To: FTC

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Re: Follow-up Comments To June 18 Workshop on Information Flows

Time and circumstance do not permit me to file detailed comments on Michael Turner's "research," entitled "The FCRA: Access, Efficiency & Opportunity – The Economic Importance of Fair Credit Reauthorization."

Fortunately, however, Turner's premises and conclusions are so faulty that his "research" can largely be discredited by examining a few of its passages.

A major basis for Turner is that there is "Full-File Credit Reporting." The fact is that the main impediments to true full-file credit reporting are those furnishers who for competitive reasons do not report all data about their customers. Such furnishers do not want their customers to stand out as attractive targets for pre-screened offers by their competitors. In a recent article by the *American Banker*, Capital One openly admitted that it does not report credit limits to credit bureaus (CRAs). The article explained that this makes customers appear more "maxed out" on their credit than they actually are and causes their credit scores to drop. In Turner's words, Capital One does this to stymie the "predictive power" of its competitors' pre-screening models Thus, there already impediments to full-file credit reporting that have nothing to do with State or Federal law. Perhaps Turner doesn't mention this because it works to the benefit of some of the principles that underwrite his "research."

Of course, Turner is expounding the theory that if FCRA preemption expires, and States enact new duties on furnishers, then credit grantors will no longer participate in "full-file credit reporting" because of increased liability.

For starters, furnishers already are subject to liability under FCRA if they continue to report inaccurate data after a CRA has relayed to it the consumer's dispute. Furnishers are subject to actual damages if the violation is negligent and punitive damages if the violation is willful. Turner's thesis reflects the reality that many furnishers do not appear to take seriously this liability. As defendants in FCRA lawsuits, several major furnishers have argued (and lost) that the FCRA does not create a private right of action for "1681 S-2b" violations. Turner ignores the existing liability under current FCRA.

Second, Turner footnotes several State proposals as the basis for his thesis that, absent FCRA preemption, State action will increase liability to such a degree that furnishers will

no longer voluntarily furnish information. For instance, Calif. AB 800 (Footnote 71) originally proposed some new burdens on furnishers, but those provisions were stripped out of the bill that was reported out of committee. Illinois HB 3334 (FN 71) does not even place obligations on furnishers. It mirrors much of what is already in the current FCRA or places burdens on CRAs.
N. Dakota SCR 4019 (FN 72) is a concurrent resolution approved by the legislature that calls for a study on the problem of inaccurate or obsolete information on consumer reports. New York SB 356 only deals with CRA time limits for reporting negative information and was referred to committee. We're still looking for Rhode Island HB 5820 (FN 72)

Calif. AB 3 (FN 73) would increase liability by adding a "should know" information is inaccurate standard, but that bill has not made it out of committee. We're still looking for New York SB 1530.

Thus, none of the proposals that Turner footnotes as a basis for his theory actually support his theory that draconian State action will prompt furnishers to withdraw from credit reporting. In fact, these proposals do not even support the view that State action is imminent.

Underlying Turner's view is that it's asking too much for credit grantors to be required to report accurate information about consumers to CRAs, or that they should assume liability for continuing to do so after being notified of errors. As an aside, it's worth noting that the FTC has recommended extending to credit grantors the reinvestigation duties that currently apply to CRAs. As a practical matter, this would trigger liability for furnishers after receiving a dispute directly from their customers, rather than requiring the customer to route his or her dispute through the CRA. Thus, the FTC's modest recommendation goes beyond any of the State proposals cited by Turner. Turner explicitly states that such a federal proposal also would negatively impact full-file credit reporting. Under his theory, if the FTC's recommendation becomes law, then the quality of data in our credit reporting system. Turner has no real evidence to support this unfounded theory because there is no evidence to support it.

Accordingly, Turner has to erect a series of false assumptions. To recap, they are:

- All creditors currently engage in full-file reporting
- The only threat to full-file reporting are State or Federal FCRA amendments that would increase liability on furnishers
- State FCRA legislation to increase furnisher liability is imminent
- Consumers are satisfied with the current regime of disputes and reinvestigations for inaccurate data provided by furnishers

Although an economist, Turner is guilty of ignoring an important reality of today's marketplace: furnishers will not stop reporting negative information on consumers because such reporting helps pressure consumers into paying their bills on time. In sum, to furnishers, the credit reporting system provides important incentives for consumers to

pay on time and even serves as an arm of debt collection. These economic advantages clearly outweigh liability under current or contemplated FCRA laws.

Pre-Screening

Because he only gathers data from credit grantors, Turner concludes that pre-screening does not contribute to identity theft. This conclusion is the product of faulty assumptions and faulty methodology.

Turner writes, "Prescreened credit card offers do not contain any personal information other than names other than name and address, and none of the other prerequisite personal information needed in order to apply for credit. This fact presumably explains why information obtained from prescreened solicitations is rarely used to commit identity theft."

This passage illustrates how Turner combines false assumptions with wishful thinking in order to arrive at questionable conclusions. First, it is factually inaccurate to state that prescreened credit card offers do not contain any personal information other than names and addresses. As the FTC itself argued, and the federal appeals court agreed in ***Trans Union I***, the list you're on says something about you. Prescreened lists are produced according the creditors' criteria that ultimately reveal information about the recipients, at least in relation to what category they are in. A creditor might be looking for suburbanites with at least two credit cards and who maintain manageable level of debt. We clearly learn something about the recipient of a pre-screened offer for a high-end card, like an American Express platinum card. We learn something entirely different about the recipient of a prescreened offer for a sub-prime or secured credit card. Thus, the prescreened offer effectively discloses information about the recipients' financial status.

Turner believes it is a "fact" that prescreened solicitations are rarely used to commit identity theft, presumably because his underwriters in the financial services industry told him so. But a defect in Turner's methodology is that he does not gather information from those sources that would have the most first-hand knowledge of the extent to which criminal gangs are targeting prescreened offers and other mail containing personal information: U.S. Postal Inspectors.

This is what *Privacy Times* did, allowing us to report that U.S. Postal Inspectors said criminal gangs are systematically targeting prescreened offers and other mail to commit identity theft. Arrests have gone up dramatically this year; Between October 1, 2002 and May 2003, there were over 2,000 arrests related to identity theft-mail theft. What's important for Turner to understand is that even when the criminals can't convert the prescreened offer into cash or instant credit, they can sell the personal information contained therein to a fence. This method of operation falls outside the radar screen of financial institutions. Because Turner uses the defective methodology of relying chiefly on data provided by his funders or their allies, he fails to gather the data needed to

determine the increasing role that prescreening plays in identity theft. The fact that credit card issuers flag address changes on prescreened offers is no longer dispositive.

Turner's purpose is to show that the FCRA preemption of State law in the area of prescreening should be left untouched. It is rather obvious that the Americans are not sufficiently aware that the deluge of credit card offers is the result of prescreening. This is because there is nothing clear or conspicuous about notices (see my Congressional testimony before the House and Senate). Consumer deserve better notice and protection when it comes to prescreened offers. The growing prevalence of identity theft makes it urgent.

Turner seems to ignore the fact that FCRA is a consumer protection law. He also doesn't appreciate that FCRA one of America's first privacy laws. Privacy is more than just a consumer protection issue. As recognized in international conventions, privacy is a fundamental human right. Again, Turner is unaware of this fact so that it does not enter his analysis.

It should be noted that Turner is part of a rich historical tradition. Whenever advances in human rights threatened the material interests of established powers, those powers would trot out an "expert" to explain why those advances were too dangerous or unnatural, or that society could not afford them.

In 1857, someone of Turner's ilk likely would have shown us the economic advantages of slavery and how American consumers – North and South – benefited from the system. In 1910, a Turnerite would have developed a model to show that giving women the right to vote would distract them from their daily duties and therefore disrupt the economy. In the early-1960s, Turnerism again would have seen proposed civil rights laws as a threat to economic order and would have developed a model to demonstrate their disruptive influence.

Privacy will continue to be one of the foremost human rights issues of the information age. Turner's primary purpose in defending preemption of State law is to argue against advancing privacy protection in the arenas where it has the best chance of happening – the States. In North Dakota, the financial services industry came forth with a Turnerist-like argument: a stronger privacy law would cause economic disaster. The people of North Dakota were not fooled. Privacy won 72% to 28%.