Nos. 06-84 & 06-100

In the Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, et al.,
Petitioners,

v.

CHARLES BURR, et al.,
Respondents.

GEICO GENERAL INSURANCE COMPANY, et al.,
Petitioners,

v.

AJENE EDO,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR *AMICUS CURIAE* TRANS UNION LLC IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

With the consent of all parties[1] *amicus curiae*, Trans Union LLC ("Trans Union"), submits it brief in support of petitioners Safeco Insurance Company of America, *et al.* and GEICO General Insurance Company, *et al.* ("Petitioners").

Trans Union is a Delaware limited liability company with businesses that operate as a "consumer reporting agency," as that term is defined under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"), and which is more commonly known as a credit bureau. Trans Union's consumer reporting database contains approximately 3.7 billion items of information, associated with approximately 200 million consumers throughout the United States. These items consist of "tradelines" from credit grantors ("tradeline" is an industry term for the current and historical activities of a particular consumer's account with a particular credit grantor), and public record items from public records sources. Each month, Trans Union receives over 2 billion updates/additions to the items in its database. These updates come from approximately 85,000 different sources (called "furnishers"), including banks, credit card companies, mortgage companies, collection agencies, and other financial institutions. *See, e.g.*, *Benson v. Trans Union, LLC*, 387 F. Supp. 2d 834, 841 (N.D. Ill. 2005) (noting vast scale of information received and processed by Trans Union).

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[1] Letters from petitioners and respondents memorializing the consent to the filing of *amicus curiae* briefs by any entity have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made any monetary contribution to the preparation or submission of this brief.

Trans Union, Equifax Information Services, LLC, and Experian Information Solutions, Inc.—the nation's three largest "consumer reporting agencies," or CRA's, as that term is defined in the FCRA, 15 U.S.C. § 1681a(f)—collectively issue more than 1 billion consumer reports to third parties each year, and issued 57.4 million file disclosures to consumers in 2003. FTC & Bd. of Governors of the Fed. Reserve Sys., *Rep. to Cong. on the Fair Credit Reporting Act Dispute Process*, at 2-3 (Aug. 2006) (citations omitted).[2]

Trans Union maintains files on residents of all 50 States, and employs procedures which apply across its national operations. Trans Union has approximately 4,000 employees.

Trans Union submits this brief in support of the Petitioners because the consumer credit reporting activities of Trans Union are extensively regulated by the FCRA. Moreover, because the FCRA is directed primarily at regulating CRA's, and not their clients (like the Petitioners here), the Ninth Circuit's erroneous ruling as to the standard for establishing a "willful" violation of the FCRA, 15 U.S.C. § 1681n, greatly impacts Trans Union. Finally, Trans Union respectfully submits that consideration of the unique statutory scheme which imposes duties on CRA's will further demonstrate the error of the Ninth Circuit's ruling on the issue.

The Petitioners collectively raise two issues. The arguably more narrow issue involves review of the Ninth Circuit's determination that certain uses, and the consequences of those uses, of consumer credit data by personal lines insurers constitute "adverse action," as that term is defined in the FCRA, thereby triggering the insurers' duty to provide adverse-action notices under 15

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[2] Available at <http://www.ftc.gov/os/comments/fcradispute/P044808fcradisputeprocessreporttocongress.pdf>.

U.S.C. § 1681m. The obligation on users of "consumer report" information to provide adverse-action notices is one of the few significant duties imposed on customers of CRA's. *See generally* 15 U.S.C. § 1681m ("Requirements on users of consumer reports"). Notably, by the 2003 amendments to the FCRA, Congress eliminated the private right of action to bring claims for violations of Section 1681m, such as the failure to provide adverse-action notices. *See* 15 U.S.C. § 1681m(h)(8)(A); *Perry v. First Nat'l Bank*, 459 F.3d 816, 823 (7th Cir. 2006).

The larger issue, and one which more directly impacts Trans Union and other CRA's, is the Ninth Circuit's ruling, in conflict with the holdings of other Circuits that have considered the issue, that a defendant can be found to have "willfully" violated the FCRA where it relies upon what is later viewed to be an "unreasonable" interpretation of the statute. *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006). Given the impact on Trans Union if the Ninth Circuit's ruling were to be upheld, Trans Union respectfully submits this brief to offer a perspective on the statute that the parties likely will not offer.

As originally enacted, the regulatory focus of the FCRA was on CRA's like Trans Union. As part of its legislative findings, Congress noted that "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(3). Congress further expressly stated that the purpose of the FCRA was "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce . . . in a manner which is fair and equitable to the consumer." 15 U.S.C. § 1681(b). Much more recent amendments to the FCRA have imposed certain duties on data furnishers and users of data reported by credit bureaus and other CRA's. Nonetheless, the statute

remains primarily focused on regulating the business operations of CRA's.

The FCRA also permits consumers to sue CRA's for the violation of "any requirement imposed under" the FCRA. 15 U.S.C. §§ 1681n(a), 1681o(a). Where a CRA has been "negligent in failing to comply with any requirement," the FCRA expressly provides for an award of "any actual damages sustained by the consumer as a result of the failure," as well as an award of attorneys' fees. § 1681o(a). Where a CRA is found to have "willfully" violated "any" of its statutory duties, it is liable for "actual damages" or, alternatively, "damages of not less than $100 and not more $1,000," and punitive damages, as well as attorneys' fees. § 1681n(a). These remedial provisions, which arguably guarantee a minimum recovery of up to $1,000 for "any" willful violation of the FCRA and attorneys' fees, have encouraged plaintiffs, and their lawyers, to bring claims for willful violations of the FCRA on behalf of putative classes. *See* David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931, 931 (2006) (noting "proliferation of class action lawsuits" brought under FCRA in recent years).[3]

The possible "crushing liability" engendered by this remedial statutory scheme was noted by Justice Kennedy (and joined by Justice O'Connor) in their dissent to this Court's denial of certiorari in *Trans Union LLC v. FTC*, 536 U.S. 915, 917 (2002). There, Justice Kennedy questioned the District of Columbia Circuit's rejection of the First Amendment challenge to the Federal Trade Commission ("FTC") decision that Trans Union's target marketing lists constituted "consumer reports" subject to the full panoply of duties imposed by the FCRA. *Id.* at

[3] The statute does not expressly provide for class action prosecution of FCRA violations, and therefore does not contain a cap on class action liability.

916. Justice Kennedy's opinion also underscores the problems associated with implementing the provisions of the FCRA when he noted that the FTC's interpretation of the statute at issue was "nonsensical." *Id.* at 917. Justice Kennedy also noted the "important practical implications" of the FTC ruling, in light of the "series of class actions" purportedly brought on behalf of 190 million individuals: "Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion . . . The company's demise will have adverse effects on both the national economy and petitioner's thousands of employees." *Id*.

SUMMARY OF ARGUMENT

This Court should reverse the court of appeals' decision which blurs the differing "state of mind" requirements in the civil liability provisions of the FCRA, and which ignores the statutory scheme as a whole. Although the particular claims at issue here involve the obligations of users of FCRA information to advise consumers of "adverse action," the FCRA primarily regulates "consumer reporting agencies" like Trans Union. Therefore, as this Court has previously noted, comprehensive regulatory statutes like the FCRA must be interpreted in harmony with the overall regulatory scheme, and its focus on CRA's.

The FCRA requires credit bureaus like Trans Union to implement balanced procedures which, on the one hand, will facilitate consumer credit and other transactions for which CRA's have a "vital role" while, on the other hand, being "fair and equitable" to the consumer. Given the volume, and the computerized and electronic nature, of those transactions, the procedures employed by CRA's are necessarily implemented by computerized algorithms and other complex business processes. Further complicating the challenge of devising

uniform, nationwide procedures which comply with the numerous mandates of the FCRA is the inherent vagueness of much of the statutory language. Both the FTC, by its informal efforts to provide guidance (despite its lack of rulemaking authority), and Congress, by its express statements and its efforts to clarify the statute by later amendments, have noted the inherent (and perhaps unavoidable) vagueness of the FCRA.

Consistent with these practical realities which CRA's face and the legislative directive to balance the needs of commerce with consumer protection goals, the statute does not impose strict liability on CRA's for any particular transaction which results in an error or the mis-delivery of a consumer report. Only when a CRA is put on notice of a reported inaccuracy that is not later remedied is it subject to liability for a negligent violation of the FCRA under 15 U.S.C. § 1681o. Similarly, only when a CRA has received information inconsistent with the statutory "reason to believe" that a credit bureau customer has a permissible purpose to receive "consumer report" information is the CRA subject to liability under Section 1681o.

Therefore, the Ninth Circuit's ruling that defendants can be subject to statutory damages of $100 to $1,000 and punitive damages for procedures resulting from an "unreasonable" interpretation of the statute, *Reynolds*, 435 F.3d at 1099, is inconsistent with the statutory scheme as a whole. This Court should adopt the rulings of other appellate courts which have considered the issue, and which have held that liability for willful violations under Section 1681n. is appropriate only where the defendant knowingly violated the FCRA.

ARGUMENT

I. The Credit Bureau Industry Faces the Challenge of Establishing Uniform Nationwide Procedures which Comply with Numerous and Often Vague Duties Imposed on Consumer Reporting Agencies under the FCRA.

A. The FCRA requires CRA's to implement procedures which balance the competing statutory goals.

The FCRA is directed primarily at CRA's—not entities like the Petitioner insurance companies, which are users of consumer reports—and imposes both general and specific duties on CRA's to create and implement reasonable procedures. Indeed, as part of the "Congressional findings and statement of purpose," Congress expressly stated that the purpose of the FCRA was to require CRA's to adopt reasonable procedures which balance the needs of commerce with the rights of consumers:

> It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

15 U.S.C. § 1681(b).

Consistent with 15 U.S.C. § 1681(b), the FCRA contains general directives to CRA's to implement "procedures" which will serve the general statutory goals enumerated by the FCRA. A primary goal of the FCRA is to maximize the accuracy of the information reported by CRA's to its customers. *See* 15 U.S.C. § 1681(b). The FCRA imposes a general duty on CRA's to "follow reasonable procedures to assure maximum possible accuracy" of the information delivered in "consumer reports" subject to the FCRA. § 1681e(b). To serve the goals of "confidentiality" and "proper utilization" of information furnished by CRA's—in other words, privacy—the statute similarly requires CRA's maintain "reasonable procedures" designed "to limit the furnishing of consumer reports" to the permissible purposes listed in the FCRA. 15 U.S.C. § 1681e(a), *citing* § 1681b.

The Congressionally-required balancing of the needs of commerce with the rights of consumers means that CRA's must establish procedures that will efficiently facilitate transactions in which accurate and relevant consumer information is delivered only to entities which will use that information to establish a consumer's eligibility for credit, insurance, or employment. *See, e.g., Washington v. CSC Credit Servs.*, 199 F.3d 263, 266-67 (5th Cir. 2000) (reasonable procedures must balance needs of commerce with interests of consumers); *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972-73 (7th Cir. 2004) (more extensive procedures to verify the accuracy of information from reliable sources would result in increased cost to consumers), *citing Henson v. CSC Credit Servs.*, 29 F.3d 280, 285 (7th Cir. 1994). The FCRA, however, provides no guidance on how to properly balance these important interests in creating "reasonable procedures." 15 U.S.C. § 1681e(b).

Even when the FCRA provides some detail about the procedures that CRA's must employ, it leaves the

ultimate decision-making based on those procedures to the judgment of the CRA's. For example, the FCRA requires that CRA's conduct a "reasonable reinvestigation" of any information disputed by a consumer. 15 U.S.C. § 1681i(a)(1)(A). The FCRA provides some details about the required reinvestigation: a CRA must complete the reinvestigation within 30 days, § 1681i(a)(1)(A); it must convey the dispute to the furnisher of the disputed information within five days of receiving the dispute, § 1681i(a)(2)(A); it must either delete or modify any "inaccurate or incomplete" information based on the furnisher's response and any information submitted by the consumer, § 1681i(a)(5)(A); and it must notify the consumer of the results of the reinvestigation within five days of the completion of the reinvestigation, § 1681i(a)(6)(A).

Despite these details, however, the FCRA requires a CRA to use its judgment and discretion when reinvestigating disputed information. The FCRA ultimately places the duty to compare the separate information received from the consumer and the data furnisher and determine the accuracy of the information "squarely on" the CRA. *Stevenson v. TRW, Inc.*, 987 F.2d 288, 293 (5th Cir. 1993) ("In a reinvestigation of the accuracy of credit reports, a credit bureau must bear some responsibility for evaluating the accuracy of information obtained from subscribers."). As a first step, the CRA must determine what information the consumer is disputing. It must then decide what constitutes "all relevant information" that it must send to the source of the information, 15 U.S.C. § 1681i(a)(2)(A); evaluate whether the dispute is "Frivolous or Irrelevant," § 1681i(a)(3); and "review and consider all relevant information submitted by the consumer," § 1681i(a)(4). While the furnisher is required to provide information to the CRA as part of the reinvestigation, the CRA cannot simply rely on the information received from the furnisher

in response to the dispute, and may even be required to conduct an independent investigation. *See Henson*, 29 F.3d at 286-87 (to determine whether it has duty to go beyond the information provided by the furnisher, CRA must balance cost of verifying furnisher's information with possible harm to the consumer); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 225 (3rd Cir. 1997) (CRA cannot fulfill reinvestigation duties by "merely parroting information received from other sources"). Ultimately, the CRA must reconcile often conflicting information from consumers and data furnishers and determine the "appropriate" modification for any information that the CRA determines is inaccurate or incomplete. 15 U.S.C. § 1681i(a)(5)(A).

B. The "procedures" mandated by the FCRA are computerized algorithms and other business processes which must facilitate millions of real-time transactions.

Given the volume of information handled by CRA's, as well as certain specific mandates of the FCRA, the procedures implemented by CRA's must be automated.[4] Accordingly, CRA's, like Trans Union, have established computerized algorithms, business processes, and other procedures which must, in essence, apply Trans Union's interpretations of the FCRA to the delivery of hundreds of millions "consumer reports" each year.

For example, to comply with the mandate of 15 U.S.C. § 1681e(b) to ensure the accuracy of consumer reports, Trans Union's "procedures include collecting and storing individuals' names, addresses, social security

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[4] Automation serves the interests of commerce by providing affordable access to accurate, timely consumer credit information, which allows credit grantors to make better decisions.

numbers and birthdates, and then linking that information to individual 'trade lines of credit,' which are in turn compiled to generate credit reports." *Benson*, 387 F. Supp. 2d at 841. Only an automated process could perform these database-building activities with 2 billion/updates additions received from 85,000 data furnishers each month. *See id.*

To serve the statutory goal of only providing consumer reports for permissible purposes, and to provide the proper consumer's report, Trans Union designed and employs sophisticated computerized algorithms which match inquiry information from potential creditors to the consumer information in Trans Union's database. The match logic of these algorithms compares, on a real-time basis, the identifying information submitted by a potential creditor (*i.e.*, name, address, social security number, date of birth) and identifies the existing consumer credit files with similar identifying information to determine what electronic data relates to the consumer applying for credit. *See Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056, 1062 (C.D. Cal. 1998) (describing Trans Union's proprietary procedures for selecting consumer files), *rev'd on other grounds*, 532 U.S. 902 (2001), *and aff'd in part, rev'd in part*, 289 F.3d 600 (9th Cir. 2001); *see also Crabill v Trans Union, L.L.C.*, 259 F.3d 662, 663-64 (7th Cir. 2001) (describing Trans Union's computer programs which select the correct consumer's information).

Indeed, the FCRA mandates automated procedures. The FCRA requires nationwide CRA's, like Trans Union, to provide an automated system to allow furnishers of consumer credit information to report the results of dispute investigations. 15 U.S.C. § 1681i(a)(5)(D). More than 83% of consumer disputes are currently processed electronically, and all disputes will be processed electronically in the future. FTC & Bd. of

Governors of the Fed. Reserve Sys., *Rep. to Cong. on the Fair Credit Reporting Act Dispute Process*, at 15-16 (citations omitted). The FCRA also mandates that "Nationwide Consumer Reporting Agencies" establish an automated "centralized source" to provide consumers with their free annual credit reports. 15 U.S.C. § 1681j(a).

C. The duties imposed on CRA's are vague.

The language of the FCRA which governs the conduct of CRA's is inherently vague. This fact further complicates the efforts of CRA's to establish uniform nationwide procedures which comply with the statute.

The Congress that passed the FCRA recognized the statute's essential vagueness. *See* 116 Cong. Rec. 36574-76 (Oct. 13, 1970). One congressman, who supported the bill, admitted that "there is considerable confusion about how this bill will be interpreted. The definitions are so vague that no one is certain what is included as a consumer credit report.'" *Id*. at 36576 (remarks of Rep. Brown). Another lamented that "[i]t really is unfortunate that we must legislate in such a manner that leaves so many questions unanswered." *Id*. at 36575 (remarks of Rep. Wylie).

The uncertainty surrounding the meaning of the FCRA is illustrated by the varying interpretations given to the single most fundamental provision of the FCRA: 15 U.S.C. § 1681a(d). This provision defines the term "consumer report," which is the statutory term for the information subject to the FCRA. Knowing what is and is not a "consumer report" is the cornerstone of CRA's efforts to comply with the statute as there is no liability under the FCRA for disclosing information that is not a statutory "consumer report." Conversely, information that is a "consumer report" is subject to the full panoply of duties and rights created by the statute.

The FCRA defines a "consumer report," in part, as:

> any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expect to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for –
>
> (a) credit or insurance to be used primarily for personal, family, or household purposes;
>
> (b) employment purposes; or
>
> (c) any other purpose authorized under section 1681b of this title.

15 U.S.C. § 1681a(d)(1).[5]

As the Seventh Circuit has noted, by referencing the purposes for which a "consumer report" can be disclosed under 15 U.S.C. § 1681b, this definition of "consumer report" is circular. *Ippolito v. WNS, Inc.*, 864 F.2d 440, 449 n.10 (7th Cir. 1988). In addition, the FCRA

[5] The partial quotation from the statutory definition does not include the exclusions from the definition, many of which are counterintuitive. For example, under § 1681a(d)(2)(A)(iii), information that is a "consumer report" ceases to be a consumer report if it is communicated among corporate affiliates and the consumer has been given notice and the opportunity to prevent the communication. 15 U.S.C. § 1681a(d)(2)(A)(iii).

limits the definition of "consumer report" to only communication of information by a "consumer reporting agency," 15 U.S.C. § 1681a(d), but then defines "consumer reporting agency" as an entity that collects information "for the purpose of furnishing consumer reports," § 1681a(f).

Not surprisingly, courts have struggled to interpret the term "consumer report." Some courts found that information was not a "consumer report" unless the end-user of the information used it for a purpose specified by the FCRA, such as granting credit. *See Hovater v. Equifax, Inc.*, 823 F.2d 413, 417 (11th Cir. 1987); *Houghton v. New Jersey Manu. Ins. Co.*, 795 F.2d 1144, 1148 (3d Cir. 1986); *Cochran v Metropolitan Life Ins. Co.*, 472 F. Supp. 827, 831 (N.D. Ga. 1979); *Henry v. Forbes*, 433 F. Supp. 5, 9-10 (D. Minn. 1976). Other courts reached a different conclusion, finding that, regardless of the purpose for which the information was used, a "consumer report" existed if information was collected by the consumer reporting agency for a purpose specified by the FCRA. *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 885 (5th Cir. 1989); *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693, 696 (10th Cir. 1980); *Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978); *Boothe v. TRW Credit Data*, 523 F.Supp. 631, 634 (S.D. N.Y. 1981).

Indeed, one aspect of the decision below provides further evidence of the uncertainty of the term "consumer report." The statutory definition includes "any written, oral, or other communication" of information bearing on one of seven characteristics. 15 U.S.C. § 1681a(d); *Trans Union Corp. v. FTC*, 81 F.3d 228, 231 (D.C. Cir. 1996) (definition of "consumer report" in FCRA contains "seven enumerated factors"). According to the Ninth Circuit, this definition is so broad that it "unquestionably" includes a CRA's disclosure that is does *not* have any such

information about the consumer. *Reynolds*, 435 F.3d at 1093-94. In other words, according to the Ninth Circuit, a consumer report includes not only consumer creditworthiness information that a CRA has, *but also* information it does not have.

Just as Congress first acknowledged the ambiguity of the FCRA when it first enacted the statute (*see supra* p. 12), a quarter-century later Congress again conceded the original statutory vagueness. When it amended the FCRA in 1996, Congress recognized that certain amendments were necessary to address problems caused by confusion over existing provisions and technological advancements in the credit reporting industry:

> A number of problems in the FCRA's implementation and interpretation have arisen in the years since the law's enactment. Many of these problems are a result of *ambiguities in the statute*; other problems have arisen as the credit reporting industry has grown in the wake of *information technology advances* that have occurred over the last twenty years.

Report of the Committee on Banking, Housing and Urban Affairs, S. Rep. No. 104-185, at 18 (1995) (emphasis added).

To clarify the ambiguities in the FCRA, Congress in 1996 made several specific changes. For example, the originally-enacted FCRA was unclear on which date CRA's should use to calculate when derogatory credit information became obsolete. To ensure the timely removal of such information, Congress specified a standard "date of delinquency" used to calculate when information became obsolete. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, §2406(a)(b), 110 Stat. 3009-434 (1996), *codified at* 15 U.S.C. §

1681c(c)(1). The FCRA also originally provided that CRA's must disclose to a consumer the "nature and substance" of the information in their file for that consumer. *See* S. Rep. No. 104-185, at 41. Congress changed this provision to require disclosure of "all information" in a consumer's file to ensure that consumers received actual copies of their reports, which is consistent with the FTC's view that a consumer's "file" only encompasses information that a CRA provides to a third party in a consumer report. Pub. L. 104-208, §2408(a), 110 Stat. 3009-436, *codified at* 15 U.S.C. § 1681g(a)(1); 16 C.F.R. Pt. 600, App., § 603(g), No. 2. As part of the 1996 amendments Congress also codified (with some variance) the FTC interpretation of the FCRA which permitted CRA's to access credit report data to provide "prescreened" lists for the purpose of making unsolicited credit and other offers. *See* S. Rep. No. 104-185, at 36; 16 C.F.R. Pt. 600, App., §604(3)(A), No. 6. The 1996 amendments specifically identified "credit or insurance transactions that are not initiated by the consumer" as a permissible purpose. Pub. L. 104-208, §2404(a), 110 Stat. 3009-431–33, *codified at* 15 U.S.C. § 1681b(c).

D. There is little regulatory guidance regarding the FCRA duties imposed on CRA's.

Unlike many consumer protection statutes, or other statutes creating detailed regulatory schemes, there is little formal guidance available about the FCRA and no Federal agency has comprehensive rulemaking authority regarding the duties of CRA's. As originally enacted in 1970, although it did provide the FTC with enforcement authority, 15 U.S.C. § 1681s(a)(1), the FCRA did not provide the FTC with rulemaking authority. By the 1996 amendments, Congress made it clear that the FTC had no authority to issue regulations related to the FCRA. *See*

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, §2416(a)(2), 110 Stat. 3009-450 (1996).

While this provision was later removed, the FCRA currently authorizes the FTC to issue regulations only as to specific topics. *See, e.g.*, 15 U.S.C. § 1681a(q)(3) (authority to define "identity theft"); 15 U.S.C. § 1681m(d)(2)(B) (authority to dictate format, type size, and manner of presentation of address and telephone numbers on firm offers of credit); 15 U.S.C. § 1681m(e) (authority to issue regulations regarding identity theft). Much of this authority was added by the 2003 amendments to implement new provisions, many of which do not relate to CRA's or their pre-existing duties under the FCRA. *See, e.g.*, Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, §115(2), 117 Stat. 1990 (2003), *codified at* 15 U.S.C. § 1681m(e) (authority to issue regulations regarding identity theft); Pub. L. 108-159, §211(d), 117 Stat. 1972 (authority to issue regulations implementing the requirement to provide consumers with free annual consumer reports).

Shortly after the enactment of the FCRA in 1970, the FTC recognized the need to interpret the vague terms of the FCRA to help CRA's and other regulated entities comply with their legal obligations. Therefore, pursuant to its enforcement authority, the FTC issued "Statements of General Policy or Interpretation" in 1973. 16 C.F.R. Pt. 600; 88 F.R. 4945 (Feb. 23, 1973). The FTC amended and supplemented its interpretations over time, ultimately issuing in 1990 its "Commentary on the Fair Credit Reporting Act." 16 C.F.R. Pt. 600, App.; 55 F.R. 18808 (May 4, 1990). The FTC issued this nonbinding Commentary to "serve as guidance to consumer reporting agencies, their customers and consumer representatives." 16 C.F.R. §§ 600.1(b), 600.2(a). This Commentary, however, has not been updated since 1990, and it does not reflect the significant amendments to the FCRA in 1996

and 2003. Separately, while the FTC formerly issued nonbinding staff opinion letters answering questions about the application of the FCRA to particular fact scenarios, it has not done so since 2001.[6]

Therefore, there is no rulemaking or other administrative guidance which can mitigate the vagueness of many of the duties imposed by the FCRA.

II. The Statutory Framework of the FCRA Evidences an Intent to Subject a CRA to Statutory and Punitive Damages Only When the CRA Knows That its Conduct Violates the FCRA.

CRA's like Trans Union facilitate more than 1 billion transactions each year between individual consumers and credit grantors, insurers, and other entities with whom they seek to do business. It is well-established that this widespread availability of real-time consumer credit information provides significant benefits to United States consumers by allowing them easier access to less expensive credit.[7] Congress expressly found,

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[6] The FTC issued staff opinion letters until 2001, but has stated that "Except in unusual circumstances, the staff will no longer issue written interpretations of the FCRA." *See* <http:// www/ftc/gov/os/statutes/fcrajump.htm> (providing access to copies of Staff Opinion Letters issued from 1997 through 2001).

[7] *See, e.g.,* Walter F. Kitchenman*, U.S. Credit Reporting: Perceived Benefits Outweigh Privacy Concerns*, The Tower Group, at 5 (Jan. 1999) (available at <http://www. privacyalliance.org/resources/kitcenman.pdf>). For example, United States consumers pay lower mortgage rates than consumers in Europe, yielding an estimated savings of $120 billion each year. *Id*. at 7; Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at 7 (available at <http://www.ftc.gov/bcp/ workshops/infoflows/statements/cate02.pdf>); Fred H. Cate and

in enacting the FCRA, that CRA's perform a "vital" role in the U.S. economy. 15 U.S.C. § 1681(a)(3). Based on this vital role, and due to the enormous volume of data which is assembled and furnished by CRA's in consumer credit transactions, the FCRA does not make CRA's strictly liable for procedures which result in errors in consumer reports or in providing consumer reports to users who do not have a permissible purpose.

Even though the statute is designed to protect against such occurrences, the statutory scheme as a whole makes clear that only when a CRA has knowledge of facts which suggest, for example, an inaccuracy or lack of permissible purpose, is the CRA subject to a claim for a *negligent* violation of the FCRA. The standard necessary to establish a *willful* violation, and to subject defendants to statutory and punitive damages under 15 U.S.C. § 1681n(a) is, accordingly, significantly higher. Therefore, the Ninth Circuit's ruling that a willful violation of the FCRA can occur if a defendant interprets the FCRA in a way that is "unreasonable" or "creative," *Reynolds*, 435 F.3d at 1099, is inconsistent with the statutory framework, which as other Circuits have realized, requires knowledge that particular conduct is violative of the FCRA to establish a willful violation of the FCRA.[8]

Richard J. Varn, *The Public Record: Information Privacy and Access-A New Framework for Finding the Balance*, at 11 (1999).

[8] Other provisions of the FCRA use the term "knowing." Looking at the statute as a whole, however, it is clear that Congress has not carefully used the term "knowing" to have a precise, separate meaning different from "willful." The FCRA includes numerous "state of mind" words in the statute—malice, 15 U.S.C. § 1681h(e), knowingly, §§ 1681n(a)(1)(B), 1681n(b) willfully, §§ 1681n(a), 1681q, 1681r, pattern and practice, § 1681s(a)(2)(A), false pretenses, §§ 1681n(a)(1)(B), 1681n(b)—thereby suggesting that the use of one term rather than another has no particular significance. The overlap between the precise meaning of these terms is further

A. The FCRA is a comprehensive statutory scheme for regulating CRA's, and its civil liability provisions should be interpreted in a manner consistent with the statutory framework.

The level of knowledge and intent required to establish a willful violation of the FCRA under 15 U.S.C. § 1681n should not be viewed in isolation, or even in the context of an insurer's failure to provide adverse-action notices. Instead, because the FCRA represents a comprehensive scheme for regulating CRA's, the standard for establishing *negligent* violations of duties imposed on CRA's (under § 1681o) is relevant to determining the knowledge requirement for *willful* violations under § 1681n.

Federal courts have long recognized that the FCRA is a "comprehensive series of restrictions on the disclosure and use of credit information assembled by [CRA's]," as well as an "elaborate scheme for administrative enforcement of the FCRA." *FTC v. Manager Retail Credit Co.*, 515 F.2d 988, 989-90 (D.C. Cir. 1975); *see also Islam v. Option Mortgage Corp.*, 432 F.Supp.2d 181, 185 (D. Mass. 2006) (noting the FCRA's "elaborate regulatory structure"). Trans Union, like other CRA's, is "comprehensively regulated by the provisions of the FCRA." *FTC v. TRW, Inc.*, 628 F.2d 207, 208-09 (D.C. Cir. 1980).

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demonstrated by Congress' grouping of these terms together. *See, e.g.*, §§ 1681h(e) ("malice or willful intent"); §§ 1681n(a)(1)(B), 1681n(b) ("under false pretenses or knowingly"); §§ 1681q, 1681r ("knowingly and willfully"); § 1681s(a)(2)(A) ("knowing violation, which constitutes a pattern or practice"). In sum, it is fair to say that the FCRA does not use the terms "willful" and "knowing" in a way that would suggest an intended clear hierarchal "state of mind" requirement.

When examining another consumer-protection statute enforced by the FTC, this Court recognized that "strict construction" was not appropriate because "[w]e deal with remedial legislation of a regulatory nature where our task is to fit, if possible, all parts into an harmonious whole." *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959) (Fur Products Labeling Act). Therefore, this Court read the disputed definition "hospitably with [the purpose of the act] in view." *Id*. This statutory construction principle is consistent with this Court's other decisions interpreting regulatory statutes. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

> The meaning or ambiguity of certain words or phrases may only become evident when placed in context. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole."

Id. at 132-33 (citations omitted). The Ninth Circuit failed to perform this statutory construction exercise, and essentially adopted a definition of "willful" under Section 1681n that merges the necessary distinction between "negligent" violations, which entitle consumers to "actual damages" and attorneys' fees, and "willful" violations, which subject CRA's to liability, including potential class action liability, for statutory damages of up to $1,000 per person, as well as punitive damages.

B. CRA's must have notice of a problem before liability under 15 U.S.C. § 1681o is established.

The FCRA does not impose strict liability on CRA's for conduct which results in inaccurate or mis-reporting of data, or other violations of the FCRA, and instead requires a showing of knowledge of a specific problem before liability under 15 U.S.C. § 1681o for a negligent violation is established.

The FCRA does not make CRA's strictly liable for reporting information that is found to be inaccurate. Instead, a CRA's duty is to maintain "reasonable procedures" to assure the accuracy of the information reported. 15 U.S.C. § 1681e(b); *see also Henson*, 29 F.3d at 284; *Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991); *Crabill*, 259 F.3d at 663-64. Absent specific notice of an error in information that it receives, a CRA's duty to maintain reasonable procedures generally does not obligate it to investigate or verify the accuracy of the data reported to it. *Henson*, 29 F.3d 285-86. 15 U.S.C. § 1681e(b) "does not hold a [CRA] responsible where an item of information, received from a source that it reasonably believes is reputable turns out to be inaccurate, unless the [CRA] receives notice of systemic problems with its procedures." *Sarver*, 390 F.3d at 972, *citing* the FTC's 1990 Commentary, 16 C.F.R. Pt. 600, App., §607, No. 3.A. This rule makes practical sense. As the Seventh Circuit has observed:

> One can easily see how, even with safeguards in place, mistakes can happen. But given the complexity of the system and the volume of information involved, a mistake does not render the procedures unreasonable. . . In the absence of notice of prevalent unreliable information from a reporting lender, which would put [the

> CRA] on notice that problems exist, we cannot find that such a requirement to investigate would be reasonable given the enormous volume of information [the CRA] processes daily.

Sarver, 390 F.3d at 972.

Nor are CRA's strictly liable for disclosing consumer reports when the end user does not have a "permissible purpose" to obtain them. Instead, CRA's have only a duty to maintain "reasonable procedures to limit the furnishing of consumer reports" to the permissible purposes listed in 15 U.S.C. § 1681b. *See* 15 U.S.C. § 1681e(a). Consistent with that standard, the FCRA also provides that a CRA may furnish consumer reports to persons which the CRA "has reason to believe" intend to use the consumer reports for a permissible purpose. Moreover, if the CRA follows the basic procedures to obtain a user's certification of permissible purpose,[9] the CRA then has the statutory "reasonable grounds for believing" that the disclosure of a consumer report is for a permissible purpose under the FCRA. § 1681e(a). Unless the CRA actually knows that the consumer report is sought for an improper purpose, a CRA will not be liable for violations of the FCRA. *Boothe*, 557 F.Supp. at 71.

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[9] The FCRA requires that the prospective users identify themselves, certify the purpose for which the information is sought, and to certify that the consumer reports will not be used for another purpose. 15 U.S.C. §1681e(a). The CRA also is required to make a reasonable effort to verify the identity of new users and the uses for the information identified by them. §1681e(a).

C. The knowledge requirement for "negligent" FCRA liability mandates a standard for "willful" liability requiring proof of the defendant's knowledge of the violation of law.

The FCRA imposes differing civil liability on credit bureaus for violation of "any requirement" imposed by the federal statute, depending on the relative "state of mind" of the defendant. A negligent failure to comply with any of the numerous duties imposed upon credit bureaus entitles a consumer to "actual damages" and attorneys fees. 15 U.S.C. § 1681o(a). Nonetheless, as described above, the specific provisions of the FCRA which impose duties on credit bureaus do not create liability absent prior notice to the CRA of some problem with its procedures. Therefore, the express terms of the statute, *e.g.*, 15 U.S.C. §§ 1681e(a), 1681b(a)(3), and federal appellate court decisions interpreting these provisions, recognize a higher standard for negligent violation of the law as compared to traditional standards of common-law negligence.

Consistent with this statutory scheme, therefore, the ruling of the Ninth Circuit that conduct based upon an interpretation of the FCRA that is later deemed to be "unreasonable," *Reynolds*, 435 F.3d at 1099, is not consistent with the statutory scheme. As the majority of the Circuits which have examined the issue have ruled, a willful violation of the FCRA can only occur when the defendant knowingly violated its statutory obligations.

CONCLUSION

Indeed, if left undisturbed, the Ninth Circuit's standard could impose statutory and punitive damage liability for conduct that should not even give rise to negligent liability. Therefore, for the foregoing reasons, *amicus curiae* Trans Union LLC respectfully requests that this Court reverse the decision of the Court of Appeals and hold that a willful violation of the FCRA can only be established by a showing that the defendant knowingly violated the statute.

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Respectfully Submitted

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