

CREDIT REPAIR: IT'S PART OF THE SOLUTION, NOT THE PROBLEM

Every day, credit report inaccuracies preclude honest consumers from attaining their dreams. The Federal Trade Commission's December 2012 Report to Congress stated that 26% of the participants in its recent study identified at least one potentially material error on at least one of their three credit reports. [Federal Trade Commission, Report to Congress under Section 319 of the Fair and Accurate Credit Transactions Act of 2003, December 2012, Executive Summary, p. i]. A single inaccuracy can often have devastating consequences. The FTC reported that among those disputed reports with a potential change in credit score, a staggering 41% would experience a score increase exceeding 25 points. [*Id.*, Executive Summary at p. vi]. The FTC further reported that of those studied participants who filed disputes regarding potentially material errors on their credit reports, 63% of those disputants still had allegedly incorrect information on the reports even after their disputes were processed. [*Id.*]. For some, continued inaccuracies can cause the consumer to be rejected when applying for certain products or services, while for others such errors can cause the consumer to incur a higher price or interest rate, or less favorable credit terms. [*Id.*].

Credible, law-abiding credit repair companies fulfill a vital role in serving those who request assistance in removing inaccurate and unverifiable information from their credit report so that it accurately reflects their probable credit worthiness. The FTC's own Congressional reports explain the necessary role that experts play in helping consumers obtain an accurate credit report. This relief often enables consumers to obtain a car loan or home mortgage, to qualify for a lower interest rate, or in some instances, to get a job. As former FTC Chairman Daniel Oliver has stated, "correcting and updating such information benefits creditors as well as consumers by helping to ensure that credit-granting decisions are made on the basis of complete and accurate information reflecting the probable credit worthiness of the consumer." [May 11, 1987 Daniel Oliver Letter to Hon. Frank Annunzio, U.S. House of Representatives, commenting on proposed CROA provisions]. Outgoing FTC Chairman Jon Leibowitz, recently interviewed for a February 10, 2013, CBS News "60 Minutes" Report, acknowledged that legitimate credit repair companies can help consumers through the

process of disputing inaccuracies on their credit reports. [CBS News, 60 Minutes, “40 Million Mistakes,” February 10, 2013.]

Credit repair complaints accounted for only one-tenth of one percent of consumer complaints detailed in the FTC’s Consumer Sentinel Network Data Book for the 2012 calendar year. [Federal Trade Commission, Consumer Sentinel Network Data Book for January – December 2012, February 2013, at p. 80]. A few companies claiming to do credit repair do nothing more than defraud consumers, and credit repair industry leaders join the FTC in supporting efforts to eliminate these credit repair scams. These efforts are working: the percentage of Consumer Sentinel Network complaints attributable to credit repair has decreased for five consecutive years, with the current figure less than 1/3 of the 0.31% reported in 2007. During that same timeframe, legitimate credit repair companies have continued to maintain a stellar track record in serving tens of thousands of satisfied customers. These well-established businesses stimulate the economy, hire employees, and become actively involved in their communities. Countless individuals, families and businesses have benefitted significantly from credit repair services.

Despite the tremendous consumer need for assistance in correcting credit report inaccuracies, and the vital role that the credit repair industry plays in addressing this need, ongoing FTC overreaching threatens to put credible credit repair companies out of business. The FTC irresponsibly characterizes credit repair companies in general as illegitimate fraudsters, even as the FTC reports to Congress that the specific services that make up the credit repair process require substantive expertise. An established credit repair company with no known FTC consumer complaints can find itself subjected to a costly multi-year civil investigation and/or punitive litigation based upon the FTC’s overbroad and inconsistent application of federal law and disregard for state laws providing additional consumer protection. This misguided administrative overreaching hurts these small businesses, and also the consumers who need them.

The FTC staff interprets the Credit Repair Organizations Act (“CROA”) in an overreaching fashion that conflicts with its plain language and disregards Congressional

intent. For example, CROA Section 404(b) states that a credit repair organization may not charge or collect for “any service” until “such service” is “fully performed.” [15 U.S.C. § 1679b(b)]. However, in an October 2011 letter to Congress, FTC Chairman Leibowitz acknowledged that the FTC is imposing further requirements upon credit repair companies that are not set forth within CROA’s plain language – specifically that a credit repair organization cannot even charge or collect for services that it has fully performed “until such time as it has significantly improved the customer’s creditworthiness.” [Letter from Jon Leibowitz, Chairman, Federal Trade Commission to Spencer Bachus, Chairman, Committee on Financial Services, U.S. House of Representatives, at p. 10 (October 12, 2011)]. Further, the FTC and its staff have articulated vastly inconsistent interpretations as to what “significant improvement” requires. The FTC has imposed upon the credit repair industry an undetermined standard (much different than the statutory language) that does not allow a viable business model. In doing so, the FTC continues to disregard a December 2010 Federal Court opinion that details how such a departure from CROA’s plain language fails both legal and logical scrutiny. [*Ducharme v. Heath*, 2010 U.S. Dist. LEXIS 133299 (M.D. Cal., December 16, 2010)].

The credit repair industry has protected thousands of consumers from the potentially devastating consequences of an inaccurate and/or unverifiable credit report. These efforts have empowered the American dream, yet credit repair companies currently face an American nightmare. The FTC has unfairly branded the industry as a sham, and has substituted its own will and onerous requirements in place of statutory language.

If left unchecked, the FTC’s overreaching behavior will: (1) continue depleting limited government resources funded at taxpayer expense; (2) drive those companies seeking to provide credible credit repair out of the marketplace; (3) deny consumers access to these fundamentally important services; and (4) decimate the ongoing business operations of countless companies. Numerous consumers, businesses who benefit from accurate credit reporting, credit repair company employees and their communities face imminent significant harm.

I. Credit Report Inaccuracies Often Have A Devastating Effect on Consumers

Credit report accuracy and completeness is fundamentally important to consumers. Credit reports impact the availability and cost of various products and services such as credit (including mortgages), insurance, and employment. These reports enable creditors to make fast and accurate decisions, benefiting creditors and consumers. At the same time, any errors in these reports can cause consumers to lose these benefits or pay more for them. Increased risk-based pricing makes relatively modest credit score differences more relevant to consumers. Because even small discrepancies in a consumer's credit score can significantly impact credit cost or availability, or employment eligibility, having accurate information to underlie credit scores is essential. [See Federal Trade FTC, *December 2004 Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions ("FACT") Act of 2003* (Executive Summary, Page i)].

Inaccurate credit reports can cause devastating consequences. While serving in 2003 as Assistant Attorney General for the State of Vermont, FTC Commissioner Julie Brill provided the following example in testimony to the U.S. House of Representatives:

In 1991, our office began to receive calls from consumers who were unable to refinance mortgages or obtain loans as a result of errors in their credit reports. At first the calls appeared to be isolated to the residents of one town – Norwich, Vermont. A Norwich doctor couldn't use his credit cards on vacation, a local jewelry store owner's mortgage was turned down, and a professor at the nearby law school had his home improvement loan delayed. Then the calls began to come in from other Vermont towns. . . . Our office learned that two of the three credit reporting agencies . . . hired a subcontractor that misunderstood public record information on file in Vermont town clerks' offices. As a result, these two credit reporting agencies falsely listed hundreds of Vermont residents as tax deadbeats: their credit files stated that they had tax liens on their real property for failure to pay property taxes, when in fact the

consumers so identified did not have tax liens and had paid their property taxes. This egregious error by two of the major credit reporting agencies caused enormous disruption in the lives of hundreds of Vermont residents.

[June 4, 2003 Testimony of Julie Brill before the House Subcommittee on Financial Institutions and Consumer Credit, pages 4-5].

Senator Richard Bryan conveyed another credit report nightmare:

Mary Lou Mobley. . . first discovered problems with her credit report when she was turned down for a law school student loan even though she was in fact an excellent credit risk with no history of credit problems. She was forced at that time to reapply for another loan at . . . a substantially higher interest rate. And she had to secure a cosigner. Had she not been able to [do so], it is very, very doubtful she would have been able to get her student loan and perhaps would not have been able to continue in law school. After graduating from law school and believing that the problem had been corrected . . . she applied, now for a car loan . . . only to be told she would have to pay 17.9 percent as the interest rate for her automobile instead of the normal 8.9 percent rate because she was a high risk based upon bad credit history. . . She was told by one of the credit bureaus that she had been married to a man with the same last name in Arizona who had a number of bad debts. She was told that . . . his bad debts were her responsibility and, therefore, by implication, his bad credit record was her bad credit record. . . How do you handle a situation like that? How do you prove the negative, that you had not been married to someone who you never met, let alone never married? It is a burden that caused Ms. Mobley considerable frustration, aggravation and time.

[Statement of Sen. Bryan, 140 Cong.Rec. S4973-S4975 (May 2, 1994)].

Senator Kit Bond recalled a consumer who "lost a home because he and his wife were unable to clear up incorrect information on their credit report that made it

impossible for them to find financing for the home. It was an error, but they could not get the credit bureau to change it in time. So he lost his opportunity to purchase the house that he and his wife wanted." [Statement of Sen. Bond, 140 Cong.Rec. S4982-S4983 (May 2, 1994)].

Although prior studies addressing credit report accuracy produced distinctly varied results, the FTC's 2004 FACT Report to Congress cited to a 2004 US PIRG study finding that 79% of the consumer reports surveyed contained some error, and a 2003 Federal Reserve Board study finding that "creditors failed to report the credit limit for about one-third of the open revolving accounts in the sample, and about 70% of files had at least one account missing a credit limit. . . (thus) lowering the credit score." [See 2004 FACT Report, at 24 & 29]. As Rep. Henry Gonzalez stated, "nearly every decision made about us--whether to approve a loan, rent an apartment, insure property, or offer a job--could involve a credit report. . . With the enormous numbers of files and information amassed by the credit bureaus on American consumers, the implications for errors and invasions of privacy are staggering." [Statement of Rep. Gonzalez, 141 Cong.Rec. E121 (January 18, 1995)].

The FTC's December 2012 Report to Congress left no doubt as to the magnitude of this consumer crisis. Given the FTC's estimate that credit reporting agencies maintain reports on approximately 200,000,000 consumers, the fact that 26% of the participants in the FTC study identified at least one potentially material error on at least one of their credit reports suggests that perhaps 52,000,000 consumers face the ramifications of erroneous items on their credit reports. This number has staggering implications for our national economy and the burdens placed upon those individuals. Further, the FTC findings that 63% of those who disputed items identified incorrect information on one or more of their credit reports even after having their disputes processed demonstrates the staggering need for legitimate credit repair companies to assist these millions of consumers.

II. Despite Having Called Credit Repair a "Scam," the FTC's FACT Reports to Congress Underscore the Critical Need for Credit Repair Services

Despite the tremendous harm that countless consumers suffer due to inaccurate credit reports, some FTC officials continue to broadly paint the credit repair industry as a sham, even as the FTC reports to Congress that many consumers need expert assistance to navigate the credit repair process. FTC officials state that "they've never seen a legitimate credit repair operation" and that "these companies can't deliver an improved credit report using the tactics they promote." [Federal Trade Commission: *Your Finances: Protect Yourself from Credit Repair Scams*, <http://www.ftc.gov/bcp/edu/pubs/articles/naps37.pdf> and "Credit 'Repair' Could Leave You in a Fix," *Los Angeles Times*, June 3, 2007 (quoting FTC Midwest Region Director Steve Baker)]. In its 2003 Telemarketing Sales Rules narrative, the FTC referred to credit repair services as "fundamentally bogus," and stated that "it is the essence of these schemes to take consumers' money for services that the seller has no intention of providing and in fact does not provide." [See Federal Trade Commission, 16 CFR Part 310, Telemarketing Sales Rule, Final Amended Rule, 68 Fed. Reg. 4580, 4614 (January 29, 2003)]. These comments convey an absolute negative predisposition against credit repair companies, even as the FTC becomes more and more aware of the importance of legitimate credit repair.

The FTC's FACT Reports to Congress increasingly convey that experts play a vital role in helping consumers remove inaccurate and unverifiable items from their credit reports, and that consumers need that assistance. The FTC has directly noted and articulated the many challenges that consumers face in reviewing and repairing an inaccurate credit report, the function that experts can serve in assisting consumers throughout the process, and the extensive need for that expertise.

FACT Act § 319 requires the FTC to conduct "an ongoing study of the accuracy and completeness of information contained in consumer reports prepared or maintained by consumer reporting agencies and methods for improving the accuracy and completeness of such information." Congress directed the FTC to complete this study and submit its final report by December 2014 and to submit interim reports every two

years. [See Federal Trade Commission, *December 2010 Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003*, at p. 1]. The FTC utilized two pilot studies to test and shape the methodology for the final study.

The FTC's FACT pilot study results confirmed that many Americans don't understand credit reporting, and that they often cannot interpret their credit report. Specifically, the FTC reported to Congress that "consumers are often not familiar with credit reporting procedures and may have difficulties in understanding their credit reports." [Federal Trade Commission, *December 2006 Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003*, at p. 6]. Thus, the FTC directed the FACT study contractor to hire and train "experts" to do the following:

- Develop materials and procedures to train "consumer coaches" to instruct and interview consumers.
- Train consumer coaches "who will work with the consumers to (a) examine their credit reports in-depth, (b) help the consumers identify potential errors, and (c) help clear up common misunderstandings they may have about information in their reports...it is important that the expertise of the contractor includes an awareness of common consumer misunderstandings and knowing how to advise the consumer."
- Help consumer participants obtain their three credit reports.
- Develop a checklist for consumers to use in preparing for in-depth review of their credit report.
- Design an interviewing guide for experts to use during their interviews/meetings with consumers to review their credit report.
- Compile background information for addressing common consumer questions.

- Thoroughly prepare for the in-depth reviews with consumers, and perform a careful review and cross-check of information available in the three credit reports prior to the interview (“thorough preparation by the research associates who conduct the in-depth reviews with consumers is essential for an effective review of the credit reports and protection of consumers’ privacy.”)
- Meet with consumer participants to educate them regarding the credit reporting process, review their credit reports and identify potential inaccuracies, explain the impact of such inaccuracies on their credit score, and spell out the steps needed to dispute errors and inaccuracies.

[See 2006 FACT Report at p. 5-6; Federal Trade Commission, *December 2008 Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003*, at p.1-4, and Appendix III at p. 8-10 and Ex. 3; 2010 FACT Report, Attachment 1 (Statement of Work) at p. 5-8 and Attachment 2 (July 20, 2009 Federal Register Notice) at p. 35193 and 35195].

The steps set forth above, which the FTC identified as critically important, comprise key components of the credit repair process. Credit repair companies train their employees, help customers obtain their credit reports, educate them about the credit reporting process, work with them to review their credit reports and identify potentially inaccurate and non-verifiable items, and explain the process required to dispute them. The FTC has confirmed that these steps are fundamentally important. They are most certainly not “fundamentally bogus.”

The FTC also advised Congress that consumers need expert assistance to submit their disputes to the credit bureaus, and to conduct the necessary follow-up. Specifically, in the first FACT pilot study, “many who alleged errors did not file a dispute,” “intensive follow-up was required for those who said they would file a dispute,” and “only one of out three people who alleged material errors subsequently filed a dispute.” [2006 FACT Report at p. 4]. Specifically, the FTC reported that “some consumers may need extra guidance and help in completing the process of filing

disputes for items they believed to be in error.” [*Id.* at p. 6]. Upon providing expert assistance to consumers participating in the second FACT pilot study, the FTC reported that “helping consumers file disputes when warranted proved very successful.” [2008 FACT Report at p. 2]. Thus, the FTC directed the FACT study contractor to employ the following steps:

- Guide consumer participants through the dispute process established by the Fair Credit Reporting Act.
- Prepare 8-10 templates, or exemplars, of consumer dispute letters.
- Prepare a draft dispute letter on the consumer’s behalf (together with a stamped, pre-addressed envelope), for mailing to the relevant credit reporting agency, with respect to each disputed item.
- Ascertain from the consumer whether the letter correctly states the consumer’s allegation, and ask the participant to sign and mail the letter.
- State and employ a procedure to discern whether the consumer actually sends each dispute letter.
- Rescore a “frozen file” of the consumer’s credit report to identify potential credit report score changes related to disputed items.
- Participate in telephone calls and additional follow-up related to disputed items.
- Assist consumers in obtaining new credit reports and scores from the credit reporting agencies to whom the participating consumers have disputed credit report information.

[See 2010 FACT Report at Attachment 1 (Scope of Work), p. 7, 10, and 13, and Attachment 2 (Federal Register notice), p. 35193-35195; 2008 FACT Report at p. 1-4, 7-8 and at App. III, Ex. 6A; 2006 FACT Report at p. 4 and 6].

Once again, these steps – which the FTC has identified as essential to help consumers dispute inaccurate and unverifiable items on their credit reports – make up a significant component of the credit repair process. These are, in fact, the “tactics” that legitimate credit repair companies promote and employ. And, credible credit repair companies deliver an improved credit report using these steps.

III. Credible Credit Repair Companies have Benefitted the Marketplace, and Consumer Complaints Regarding Credit Repair have Plummeted

In recent years, as legitimate credit repair companies have become established in the marketplace, consumer complaints regarding credit repair have plummeted. The FTC’s February 2013 and March 2011 Consumer Sentinel Network Data Books, providing data for calendar years 2008 through 2012, show that consumer complaints regarding credit repair have dropped more than 68% over the past five years, and that in 2012 credit repair accounted for only one-tenth of one percent of the year’s CSN complaints. [See February 2013 Report and Federal Trade Commission, Consumer Sentinel Network Data Book for January through December 2010 (March 2011), at p. 76]. In fact, credit repair was not even within the top 70 product / service subcategories attracting consumer complaints in 2012. [See February 2013 Report at p. 80 – 85]. In contrast, 2012 consumer complaints regarding credit bureaus and credit information furnishers (30,106 combined) outnumbered credit repair complaints by a margin approaching 15 to 1. [See *Id.*, at p. 80 – 81].

IV. Honest, Credible Credit Repair Companies Positively Impacts People’s Lives

Consumer testimonials make clear that credit repair companies repeatedly serve consumers’ best interests. To illustrate, consider the following examples:

About a month ago, my wife and I started looking for a new home to purchase. When we decided to get serious about it, I pulled my credit to work on a pre-approval for my home loan. When I pulled my credit report I became aware that I had been a victim of identity fraud. My credit score had dropped dramatically from where I believed it was at. I was under the impression that my credit score was around 720 but due to a false collection account and lack of revolving debt my middle credit score was only 682. . . . I

immediately enrolled in [your] program. By following [your] advice and working the program I have raised my credit score from a 682 to a 713 in just a month and a half. Without [your] help I would not have been able to make this happen on my own. I will now be able to benefit with a better interest rate on my home loan.

[Message from Lee W., December 10, 2012].

I am very impressed with your Credit Repair Process and I would like to personally thank you and your other employees for their dedicated work to ensuring that all my bad credit is removed and to stop the ongoing reporting of inaccurate information and data to continue to destroy my credit. I cannot tell you how thankful that I am to have learned about your company, my rights and wrongful actions taken against me by other credit reporting entities. Your company has been excellent in providing me with the detailed information of how my credit can be repaired and not only that but also helping me to recognize and know my rights. I honestly think a lot of people with bad credit have been misled and wrongfully informed of their rights to have their credit repaired. Not only that but the wrongful violations of companies who continue to report wrongful or inaccurate information to credit bureau's years after. There is so much I have learned about repairing my credit, increasing my credit score and how to protect myself from reoccurring bad credit.

[Message from Brenda M., October 25, 2012].

Thank you for everything you did for us! Your tireless efforts caused our credit scores to improve by over 100 points. Recently, we were able to buy our first vehicle without a co-signer, thanks to YOU.

Our case was certainly complicated and took longer than expected due to some stubborn reporters; however [you] stuck with us the whole time and continued to work hard to get all false reports taken off our credit report. We are truly appreciative.

[Message from Brad & Monica F., January 3, 2012].

I am very grateful for all your assistance in this trying and frightening matter. I am so glad that I found the right person and company to correct a very horrendous situation. When I was first notified that my credit report was compromised I was so angry that someone would do that to me. Then I became frightened that my hard earned credit would be non-existent. . . [Your] website is the most comprehensive site that I have ever come across. [You] contacted me immediately and answered all my questions and got the ball rolling to correct my credit report. Everyone was very courteous and very prompt. . . I am very grateful that [you were] available for me at this stressful time in my life. . . I hope that you and your company continues to help people like me that did not even know where to begin to correct the credit bureau mistakes.

[Message from Peggy G., October 25, 2011].

I was astonished and very glad to have found a company who actually cared about my situation. Thank you for any and all the hard work you have given towards improving my credit scores. You have removed the incorrect reported information off my credit reports and have made me feel like a person again! We all fall on hard times, but with [your] assistance and guidance, they have helped me through my tough times by getting me back on track. [Your employee] is great and always goes the extra mile for you, even to the point of calling multiple times to make sure you are taken care of! Way to go! I'm very pleased with the service [you] have offered me!

[October 21, 2009 Message from James].

I suffered a hemorrhagic stroke that almost killed me. I was in a coma for 21 days. I could not work for nearly two years. I had no income for 23 months. My financial outlook was not real optimistic. My credit score was in the low 500s After [you worked] with [my wife] Lisa and I, we were able to go to the bank and finance the repurchase of my insurance agency...

[April 1, 2010 correspondence from Ray and Lisa].

While running my annual credit report last year, I discovered that a medical bill that I thought was paid by the insurance company, was actually sent to a collection agency, and that was now on my credit report. I, of course, freaked out, because I always had perfect credit before this. This really dinged my credit score hard, and no one would extend me any credit after this, even after I paid the bill in full. I started searching the internet for any assistance. . . . [You] offered a free consultation. I figured it couldn't hurt anything. I spoke with [your employee], and he explained the entire procedure. He explained that there was no magic bullet, but they would do all they could to help. I really felt at ease, although I still had some doubt as to if this was going to do any good or not. I am extremely happy to report that on the first round of letters, the collection agency entry was removed from my credit report from all 3 credit bureaus. I couldn't believe it! I ordered my credit report again just to be sure, and now all 3 credit bureaus now report my score over 770 again!!! I am soooo happy and excited, I can barely type this. I now have my life back!!

[March 27, 2009 Message from Thomas].

Within six months, we were able to purchase a nearly built home. Within one year, we purchased a Honda Accord Hybrid. Not only did you "repair" our credit, but you taught us how to be financially responsible for the rest of our lives. For that...your company is invaluable to both of us.

[July 25, 2006 correspondence from Tiffany].

Thank you very much for helping me with fighting to get some inaccurate information off my credit report, including [a] bankruptcy which was recently reported on to my credit report. It was a bad time for me to find such information on my credit report, considering the fact that, we were applying for a mortgage loan with Countrywide at the time, and this issue

was in our way. Your expertise, took the stress out of the situation for me tremendously... If I come across anybody who has been a victim of identity fraud, and they're wondering where to turn to, I will send them your way.

[February 12, 2007 email from Dewitt].

Thanks to you and your co-workers. . . I am sleeping much better. I know a house mortgage is on the horizon. The first time I met with you, I was very skeptical about the credit repair business. I had read stories about credit repair being a scam. After my scores jumped from the mid 400's to mid 600's in 45 days, I am a believer. Thanks for treating me with so much respect. You guys are miracle workers.

[Message from Shannon].

Just wanted to write you and let you know how much I appreciate you for the help you have given me. I was in a slump after the death of my husband and now things are finally looking up. Thank you, thank you, thank you.

[February 27, 2008 email from Lisa].

I just wanted to write a little bit about how [your company] helped my husband & myself. We wanted to buy a house, but my ex-husband had nearly ruined my credit and my husband had basically no credit because he didn't owe anyone for anything. [You] told us exactly what to do to fix our credit situation. We followed the advice and in a matter of months we were able to be approved for a home mortgage loan. Now we are able to stop wasting money on rent and are able to grow equity in our own home. Thank you so much!

[Message from Kimberly].

I really need to give you an enormous thank you and a hug. My loan was approved, I bought the house, and I'm sitting in it right now, nice and warm and dry and actually feeling better. I was very grateful that I made it out of the bus before the winter storm set in. As you know, I had a fear of this winter and in all honesty doubt if I would have survived another one in the old bus...because of my sickness and poverty, you took my case charitably, to do all that work, invest all that time, to do what you do so well and without pay just to help a guy down and out up. [Your company] is commendable, honest and dependable, and I'm in my own house. How can I ever thank you enough? [You are] my real hero.

[January 14, 2009 email from Joseph].

V. The Credit Repair Organizations Act

The Credit Repair Organizations Act ("CROA") was first introduced in the U.S. House of Representatives on January 7, 1987, by Congressman Frank Annunzio. The Bill was introduced under various titles, but failed to become law, in the 100th, 101st, 102nd, and 103rd Congress. [See Library of Congress THOMAS Bill Summaries]. However, in late September, 1996, as Congress battled with the White House and faced a potential government shutdown, CROA and numerous other unrelated Bills were combined with and added to the Department of Defense Appropriations Act - 1997, which was subsequently included within the Omnibus Consolidated Appropriations Bill. [See Summary of Titles, H.R. 3610 (104th Congress); Excerpts from Conference Report on H.R. 3610, 142 Cong.Rec. H11644, H11764-H11766 (Sept. 28, 1996); Library of Congress THOMAS Bill Summary on H.R. 3610 (104th Congress)]. As Senate President Pro Tempore Robert Byrd remarked on the Senate floor:

And so, we [find] ourselves in Congress faced with having to deal with the President's requests in a very short period of time if we were to reach agreement on the six remaining appropriations bills by the beginning of fiscal year 1997, which starts at the hour of midnight. . . . Senators should not be placed in the position that we find ourselves in at this moment. We

should not be backed up against the wall here on the last day of the fiscal year, facing a government shutdown unless we adopt this massive resolution. No Senator, and I dare say no staff person, has had the time to carefully review the thousands of programs funded in this resolution, or to read and comprehend the many nonappropriations, legislative matters contained in this resolution.

[See Statement of Sen. Byrd, 142 Cong.Rec. S11817, S11818 (September 30, 1996)].

Congressman David Obey, ranking Democrat on the Appropriations Committee, remarked:

I support the bill because it is the only way that we can keep our obligation to keep government open and to make some of the investments necessary to help our people. . . . But this bill also contains a string of other authorizing legislation. In fact, there are some 31 separate major authorization provisions being attached. I have been asked by many Members of the House, "Dave, can you guarantee that there is not some provision in here which we will regret when we hear about it in the weeks to come?" My answer is simply to invite you to take a look at the stack on that table . . . That bill is not measured in pages, it is measured in feet. It is about a foot and a half long. I do not know how much it weighs, but you could get a double hernia lifting it. . . . You have an immense amount of legislation that has never been considered by either body, and, as a result, I think that in many ways, unfortunately, this legislation is a case study in institutional failure.

[See Statement of Rep. Obey, 142 Cong.Rec. H12051, H12088 (September 28, 1996)].

The circumstances surrounding CROA's passage do not lessen its enforceability. Congress shaped CROA's language over an entire decade. Congress sought, and received, the FTC's input, and ultimately heeded the FTC's recommendation to leave certain credit repair issues to the states to legislate and administer. This deliberate

legislative process does not reflect an urgent need to eliminate credible credit repair companies. Further, the manner in which CROA became law provides no mandate for overreaching, or for construing CROA's language in an overbroad and counter-productive manner.

Within CROA §402(a), Congress makes the following findings:

1. Consumers have a vital interest in establishing and maintaining their credit worthiness and credit standing in order to obtain and use credit. As a result, consumers who have experienced credit problems may seek assistance from credit repair organizations which offer to improve the credit standing of such consumers.
2. Certain advertising and business practices of some companies engaged in the business of credit repair services have worked a financial hardship upon consumers, particularly those of limited economic means and who are inexperienced in credit matters.

Within § 402(b) Congress states as CROA's purposes:

1. To ensure that perspective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services; and
2. To protect the public from unfair or deceptive advertising and business practices by credit repair organizations.

[See Credit Repair Organizations Act, Pub. L. No. 104-208110, Stat. 3009 (September 30, 1996), codified as 15 U.S.C. § 1679, et. seq.].

CROA § 404, entitled "Prohibited Practices," contains subsection (b), which provides:

Payment in Advance. No credit repair organization may charge or receive any money or other valuable consideration for the performance of any

service which the credit repair organization has agreed to perform for any consumer before such service is fully performed.

[*Id.* at 15 U.S.C. § 1679c(b)].

CROA § 412, entitled “Relation to State Law,” provides that:

This title shall not annul, alter, affect, or exempt any person subject to the provisions of this title from complying with any law of any State except to the extent that such law is inconsistent with any provision of this title, and then only to the extent of the inconsistency.

[*Id.* at 15 U.S.C. § 1679k].

VI. FTC Staff Disregards CROA’s Plain Language, and Overreaches in Inconsistently Interpreting CROA’s Advance Fee Prohibition

CROA § 404(b) states that “no credit repair organization may charge or receive any money or other valuable consideration for the performance of any service which the credit repair organization has agreed to perform for any consumer before such service is fully performed.” FTC staff has taken the position that “such service” actually means “all possible services,” thus precluding a credit repair company from billing its customers at the end of a particular month for services fully performed that month, or from collecting for specified services that have been fully performed. The FTC has also opined that a credit repair company that provides a customer guarantee that would require it to perform additional services (if the customer requests) during the warranty period cannot receive any payment until the end of the warranty period.

When interpreting a statute, Courts first begin by examining its language. When the language is plain, Courts enforce the plain meaning, unless absurd. Further, statutory language must be read in context, since a phrase gathers meaning from the words around it. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004). The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

FTC staff's interpretation of CROA § 404(b) does not follow the law, or provide for a viable business model in credit repair. A thorough credit repair process usually takes six months. If a credit repair company cannot collect on a periodic basis for specific services that have been fully performed to that point, the company cannot honor its own ongoing financial commitments – thus jeopardizing its viability. Further, the company risks significant payment defaults, which would require the company to charge significantly more for its services, thus harming consumers. FTC staff's interpretation of CROA § 404(b) would thus tempt companies to shortcut the process, with no warranty or guarantees, or force legitimate companies out of business entirely. Given the tremendous consumer need for credit repair, consumers would become more prone than ever to credit repair scams.

By crafting (over a decade) a statutory framework to provide consumers a means of addressing their vital interest in establishing and maintaining their credit worthiness and credit standing in order to obtain and use credit, Congress most certainly intended to provide a viable business model pursuant to which credit repair companies could serve consumers. FTC staff's interpretation of CROA §404(b) does not provide for any such viable business model, and would clearly frustrate the Congressional purpose.

Even more troubling is FTC staff's January 8, 2008 Opinion Letter to Louisiana's Commissioner of Financial Institutions (the "Staff Opinion Letter"). On page 5 of the Staff Opinion Letter, FTC staff acknowledges that "credit repair companies frequently contend that the services they have agreed to perform are those specific services spelled out in their contracts," and that credit repair companies "believe that they would be entitled to charge or receive money as soon as each of these individual specific services has been completed." FTC staff then opines that these contentions contradict CROA's stated purposes. Chairman Leibowitz's October 2011 Letter stated: "that a CRO's contract with its customers may specify discrete tasks that the Company will perform is not dispositive." Credible credit repair companies most certainly set forth the specific services they agree to perform within their contracts. To do so not only fully serves CROA's stated purposes (specifically protecting consumers), but also comports with basic tenants of contract law. And, the belief that a credit repair company may

charge or receive money for a service that the credit repair company has fully performed comes directly from CROA, not from unreasonable contention.

FTC staff challenges a credit repair company's right to charge or receive money upon fully completing specific services not upon CROA's specific language, but rather a gratuitous generalization that "consumers are not interested in a series of individual and specific services..." FTC staff therefore deems it appropriate to disregard CROA's plain language, and disavow specific written contract terms, in favor of untested presumptions. Further, FTC staff ignores that these "individual and specific services" benefit the consumer, and that consumers are, in fact, interested in them.

Even more overreaching than reading "any service" and "such service" to instead mean "all services," is the FTC's next foray into rewriting the law (as confirmed by Chairman Leibowitz) – stating that CROA will prohibit a credit repair company from charging or receiving payment "until the time as it has significantly improved the consumers' creditworthiness." Thus, even if a credit repair company fully performs all services set forth within the entire body of a written contract, the company cannot charge or receive payment until the consumers' creditworthiness has "significantly improved." Beyond the fact that Congress made no such provision whatsoever, FTC staff creates a slippery slope that now requires determination of what constitutes "significantly improved." To date, the FTC has not addressed that issue.

The FTC interpretation of CROA's advance fee prohibition leads to absurd results. For example, a credit repair company could fully perform all contracted services, and even succeed in removing one or more inaccurate items from a consumer's credit report, but if the consumer did not achieve a "significantly improved" credit score (in whatever currently undefined form that term may convey), the credit repair company could never charge that consumer a penny.

VII. The United States District Court for the Northern District of California Recently Rejected a Similar Overreaching Departure from CROA's Plain Language

In a December 16, 2010 Order Granting in Part and Denying in Part Motion to Dismiss (the "Memorandum Opinion") in *Ducharme v. Heath* [Cause No. C: 10-CV-02763-CRB, pending in the United States District Court for the Northern District of California], United States District Judge Charles R. Breyer interprets CROA's advance fee prohibition. Judge Breyer's Memorandum Opinion examines whether this CROA provision (codified at 15 U.S.C. § 1679b(b)) means what it says, or something far broader, as FTC staff currently contends. Judge Breyer's Memorandum Opinion explains that such an overbroad interpretation and application fails both legal and logical scrutiny.

Judge Breyer first discusses a "set up, first work fee" that the defendant, Lexington Law Firm, charges "after all work is done to get [the] first round of bureau disputes...out the door." The Court did not disagree with Plaintiff's own admission that this "first work fee" did not violate CROA, because that fee was "tied to the performance of specific services." Judge Breyer then considered, and rejected, Plaintiff's contention that the subsequent monthly fee that Lexington charged following the end of each month violated CROA because it was supposedly "tied to a period of time, as opposed to the services actually to be performed." Judge Breyer's rulings on this topic directly contradict FTC staff's stated position.

Judge Breyer first examines the word "service," and notes the long standing requirement (in statutory interpretation) to give undefined terms their ordinary meaning:

The Court notes that the word "service" is not defined in the Act. But neither does the Act limit the word "service" to big-ticket items. The Act speaks of "any service," see 15 U.S.C. § 1679b(b), and any service, in the Court's judgment, includes services big and small. See *U.S. v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999) ("If the statute uses a term which it does not define, the court gives that term its ordinary meaning.").

In refusing to find that the term “such service” within CROA was meant to encompass “all services” to be performed on a client’s behalf, Judge Breyer opines as follows:

In the Court’s view, CROA’s ban on advance payments for work that has not been fully performed cannot mean that credit bureaus are not to be paid until all work on a client’s behalf is completed. This is because (1) the Act speaks of “any service” and “such service,” not of “all services,” see 15 U.S.C. § 1679b(b), and (2) determining when all work on a client’s behalf has been “fully performed” is untenable. Are all services fully performed only if a disputed item is successfully removed from a client’s credit report? What if an organization challenges an item only to learn that the item was legitimate and should remain on the client’s credit report? Are all services fully performed when responses from credit bureaus have been received? What if correspondence continues at length? What if a creditor or credit bureau does not respond? Worse yet, what if the credit repair organization determines that an issue has been resolved, bills a client for that work, and subsequently receives a communication from a creditor as to that issue? If it performs any work in response to that communication, using Plaintiff’s definition, the earlier work must have only been partially performed, and the bill was therefore a violation of section 1679b(b). Instead, if “service” is defined as a typical legal task, such as drafting a letter (or a month’s worth of letters), then that service can be indisputably fully performed upon the completion of the letter (or the month’s worth of letters).

In fact, in a footnote to the language quoted above, the Court stated that “If [prohibiting payment until all services had been performed] was indeed Congress’ intent in drafting CROA, nothing prevented Congress from declaring that credit repair organizations could only be paid on a contingent basis.”

Based upon this legal and logical analysis, Judge Breyer elected to interpret and apply CROA as written, as opposed to overreaching and creating new law. He therefore ruled that:

In sum, the Court finds that section 1679b(b) means what it says: credit repair organizations may not charge clients for any service until such service has been done. By billing clients on a monthly basis for legal tasks that were indisputably performed during the previous month, Lexington does not run afoul of section 1679b(b)'s prohibition on advanced payments.

Judge Breyer's Memorandum Opinion correctly adheres to the often-cited principles and canons of statutory interpretation. Judge Breyer has given the words and terms not defined within the statute their ordinary meanings, taking into account the applicable context. Judge Breyer also properly refrains from adding language to CROA that Congress has not included. NACSO asks the FTC to do the same.

The FTC's reliance upon two opinions in *United States v. Cornerstone Wealth Corp.* is misguided. Neither Cornerstone opinion held that a CRO cannot charge and collect for specifically identified services once it fully performs such services. Cornerstone did not purport to charge a monthly fee for specified services fully performed in the prior month. Instead, even though Cornerstone's contract defined its "procedures" as "a carefully constructed series of verifications and corrections," and supporting documents stated that it "should take up to six to eight months to repair a single report," Cornerstone claimed that it had "fully performed" all services to be performed under its contract "after the initial set of verification requests are completed." *United States v. Cornerstone Wealth Corp.*, 2006 U.S. Dist. LEXIS 8294, *16, 22-23 (N.D. Tex., March 3, 2006). Thus, the District Court held that Cornerstone's effort to characterize the remaining months as a "guarantee" failed to satisfy CROA. *Id.*

The Cornerstone opinions emphasize CROAs requirement that a written contract clearly set forth the services that a CRO shall perform, and timetables for fully performing such services. Further, they certainly preclude a CRO from

mischaracterizing these terms in an effort to collect payment before the CRO fully performs a specified service. These opinions do not support FTC's effort to rewrite CROA's advance fee provision.

The FTC concedes that the "net impression/consumer expectations test" it uses to determine when a CRO may finally charge and collect for services fully performed requires a "case-by-case determination." [October 12, 2011 Leibowitz correspondence at p. 10]. Such an admission acknowledges that a CRO serving 5,000 consumers in a given year may be subject to 5,000 different set of criteria for determining when it can lawfully charge and collect for the services it has fully performed. Notwithstanding Congressional focus upon the written contract in CROA's plain language, CROs and consumers would have their payment and collection rights and responsibilities defined by undefined standards found nowhere within CROA. As Judge Breyer notes in *Ducharme*, such an interpretation leads to an absurd result. NACSO seeks an end to this destructive overreaching.

VIII. Leadership Within the Credit Repair Industry

The National Association of Credit Services Organizations has actively advocated legal compliance, consumer and industry education, ethical practices, and consumer fairness, and has provided legislative testimony consistent with these objectives. Presently, however, FTC staff's statutory interpretation threatens to eradicate legitimate credit repair companies and expose consumers to the dishonest, poorly organized and unlawful credit repair scams that will fill the void. NASCO seeks to work with the FTC, and has recently adopted the following Consumer Net Impression Disclosure as part of its ongoing effort to do so:

Consumer Net Impression Disclosure:

Credit Repair Organization's goal is to provide credit repair services to assist CONSUMER in achieving an accurate credit report. CONSUMER hereby acknowledges that Credit Repair Organization does not guarantee any specific outcomes or results on behalf of CONSUMER, but contracts to provide the specific list of services as more fully described herein. Credit Repair Organization does not charge for, nor shall Credit Repair Organization collect for, any services, until such services as detailed in the

listed contracted services are fully provided. Credit Repair Organization does not contract for services to remove accurate and/or verifiable information from CONSUMER'S credit file. CONSUMER hereby acknowledges that active participation in providing Credit Repair Organization with all requested documents, forms, and information including investigation results, is essential to providing the credit services for CONSUMER. Credit Repair Organization does not provide tax, legal or financial advice. If you need any type of legal advice, you must contact a licensed professional.

IX. Conclusion

Credit report inaccuracies can have a devastating effect on consumers. Currently, approximately 52 million consumers have potentially material errors on their credit reports. The FTC's FACT reports to Congress have acknowledged that many consumers need expert assistance to navigate the process of obtaining an accurate credit report. As credible credit repair companies have become established and benefitted the marketplace, consumer complaints regarding credit repair have plummeted over the past two years, to where credit repair was not within the top 70 product/service subcategories attracting consumer complaints in 2012. Credible credit repair companies have served tens of thousands of satisfied customers, positively impacting lives and helping consumers achieve the American dream. Credit repair companies cause consumer benefit, not consumer harm. The FTC has interpreted CROA's advanced fee prohibition in an overly broad, overreaching and inconsistent manner that departs from CROA's plain language, creates undefined parameters, and allows no viable business model for a legitimate credit repair company. As Judge Breyer noted in highlighting the multiple fallacies underlying such a flawed interpretation, this departure from CROA's language would essentially turn credit repair into a contingent fee industry.

Credit repair is a much-needed solution for hard working American consumers. It's time to allow legitimate credit repair companies to serve this critical need. The lives of up to 52,000,000 consumers will be impacted as a result.