for Consumers and the Economy: Hearing Before the H. Subcomm. on Fin. Instits. & Consumer Credit of the H. Comm. on Fin. Servs., 108th Cong. 12 (2003) (statement of Julie Brill, Assistant Att'y Gen. of Vermont) ("[T]he National Association of Attorneys General urges Congress to allow the limited preemption provision to sunset as originally contemplated."). Brill's testimony suggests attorneys general took this position because they believed the ability to enforce more stringent state laws would better serve the public interest. See *id.* at 11-12 (arguing stronger state credit reporting laws harm neither consumers nor the economy and urging Congress to "[allow] states to serve as laboratories of democracy in this incredibly important area").

work,¹⁶⁸ it seems plausible that SAGs concluded that there were other areas in which they could direct their limited resources with greater success. In any event, SAGs have rarely brought state actions to enforce consumer rights since the passage of the FCRA's preemption provisions in 1996, and in the absence of aggressive federal agency action, the result has been that the key provisions of the FCRA have gone largely unenforced.

III. SOLUTION: STATE ATTORNEY GENERAL ENFORCEMENT OF FEDERAL UDAAP PROVISIONS

In light of the federal government's failure to enforce the FCRA as discussed above, states should reclaim their role in the sphere of credit regulation. However, this Note argues that SAGs should eschew enforcement under the relatively ineffective FCRA in favor of enforcement through the UDAAP provisions propounded in the CFPB.¹⁶⁹ The passage of the CFPB marked a paradigm shift in the role afforded to state actors. Prior to the CFPB (a subset of Dodd-Frank), SAGs played a "peripheral, ad-hoc role in the enforcement of federal consumer financial protection law."¹⁷⁰ Particularly with respect to the FCRA, the grant of enforcement power to SAGs was narrow and remained largely unexercised by states.¹⁷¹ In contrast, Title X of Dodd-Frank gives SAGs the potential to be lead actors.¹⁷²

This argument proceeds in two parts. First, it explains how SAGs can use the UDAAP provisions contained within the CFPB to supplant litigation under the comparatively ineffective FCRA litigation framework. Second, it examines the broader implications of SAG action within the concurrent enforcement framework established by the CFPB, including ways in which SAG actions may interact with the CFPB's regulatory agenda. It concludes that there is an expanded and definite role for SAGs to play in consumer financial protection under the CFPB and that SAGs should embrace this role by applying the CFPB's UDAAP provisions to the conduct of CRAs.

A. *Leveraging the Federal UDAAP Provisions in the Credit Reporting Context*

As a preliminary matter, SAGs have the power to enforce the UDAAP provisions of Title X against credit reporting agencies. The arenas in which SAGs can enforce the UDAAP ban are constricted to some degree by the Act. For instance, Dodd-Frank limits the ability of SAGs to enforce UDAAP

168. See *supra* notes 158–160 and accompanying text (noting preemption provisions were not allowed to sunset and were in continual effect until 2013).

169. 12 U.S.C. § 5552 (2012) (granting SAGs power to enforce CFPB provisions); *id.* § 5536(a)(1)(B) (establishing UDAAP ban).

170. Totten, *supra* note 85, at 130–31.

171. See *id.* at 129–31 (discussing concurrent enforcement regimes prior to Dodd-Frank, including FCRA).

172. *Id.* at 131 (noting SAGs have power to enforce federal law even when CFPB lacks authority).

violations against depository institutions, such as banks.¹⁷³ However, the Act does allow SAGs to directly enforce UDAAP provisions against other “larger participants” in the market for consumer financial products and services without a predicate CFPB rule. The CFPB has defined “larger participants” to include major credit reporting agencies,¹⁷⁴ and as a result, SAGs have gained the ability to apply federal UDAAP laws to CRAs.

On a second level, the new UDAAP provisions contained within Dodd-Frank expand the authority of SAGs to regulate CRAs because the new provisions are significantly broader than their predecessor provisions. The difference between the former UDAP provisions and the new UDAAP is the addition of a new term, “abusive.” The term is a point of some consternation. Many observers have commented on the difficulty of defining the term “abusive” in a manner that does not render it redundant with respect to “unfair” and “deceptive.”¹⁷⁵ Others have voiced concerns that the uncertain and overly broad nature of the term “abusive” will have a chilling effect on transactions potentially subject to the prohibition.¹⁷⁶

However, the practices of credit reporting agencies are an excellent example of an institutional practice that falls outside the scope of previous UDAP laws, but which falls within the scope of the new term, “abusive.” Looking to the first component of UDAAP, “unfair” is defined to include an act or practice that is likely to cause substantial injury to consumers that is not reasonably avoided by consumers, where such substantial injury is not outweighed by countervailing benefits to consumers or competition.¹⁷⁷ The second component of the UDAAP provisions, “deceptive,” is defined to include a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.¹⁷⁸

173. 12 U.S.C. § 5552(a)(2)(A)–(B); see also Totten, *supra* note 85, at 138 (conceding with respect to federal depositories that SAGs are limited to enforcing CFPB regulations, rather than UDAAP provisions).

174. Defining Larger Participants of the Consumer Reporting Market, 77 Fed. Reg. 42,874 (July 20, 2012) (to be codified at 12 C.F.R. pt. 1090).

175. See CFPB Manual, *supra* note 94, pt. II.C, at 9 (acknowledging abusive practice may also be unfair or deceptive); Donald C. Lampe, Nancy Thomas & James Nguyen, Morrison Foerster, *The CFPB & UDAAP: A “Know It When You See It” Standard?*, (June 18, 2014), <http://www.mondaq.com/unitedstates/x/321416/Financial+Services/The+CFPB+UDAAP+A+Know+It+When+You+See+It+Standard> [<http://perma.cc/J5SF-T5L3>] [hereinafter Lampe, UDAAP Standard] (arguing definition of “abusive” is relatively uncertain given lack of defining precedent and regulatory implementation).

176. See John D. Wright, *Dodd-Frank’s “Abusive” Standard: A Call for Certainty*, 8 Berkeley Bus. L.J. 164, 169 (2011) (“Unless the [CFPB] takes early steps to clarify its enforcement intentions and create regulatory safe harbors, the likely consequences of the ‘abusive’ standard . . . could be significantly less financial product innovation[] [and] a reduction in consumer choice . . .”).

177. Dylan J. Castellino, *A Spotlight on Shadow Banking: The CFPB Finalizes Procedures to Supervise Risky Nonbanks*, 18 N.C. Banking Inst. 333, 352 (2014).

178. FTC Policy Statement on Deception (1983), <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception> [<https://perma.cc/YXA4-JSVG>]. The CFPB has in-

The acts and practices of CRAs at issue in this Note likely fall under neither of these provisions, in part because FTC interpretations of “unfair” and “deceptive” have foreclosed the ability to apply these terms in the credit reporting context.¹⁷⁹ FTC interpretations of “deceptive” hinge on “whether an act or practice hinders a consumer’s decision-making” by modifying or withholding material information until after the consumer has committed to purchasing a product.¹⁸⁰ Yet CRAs neither deceive nor mislead the consumer in this sense, because with respect to credit reports, the American public is really not the consumer at all; rather, the consumer is the product, and creditor institutions are the customer.¹⁸¹ Maintenance of a consumer report by a CRA requires neither a predicate action nor reliance on the part of the consumer, and as a result, CRA actions largely fall outside the scope of these terms. Similarly, the “unfairness” provision of previous UDAP laws likely does not afford relief to consumers for much the same reason. Unfairness contemplates that the citizen is acting as the consumer of the product, but with respect to CRAs, the consumer *is* the product.¹⁸² Moreover, UDAP suits under previous law were unlikely to be brought for the additional reason that the FCRA positioned violations of its provisions as per se unfair or deceptive acts or practices subject to FTC enforcement, which, as noted above, was scarce in materializing.

By broadening the scope of the UDAAP terms, Dodd-Frank opens the possibility that an act could fall within the range of the UDAAP prohibition, even if it would otherwise not qualify as a per se unfair or deceptive practice under the FCRA. Congress has defined “abusive” as taking unreasonable advantage of 1) the inability of the consumer to protect the interest of the consumer in selecting or using a consumer financial product or service, or 2) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.¹⁸³

icated it will follow the FTC’s longstanding interpretation of the term. Totten, *supra* note 85, at 132–33.

179. See Theresa A. Gabaldon, *Half-a-Cup Better than None: A Pragmatic Approach to Preventing the Abuse of Financial Consumers*, 81 *Geo. Wash. L. Rev.* 929, 938–39 (2013) (acknowledging read in isolation, “abusive” appears to add little to prevailing UDAP terms but emphasizing “intended contribution” of new term should be informed by historic FTC constructions of extant UDAP terms).

180. *Id.* at 939–40 (internal quotation marks omitted).

181. See *supra* notes 11–19 (describing economic structure of credit reporting industry).

182. See Castellino, *supra* note 177, at 352–53 (explaining question under FTC interpretations is whether consumer has been denied opportunity to compare alternatives “and select the best available option”); Gabaldon, *supra* note 179, at 939–40 (highlighting FTC interpretations of “unfair” rely on predicate assumption that consumer is within relevant market and that markets will be self-correcting so long as consumer choice is preserved). With respect to credit reports, consumers cannot select options, because they cannot impede CRAs from compiling a report. See Wu, *Dispute System*, *supra* note 19, at 2 (discussing implications of positioning consumers as CRA product rather than as primary customers).

183. 12 U.S.C. § 5531(d) (2012).

The practices and procedures of CRAs fall squarely within both prongs of this definition. With respect to the first prong of the definition, consumers cannot protect their interests in their credit reports by selecting or using a product or service because credit reports are not something that consumers can buy or select. If a credit report contains detrimental inaccuracies, the consumers' only options are to rely upon the FCRA's flawed dispute resolution process¹⁸⁴ or to file what is likely to be ineffective suit.¹⁸⁵ With respect to the second prong of the definition, the consumer is constantly forced to act in reasonable reliance on the CRA to act in the consumer's interest, because, as noted above, there is nothing else that a consumer can do. Consumers must either rely on the good faith efforts of CRAs to produce accurate reports or resort to ineffective action under the FCRA.¹⁸⁶

Application of the "abusive" prong of the new UDAAP provisions to CRAs is not only possible, but appropriate as well, in two respects. First, a CRA practice may arguably achieve technical compliance with the FCRA yet still qualify as an "abusive practice" under the UDAAP provisions. The CFPB Supervision and Examination Manual expressly affirms the ability of the CFPB to prosecute as UDAAP violations practices which are in technical compliance with preexisting federal laws.¹⁸⁷ Second, the CFPB has indicated a preference for ensuring compliance with the UDAAP ban through enforcement actions, rather than rulemaking.¹⁸⁸ Insofar as SAG action with respect to the UDAAP prohibition is limited to enforcement, rather than rulemaking, this policy choice preserves a role for SAGs in applying the UDAAP provision to CRAs.

184. See *supra* section II.B.1 (assessing problems with dispute resolution system).

185. See *supra* section II.B.2 (surveying difficulties of successful private enforcement of FCRA claims).

186. Setting aside the theoretical applicability of federal UDAAP provisions to CRAs, it appears at least one SAG has already filed suit against CRAs using Title X's UDAAP provisions. In the summer of 2014, Mississippi Attorney General Jim Hood brought suit against Experian alleging the CRA's practices amounted to widespread violations of both state and federal laws. See Complaint, Mississippi *ex rel.* Jim Hood v. Experian Info. Sols., Inc., No. 14-1212(4) (Miss. Ch. May 16, 2014) (on file with the *Columbia Law Review*). The suit appears to be the first reported major governmental suit against a CRA in recent years and seeks various remedies available under section 1055 of Dodd-Frank but not under the FCRA or Mississippi's consumer protection laws. See Alan S. Kaplinsky, Another State AG Files Lawsuit Using Dodd-Frank Authority, CFPB Monitor (June 18, 2014), <http://www.cfpbmonitor.com/2014/06/18/another-state-ag-files-lawsuit-using-dodd-frank-authority/> [<http://perma.cc/2FNU-XWH3>] (reporting on Mississippi Attorney General's action against Experian). While it is unclear if Mr. Hood was attempting to allege that Experian's practices were abusive, in contrast to unfair or deceptive, this Note argues that he would be justified in doing so.

187. CFPB Manual, *supra* note 94, pt. II.C, at 10.

188. See UDAAP: The Most Dangerous Weapon in the CFPB's Arsenal Computer Servs., Inc. (Nov. 7, 2012), <http://www.csiweb.com/resources/blog/post/2013/11/07/udaap-the-most-dangerous-weapon-in-the-cfpb's-arsenal> [<https://perma.cc/BA2S-TALX>] (noting CFPB has indicated general intention to eschew rulemaking in UDAAP context in favor of enforcement on case-by-case basis).

Moreover, the CFPB's testimony on the scope of "abusive" further buttresses the conclusion that application of the term to CRAs would be appropriate. In testifying before Congress, CFPB Director Richard Cordray has given the only official guidance on the CFPB's planned use of the term.¹⁸⁹ Cordray defined an abusive practice as one in which a business takes "unreasonable advantage of people in certain different circumstances, one of which is that they aren't in that market, they don't have an opportunity to choose their provider, so they can't shop, they can't leave, and there are markets that are marked by that."¹⁹⁰ Cordray's description of a market segment vulnerable to abusive practices precisely encapsulates the position of consumers within the credit reporting infrastructure because consumers do not comprise the primary revenue source for CRAs and cannot remove themselves from the market by limiting dispersal of their credit reports. Cordray goes on to specifically reference the mortgage servicing market as an example of a market prone to abusive practices.¹⁹¹ This reference is particularly telling, given that in other places, commentators have explicitly drawn parallels between the structuring of economic incentives in the credit reporting industry and that of the mortgage servicing market.¹⁹²

B. *A Broader View of SAGs Within Dodd-Frank's Concurrent Enforcement Scheme*

Aside from the issue of whether it is possible for SAGs to regulate CRAs through the UDAAP provisions of the CFPB, the question remains whether it is appropriate for SAGs to take on such a role within the context of the new concurrent enforcement regime established by Title X of Dodd-Frank. Even given the feasibility of SAG enforcement of the UDAAP ban against CRAs, it remains possible that regulation through another of Title X's regulatory mechanisms might prove to be a superior alternative.

189. How Will the CFPB Function Under Richard Cordray: Hearing before the Subcomm. on TARP, Fin. Servs. & Bailouts of Pub. & Private Programs of the H. Comm. on Oversight & Gov't Reform, 112 Cong. 19–33 (Jan. 24, 2012) (statement of Richard Cordray, Director, Consumer Financial Protection Bureau).

190. *Id.* at 69. Cordray further explained that "[i]f the party were to take unreasonable advantage of the fact that you are sort of at their mercy . . . that could be a realm where you could have abusive practices." *Id.* at 70.

191. *Id.*

192. See Morgenson, *supra* note 17 ("The problems with [the credit reporting] business model are identical to those of mortgage loan servicers, an industry that ran roughshod over borrowers for years and where companies have paid billions in regulatory penalties."); Peter Swire, Ctr. for Am. Progress, What the Fair Credit Reporting Act Should Teach Us About Mortgage Servicing (Jan. 18, 2011), <http://www.americanprogress.org/issues/housing/report/2011/01/18/8867/what-the-fair-credit-reporting-act-should-teach-us-about-mortgage-servicing/> [<https://perma.cc/ESR7-X3PJ>] (arguing strong parallels exist between credit reporting markets and mortgage servicing markets insofar as both markets are characterized by "misaligned incentives" leading to market failures and "systematic[] disadvantage[s]" for consumers (internal quotation marks omitted)).

This Part argues that SAG regulation of the credit reporting industry through the UDAAP provisions of the CFPB would be a welcome development, and proceeds in two parts. First, it will address the practical implications of enforcing the UDAAP ban against CRAs within the dual-enforcement regime established by the CFPB. Second, and more broadly, it will address the normative arguments in favor of SAG regulation within the UDAAP provisions, concluding that there are tangible benefits to SAG application of the UDAAP provisions to the credit reporting industry.

1. *Practical Implications of Concurrent Jurisdiction over CRAs.* — As a result of the expansive role envisioned by Congress for SAGs within Title X's dual-enforcement scheme, there are few restrictions on the ability of SAGs to levy enforcement actions against CRAs. When filing enforcement actions under Title X, SAGs are required to give prior notice to the CFPB.¹⁹³ The CFPB also retains rights of intervention and removal with respect to any state enforcement action.¹⁹⁴ Neither of these provisions prevents SAGs from catalyzing enforcement of the credit reporting industry through application of the UDAAP provisions to CRAs, and in any case, SAGs may be well-advised to consult with the CFPB prior to bringing enforcement actions, given resources the agency can bring to bear in investigating potential violations.¹⁹⁵

There also exists an additional alternative to SAG or CFPB enforcement actions of the UDAAP provisions against CRAs. Under § 5512, the CFPB retains the power to engage in substantive rulemaking under the UDAAP provisions. In effect, this power allows the CFPB to define with greater precision which practices constitute UDAAP violations under Title X. While rulemaking may seem to offer a more efficient means of regulating CRAs than enforcement actions, there are at least two reasons why the possibility of CFPB rulemaking does not foreclose a role for SAG enforcement of the UDAAP provisions against CRAs. First, the CFPB has expressly indicated a preference for enforcing the UDAAP provisions through enforcement actions, rather than through explicit rulemaking.¹⁹⁶ Second, as addressed below, there are significant normative arguments in favor of SAG enforcement actions under Title X.¹⁹⁷

2. *Normative Considerations of Concurrent Enforcement over CRAs.* — In spite of the regulatory overlap between SAGs and the CFPB, there are strong normative arguments in favor of active SAG application of the federal UDAAP ban to the credit reporting industry. For a variety of reasons, fed-

193. 12 U.S.C. § 5552(b)(1) (2012).

194. *Id.* § 5552(b)(2).

195. See Totten, *supra* note 85, at 155 (noting CFPB has significantly broader investigatory powers than states and concluding “attorneys general may find that the CFPB offers invaluable federal resources that states lack”).

196. See Lampe, UDAAP Standard, *supra* note 175 (noting CFPB preference of administering UDAAP ban through enforcement actions).

197. See *infra* section III.B.2 (setting forth normative arguments in favor of SAG enforcement role).

eral actors may be hesitant or sluggish in leveraging the UDAAP provisions to compensate for inadequacies in the FCRA enforcement scheme,¹⁹⁸ and to the extent this occurs, SAGs are well positioned to fill the regulatory void that results. Moreover, even absent federal inaction, a number of considerations counsel in favor of active SAG enforcement of the UDAAP ban against CRAs.

For one, the dual-enforcement regime established by Title X is characterized by significant regulatory overlap, which may function to impede effective regulatory oversight. William Buzbee has posited that substantial regulatory overlap has the potential to create regulatory voids in federal enforcement structures.¹⁹⁹ This possibility is acute in the context of federal regulation of the credit reporting industry, given that the FTC and the CFPB continue to share enforcement responsibilities with respect to the credit reporting industry.²⁰⁰ To the extent that regulatory overlap between the FTC and the CFPB results in regulatory inertia, SAG enforcement may function to catalyze federal action and encourage innovation in regulatory design.²⁰¹

In addition, despite the structural characteristics of the CFPB intended to render the agency resistant to agency capture and undue congressional influence, there still exists a not-insignificant possibility that the CFPB may fall prey to some degree of agency capture.²⁰² Agency attorneys wishing to enter the private sector subsequent to government employment may have suboptimal enforcement incentives.²⁰³ In other instances, the political motivations and ideologies of high-level appointees to the CFPB may act to inhibit active regulation by the agency.²⁰⁴

198. See Totten, *supra* note 85, at 168 (arguing SAG enforcement may be necessary to check agency capture and inaction resulting from resource allocation decisions or bureaucratic delay).

199. See William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 *Iowa L. Rev.* 1, 5 (2003) (arguing “regulatory commons problem” may materialize when agency jurisdiction overlaps as a result of “political economic incentives”).

200. See Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 *U. Chi. Legal Forum* 329, 337 (“The CFPB and the FTC share regulatory enforcement over non-depository consumer financial product providers [and consequently] [t]he CFPB must consult with the FTC in defining respective jurisdiction.” (footnote omitted)).

201. See Robert B. Ahdieh, *Dialectical Regulation*, 38 *Conn. L. Rev.* 863, 882–83, 890 (2006) (arguing regulatory overlap may help overcome regulatory inertia); see also *infra* notes 215–217 (examining role of SAGs in catalyzing action by federal agencies).

202. See Totten, *supra* note 85, at 173–74 (arguing CFPB remains susceptible to agency capture despite structural mechanisms designed to insulate agency).

203. See Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 *Geo. Wash. L. Rev.* 1105, 1115–18 (1995) (“Agency attorneys who plan to go into private practice have strong incentives to ‘sell out’ their agencies in order to curry favor with private-sector attorneys.”).

204. See Lemos, *supra* note 57, at 724 (noting high-ranking agency policymakers tend to be characterized by prior political loyalties and philosophical commitments which may run counter to agency’s mission and concluding “[p]olitical appointees often carry marching orders to do less, not more”).

If CFPB enforcement is slow in coming, SAGs will have an important role to play in energizing and supplementing federal regulation. Even prior to the establishment of Dodd-Frank's dual-enforcement regime, SAGs were often instrumental in compensating for shortcomings in federal enforcement. A notable historical example is the role played by Eliot Spitzer in supplementing Securities Exchange Commission (SEC) enforcement in the late 1990s. Margaret Lemos has observed that New York's involvement in SEC suits under Spitzer resulted in significant increases in the outcomes of settlement negotiations with firms accused of trading violations.²⁰⁵ A study by Eric Zitzewitz subsequently concluded that the increase in settlements resulted not from New York joining cases destined for large settlements, but from the fact that the New York AG's office was significantly more aggressive in settlement negotiations than the SEC.²⁰⁶ Insofar as the regulatory overlap created by Title X makes regulatory capture more difficult,²⁰⁷ SAGs will continue to play a critical role in supplementing federal enforcement efforts.²⁰⁸

Independent of regulatory capture concerns, SAG enforcement offers a number of benefits within the context of a dual-enforcement regime. Because the majority of SAGs are elected officials, they may be significantly more likely to initiate risky or unique reforms than unelected agency officials.²⁰⁹ Given the broad authority available to SAGs under Title X,²¹⁰ SAGs are uniquely positioned to "pursue far-reaching policy initiatives through their enforcement efforts."²¹¹ In this vein, Roderick Hills has argued that state officials such as attorneys general are uniquely positioned to act within dual-enforcement regimes as "natural policy entrepreneurs who can significantly influence what sorts of conditions are publicly

205. See *id.* at 726 (observing Spitzer's involvement in SEC negotiations increased ratio of restitution-to-harm by factor of ten (citing Eric W. Zitzewitz, *Prosecutorial Discretion in Mutual Fund Settlement Negotiations 2003–7*, 9 *Berkeley Electronic J. Econ. Analysis & Pol'y* 1 (2009))).

206. Zitzewitz, *supra* note 205, at 34–35 (2009). Zitzewitz concluded that his results supported the idea that career concerns of SEC staff members may have led the agency to take pro-industry positions in negotiations. *Id.* at 35.

207. See Lawrence G. Baxter, *Capture Nuances in Financial Regulation*, 47 *Wake Forest L. Rev.* 537, 539 (2012) (assessing plausibility of single interest group managing to effect capture of multiple regulators with divergent agendas).

208. See Lemos, *supra* note 57, at 702 (arguing state enforcement offers "hedge against the possibility that federal agencies will abdicate on enforcement due to capture, bureaucratic pathologies, [or] political influence").

209. *Id.* at 724 ("[E]lected generalists [such as attorneys general] are more likely than appointed policy specialists to take risks or initiate major reforms.").

210. See Totten, *supra* note 85, at 171 (noting SAGs enjoy broader jurisdiction to enforce consumer financial protection law than any single agency).

211. See Lemos, *supra* note 57, at 724–25, 741 ("[S]tates' enforcement efforts may have nationwide consequences because . . . [o]ne state's aggressive enforcement can prompt potential defendants to change their practices across the board.").

recognized as problems.”²¹² Spitzer again presents an excellent example of the ability of SAGs to positively influence the federal regulatory agenda. In 1999, Spitzer sued coal plants in a number of states under an untested provision of the Clean Air Act.²¹³ Six weeks later, the Environmental Protection Agency (EPA) leveraged Spitzer’s novel legal theory to launch an “unprecedented enforcement initiative” against over 100 plants.²¹⁴

SAGs have the potential to similarly catalyze effective regulation of the credit reporting industry by applying the federal UDAAP ban to CRAs.²¹⁵ By testing the application of federal UDAAP provisions to national CRAs, SAGs can and should take a leadership role in applying federal consumer protection standards under Dodd-Frank’s dual-enforcement regime.²¹⁶ As a function of the elected nature of most SAG offices, SAGs have the proper incentives to supplement federal enforcement efforts where deficient,²¹⁷ and in addition, such enforcement efforts present the added benefit of increased democratic accountability in comparison to agency action.²¹⁸ Fortuitously, they are particularly well positioned to help catalyze regulation of the credit reporting industry through the application of UDAAP standards to CRAs.²¹⁹

The ability of SAGs to function as independent actors within Title X’s concurrent enforcement framework does not mean that SAGs should eschew cooperation with federal actors in enforcing the federal UDAAP ban against CRAs. To the contrary, states can embrace “both a cooperative and competitive role” within Title X’s concurrent enforcement re-

212. See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. Rev. 1, 21 (2007) (contrasting incentives of agency bureaucrats with those of elected state politicians); Totten, *supra* note 85, at 169 (“[T]he ability to set a policy and argue for it in court is an opportunity to shape the meaning of federal law in the absence of agency rulemaking.”).

213. See Lemos, *supra* note 57, at 743–44 (expanding on Spitzer’s Clean Air Act enforcement action).

214. *Id.* (internal quotation marks omitted).

215. See *id.* at 741 (arguing state enforcement “may have wide-ranging effects when state practices prompt a shift in enforcement by federal agencies” and pointing to state influence on FTC decision to reconsider approach to antitrust violations as one example).

216. See *id.* at 737 (“States can influence policy by adjusting the level of enforcement and by pressing novel interpretations of federal law.”).

217. See *id.* at 702 (“[A]ttorneys general have . . . political incentives to challenge federal orthodoxy.”).

218. See Totten, *supra* note 85, at 169 (arguing SAG enforcement of UDAAP ban promotes democratic values).

219. See *id.* at 170. Totten elaborates that

[s]tate attorneys general create a new line of accountability for the executive branch vis-à-vis Congress, as they step in to argue that a federal agency is not following the will of Congress[,] [and in this vein] Title X’s UDAAP ban, and in particular its inclusion of “abusive” along with a statutory definition, is an obvious place where states might play this role.

Id.

gime.²²⁰ SAGs can leverage significant advantages through cooperation with the CFPB, particularly with respect to the agency's superior resource advantages and expertise, and to the extent cooperation is forthcoming, it should be welcomed.²²¹ However, in devising Dodd-Frank's dual-enforcement mechanism Congress empowered states to play a lead role in consumer protection "even when they lack a strong federal partner,"²²² and state attorneys general should affirmatively embrace this responsibility.

CONCLUSION

In allowing state and federal actors latitude to apply the federal UDAAP provisions to conduct insufficiently regulated by existing consumer protection laws, Congress gave government actors a powerful tool to remedy inadequacies in existing consumer protection laws. As this Note argues, the existing scheme of credit industry regulation under the FCRA is plagued by just such inadequacies. Given the pervasive presence of errors in the credit reporting system and the ineffective nature of enforcement under the FCRA, SAGs and the CFPB should affirmatively embrace enforcement through the federal UDAAP provisions as a means of ensuring that CRAs maintain proper levels of accuracy within the credit reporting industry.

220. *Id.* at 161.

221. See *id.* at 164 (arguing SAGs may benefit from engagement with CFPB, though Title X only requires them to give notice); see also 12 U.S.C. § 5552(b)(1) (2012) (setting forth notice requirement).

222. Totten, *supra* note 85, at 158.