National Consumer Law Center (on behalf of its low-income clients)
Americans for Financial Reform Education Fund
Center for Digital Democracy
Consumer Action
Consumer Federation of America
Demos
National Association of Consumer Advocates
Public Citizen
U.S. PIRG
Woodstock Institute
East Bay Community Law Center (CA)
Housing and Economic Rights Advocates (CA)
Tzedek DC
Legal Aid Society of Palm Beach County, Inc. (FL)

January 7, 2019

Federal Trade Commission
Office of the Secretary
Constitution Center
400 7th St., SW
5th Fl, Suite 5610 (Annex B)
Washington, DC 20024

Re: Military Credit Monitoring Rulemaking, Matter No. R811007

Dear Sir/Madam:

The undersigned consumer and advocacy groups submit these comments in response to the Federal Trade Commission's (FTC) Notice of Proposed Rulemaking (NPRM) regarding free electronic credit monitoring services for active duty military consumers, as required by Section 605A(k) of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681c-1(k). The requirement for these services was established by Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) of 2018.[1] Our key points are:

- The FTC should include as part of any "electronic credit monitoring service" free online access to credit reports when an active duty military consumer receives notification of a material addition or modification to their credit file. Otherwise, there is a significant risk that the nationwide consumer reporting agencies (CRAs) will entice active duty military consumers into paying expensive monthly fees to subscribe to paid access to their own credit reports. Our men and women in uniform deserve free access to online credit reports as part of their right to electronic credit monitoring.
- We support the FTC's proposed definition of "material additions and modifications," including the exclusion of prescreening and account review inquiries.

[1] Public Law No. 115-174, § 302 (2018).

- The FTC must tailor the requirement for "appropriate proof of identity" to accommodate the special circumstances of active duty military consumers. In general, the nationwide CRAs' identification requirements are overly difficult for consumers to meet, and are more demanding than what the nationwide CRAs require from consumers paying for their reports.
- We support the use, disclosure and advertising restrictions proposed by the FTC, which are appropriate and necessary to protect the privacy interests of active duty military consumers and prevent inappropriate use of their information.
- We support the FTC's proposal to prohibit the nationwide CRAs from asking or requiring an active duty military consumer to agree to terms or conditions in connection with obtaining the free electronic credit monitoring service that the CRAs are obligated to provide. This prohibition is necessary and appropriate, especially to prevent active duty military consumers from being compelled to agree to forced arbitration provisions in order to exercise their right to electronic credit monitoring services.

Section 609.2 Definitions

A. Active duty military consumers should have free online access to credit reports when they receive an electronic notification of a material addition or modification.

The FTC asks in Question 1 whether its proposed definition of ''electronic credit monitoring service'' adequately covers the services that should be included under Section 605(k). The definition is not adequate -- it should also include free electronic access to credit reports for active duty military consumers whenever they receive an electronic notification that there has been a material addition or modification to their credit files.

Commercial credit monitoring products generally include electronic access to credit reports.[2] Even the free version of TransUnion's credit monitoring product includes access to credit reports.[3] The free product mandated by Section 605A(k) of the FCRA as a benefit to active duty military consumers should have the same features as commonly offered credit monitoring services and include this feature. The reason is simple – what will happen when an active duty military consumer receives an electronic notification of a material addition or modification, especially if it is about a material change that they aren't expecting? It is more than likely that the military consumer will want to see this material change in the context of their credit report by viewing the credit report. The military consumer will also want to see the rest of the credit report to ensure there are no other questionable items in it. Without free access at that point, the active duty military consumer will be forced to pay for their credit report and may end up subscribing to a costly monthly subscription service.

[2] Consumer Financial Protection Bureau, Key Dimensions and Processes in the U.S. Credit Reporting System: A Review of How the Nation's Largest Credit Bureaus Manage Consumer Data 27 (2012), available at www.consumerfinance.gov (noting that 26 million consumers obtained file disclosures through various credit monitoring services in 2010 and 2011).

[3] TransUnion, Protect your credit, for free, with TrueIdentity, at https://www.transunion.com/product/trueidentity-free-identity-protection (viewed December 17, 2018)("Stay in control with 1-Touch Credit Lock, informed with UNLIMITED TransUnion Credit Report refreshes, and up-to-date with alerts. All free, always free").

The active duty military consumer might have access to a free annual file disclosure. However, it is more than likely that many active duty military consumers will receive more than one electronic notification during the year. Once their annual free report is used up, other options for free reports are limited. Some active duty military consumers might have a right under state law to a second free report, but that is limited to residents of seven states (Colorado, Maine, Maryland, Massachusetts, New Jersey, and Vermont; two free reports under Georgia law). The active duty military consumer could place a fraud alert to obtain another free report. However, not all unrecognized material additions or modifications would be due to fraud or identity theft – the electronic notification could be due to an account transfer or a new debt collection tradeline for medical debt (these are often reported to the CRAs without advance notice to the consumer). Active duty military consumers should not be forced to place a fraud alert simply to obtain a free report.

Providing free access to credit reports would not be overly burdensome to the nationwide CRAs if this access is online. There is very little marginal cost to providing it, since the active duty military consumer will have already signed up for the service and their identity has been verified. The only drawback to the nationwide CRAs is the lost opportunity to make a profit off the active duty military consumer – and the idea that the credit bureaus should make a profit off men and women in uniform risking their lives for our country as a result of a statutorily required free service that was supposed to benefit them is simply appalling.

The FTC should include free electronic access to credit reports (files disclosures) in the definition of "electronic credit monitoring service." The FTC has clear regulatory authority to do so since Section 605A(k)(3)(A) of the Act directs the Commission to issue a regulation to define that term. 15 U.S.C. § 1681c-1(k)(3)(A). Moreover, Section 605A(k)(2) states that the requirement is for the nationwide CRAs to "provide a free electronic credit monitoring service that, *at a minimum,* notifies a consumer of material additions or modifications to the file…" (emphasis added). 15 U.S.C. § 1681c-1(k)(2). Clearly, Congress contemplated that the term could include more than electronic notifications of material changes, and it is fully consistent to define the term to include a service that is part of other credit monitoring products.

B. We support the proposed definition of "material additions or modifications," but urge the FTC to also include a significant drop in credit score in the definition.

In Question 2, the FTC asks for comment on its proposed definition of ''material additions or modifications'' and whether it adequately covers the changes to an active duty military consumer's file that should require notification. In general, we agree that this definition should include new accounts, inquiries (with the exception of prescreening or account reviews), negative information, and changes to the consumer's name/address/phone number. Each of these items could be an indicia of identity theft or other fraud or error. The FTC should also add one more item to the definition: a significant drop in a credit score, such as 25 points or more. Such a drop could be a sign that something has significantly changed in the military consumer's credit file, perhaps due to fraud. For example, a credit score drop could be caused by a drastic increased usage in a credit line, which could be due to existing account fraud.

The FTC asks whether to keep changes to credit limits in the definition of material addition or modification. We think a change in credit limits should be retained in the definition. Unfortunately, credit card issuers are not required to notify a consumer of a reduced credit limit under Regulation Z, which implements the Truth in Lending Act, unless they wish to impose an over-the-limit penalty fee or rate.[4] Since many issuers no longer impose over-the-limit fees, consumers may not receive notices of decreases in a credit limit under Regulation Z. Including such notifications as part of military credit monitoring may provide a benefit to active duty military consumers.

In Question 3, the FTC asks for comment on the fact that proposed § 609.2(l)(2)(i) would not require electronic notification when an inquiry was made for prescreening or account review. We agree with this exception. One of the problems with commercial credit monitoring is that it issues notifications for prescreening inquiries. These constant notifications create information overload, which causes customers of commercial credit monitoring to begin ignoring electronic notifications. An exception for prescreening and account review inquiries would prevent this type of information overload.

In the Supplementary Information, the FTC states: "The enumerated list [of material additions or modifications] is not exhaustive, and nationwide consumer reporting agencies may elect to provide notification of other significant changes to a consumer's file. … [The nationwide CRAs] should have discretion to include additional significant changes to a consumer's file within their free electronic credit monitoring service."[5] However, we believe it is problematic to permit the nationwide CRAs to have free rein in adding other types of changes to the definition of "material additions or modifications." There needs to be some sort of FTC approval process for the addition of other items to the definition. Otherwise, having too many items could lead to electronic notifications being sent on an excessive basis, creating information overload and unduly alarming active duty military consumers who subscribe to the free credit monitoring.

C. The definition of "electronic notification" should require that any method of notification be an active "push" notification to the military consumer.

In Question 5, the FTC asks whether its proposed definition of ''electronic notification'' in proposed § 609.2(h) is adequate. In general, the reference to notification by text message, email, or mobile application appears appropriate. However, we are concerned about the reference to notification by website. Website notification could allow a CRA to "notify" the military consumer by posting a message on their account without actively informing the military consumer that there has been a material change.

Proposed § 609.2(h) should require that any method of notification be a "push" notification, whether by email or text or mobile app, in that it actively informs the military consumer that there is a material addition or modification to their credit file. The nationwide CRAs can require the active duty military consumer, after receiving the push notification, to log into website to see

[4] *See* Regulation Z, 12 C.F.R. § 1026.9(c)(2)(vi). *See generally* National Consumer Law Center, Truth in Lending § 6.8.4.6.2 (9th ed. 2015), *updated at* www.nclc.org/library
[5] 83 Fed. Reg. at 57,695.

what the actual addition or modification is. However, the information about a material change cannot simply be passively placed on a website without some sort of active notification.

D. The requirement for "appropriate proof of identity" should be tailored for active duty military consumers and should be the same for the free credit monitoring service as for paid services.

In proposed § 609.3(b)(1), the FTC would require active duty military consumers to provide ''appropriate proof of identity'' to sign up for electronic credit monitoring. The definition cross-references 12 CFR § 1022.123, which sets forth the definition used for "appropriate proof of identity" in other contexts, such as requesting free annual file disclosures. In Question 6, the FTC asks whether this provision is necessary and appropriate. Question 6 also asks what procedures the nationwide CRAs currently use for proof of identity.

In general, we support requiring proof of identity for active duty military consumers to subscribe to a free credit monitoring service, given that sensitive and confidential information is being disclosed. However, we believe that the current practices of the nationwide CRAs could be problematic for active duty military consumers. For one thing, the nationwide CRAs currently require consumers to submit all addresses within the last 2 years for identity verification. This requirement could be a problem for active duty military consumers, because some of them may have moved addresses several times in the last 2 years, and it may be unclear which address or addresses are listed in the CRAs' file – is the address before a military consumer enlisted? Would the address for the basic training camp be included? The rule should make accommodations for these issues, and be appropriately tailored for the unique situations of military consumers.

Furthermore, there have been many complaints that the identification verification procedures of the nationwide CRAs are too onerous for consumers in general, which would include active duty military consumers. Many consumers who are legitimately seeking their own file disclosures are unable to answer the security questions about items in their distant past posed by the nationwide CRAs and are thus unable to access their free annual file disclosures. Question 6 asks whether the nationwide CRAs require proof of identity for customers of commercial credit monitoring products. The answer is that while they do require proof of identity, they require far less of a paying consumer than a consumer seeking a free file disclosure.

As detailed in the recent case *DeVries v. Experian Information Solutions*,[6] consumers who make requests through annualcreditreport.com are required to provide the following information: full first and last name, middle initial, current address, past addresses within two years, date of birth, any generational information, SSN, and then to answer a series of "identification verifying" questions. These questions often trip up consumers -- in *Devries* they involved "trick questions regarding non-existent mortgages." If the consumer cannot answer these questions, they must provide a copy of a driver's license or state ID, utility bill, and bank or insurance statement.

In contrast, the same consumer can obtain a file disclosure when paying a fee, or presumably when paying for a credit monitoring subscription product, by simply providing first and last

[6] 2018 WL 1426602 (N.D. Cal. Mar. 22, 2018).

name, middle initial, current address, date of birth, any generational information, and SSN. If the latter identification information is sufficient for commercial credit monitoring products, it should be sufficient for both the free version for active duty military consumers and for all consumers via annualcreditreport.com. If the fact that a credit card is used to pay for paid products helps identify the consumer, the nationwide CRAs could use a similar "token" such as a scanned copy of a military ID for military consumers or driver's license for other consumers. Another option is a PIN number sent by SMS to a verified call phone number of the consumer. A copy of a servicemember's most recent Leave and Earnings Statement (LES) is available to all servicemembers electronically and would be another form of identification that CRAs could accept.

In general, the FTC needs to ensure that active duty military consumers can easily exercise and activate their right to free credit monitoring. The FTC should impose a "least burdensome" standard on the nationwide CRAs to prevent the latter from throwing up unnecessary roadblocks to access. This should include accepting a servicemember's current unit mailing address in case the unit deploys and the servicemember no longer has a current stateside mailing address.

II. Section 609.3 Substantive Requirements

A. Section 609.3(c) should provide a method for proof of active duty service for National Guard and federal Reserve members and should also include the Military Lending Act database as one such method.

In Question 1 of this section, the FTC asks whether the methods specified in proposed § 609.3(c) for ''appropriate proof of active duty military status'' are adequate and whether there are other methods that should be included. The methods in proposed § 606.3(c) include: (1) a copy of the consumer's active duty orders; (2) a copy of a certification of active duty status issued by the Department of Defense (DoD); (3) a method or service approved by DOD; or (4) a certification of active duty status approved by the nationwide CRA.

One deficiency in proposed § 606.3(c) is that there is no provision for a consumer who is a member of National Guard or the federal Reserves, collectively called the Reserve Component (RC). Section 605A(k)(1)(A) of the Act defines "active duty military consumer" to include members of the National Guard. We believe that this should include all members of the RC. Thus, proposed § 606.3(c) needs to include a method or methods to address how a member of the RC would provide proof of that status.

Another way to prove active duty military status would be to use the DoD database developed for lenders to comply with the Military Lending Act (MLA) at https://mla.dmdc.osd.mil/mla/#/home. A nationwide CRA could easily check that database to determine whether a consumer has active duty military status. Furthermore, the MLA Database includes members of the RC who are called to active duty since they are covered by the protections of the MLA. Another would be for the CRA to accept their monthly Leave and Earnings Statement (LES) as proof of eligibility.

Because Congress has moved to an "Operational Reserve" model, whereby members of the RC are called up for one year of active duty out of every three, the financial health of the RC is equally crucial to national security and should be maintained even while not on active duty orders.

B. The use, disclosure, and advertising restrictions proposed by the FTC are appropriate and necessary to protect the privacy interests of active duty military consumers and prevent inappropriate use of their information.

Proposed § 609.3(d) would restrict how a nationwide CRA could use or disclose information collected from an active duty military consumer when they submitted a request to obtain the free credit monitoring service. Nationwide CRAs could only use and disclose this information: (1) to provide the free electronic credit monitoring service requested by the consumer; (2) to process a transaction requested by the consumer at the same time as a request for the free electronic credit monitoring service; (3) to comply with specific legal requirements; or (4) to update information already maintained by the CRA for the purpose of providing consumer reports. We support the limitations in proposed § 609.3(d) as necessary to protect the privacy of active duty military consumers who request free credit monitoring and to prevent the inappropriate use of their personal, confidential information for marketing or other unrelated purposes.

Similarly, we support that the advertising restrictions in proposed § 609.3(e)(1), which bans marketing to an active duty military consumer until they have actually enrolled in the free credit monitoring service. We agree that this limitation is necessary to ensure that active duty military consumers can easily obtain their free electronic credit monitoring service without the obstacle of distracting advertising. We do not believe this limitation imposes any burdens, much less undue burdens, on the nationwide CRAs – unless one believes that the lost opportunity to make profits off of men and women in uniform is some sort of burden.

We also support proposed § 609.3(e)(2), which prohibits any communications or marketing from interfering in the provision of a free credit monitoring service to active duty military consumers. As for the prohibitions in proposed § 609.3(e)(3) against false misrepresentations, not only is that an appropriate provision, it should be noncontroversial and obvious. Furthermore, the nationwide CRAs should absolutely be prohibited from representing or implying that military consumers must purchase a paid product or service in order to obtain free electronic credit monitoring or that the free version is inferior to a paid one.

Similarly, we support the proposed prohibition against making a false representation that an ancillary product, such as identity theft insurance, is free. In fact, we believe that the nationwide CRAs should be prohibited from offering identity theft insurance at all to active duty military consumers in relation to free electronic credit monitoring, given the serious problems with that product. A report by the Government Accountability Office found that identity theft insurance products have incredibly low loss ratios and payouts, making them almost useless.[7] Given the

[7] Government Accountability Office, Identity Theft Services: Services Offer Some Benefits but Are Limited in Preventing Fraud, GAO-17-254, March 2017, at 20, available at www.gao.gov/assets/690/683842.pd. For instance, the GAO noted that one company admitted it had experienced 'almost zero' claims in recent years while another

dubious nature of these products, they simply should not be pitched to active duty military consumers in relationship to the free credit monitoring product, whether before or after the military consumer is enrolled.

C. Active duty military consumers should not be compelled to agree to terms and conditions, including forced arbitration provisions, in order to access the free credit monitoring services required by the FCRA.

Proposed § 609.3(f) prohibits asking or requiring an active duty military consumer to agree to terms or conditions in connection with obtaining a free electronic credit monitoring service. The FTC asks whether this prohibition necessary and whether it imposes undue burdens on the nationwide CRAs.

Proposed § 609.3(f) is similar to the provision in Regulation V, 12 C.F.R. § 1022.136(h)(3), that prohibits nationwide CRAs from requiring, or even requesting, that consumers agree to any specific terms or conditions in connection with obtaining a free annual file disclosure. We support proposed § 609.3(f) and believe that it is necessary to protect active duty military consumers from being required to agree to terms and conditions that would be harmful to their interests. Given that § 1022.136(h)(3) has not imposed undue burdens on the nationwide CRAs, proposed § 609.3(f) should not impose any such burdens either.

One of the problematic practices that proposed § 609.3(f) will prevent is the nationwide CRAs requiring active duty military consumers to agree to forced arbitration provisions. As the Equifax data breach highlighted, all of the nationwide CRAs include forced arbitration provisions in commercial credit monitoring products. Active duty military consumers, and consumers in general, should not and arguably cannot (due to lack of consideration) be compelled to agree to forced arbitration provisions for something that federal law requires the nationwide CRAs to provide.

III. Other Issues

A. Section 609.5 should include the Summary of Consumer Identity Theft Rights in addition to the Summary of Consumer Rights and should require a more effective method of delivering the information.

Proposed § 609.5 would require that "electronic notifications" of a material addition or modification include a link to the Summary of Consumer Rights mandated by Section 609(c) of the FCRA, 15 U.S.C. § 1691g(c). The FTC asks whether providing this information is useful, and whether there is a better method than providing a link.

Certainly providing the information in the Summary of Rights could be useful, especially the information about the ability to place free security freezes on credit reports. However, given that electronic notifications are intended as a warning sign of possible identity theft and fraud, it would also be useful to include the Summary of Consumer Identity Theft Rights mandated by

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company stated it paid out less than 2 cents for every dollar it collected in premiums and a third ID theft insurance provider with a government contract covering more than 4 million consumers paid out one claim of $1,519. *Id.*

Section 609(d) of the FCRA, 15 U.S.C. § 1691g(c). This latter Summary includes information on additional tools that are useful when dealing with possible identity theft, such as fraud alerts and blocking of fraudulent information.

As for the delivery of the information in these Summaries, there are more effective methods than providing a link to ensure that the active duty military consumer actually sees the information. The FTC could require that the information be presented in the same email or webpage as the electronic notification, or a webpage that the military consumer must "click through" in order to receive information about the material addition or modification. If the FTC mandates online access to free file disclosures, both Summaries could be appended to the end of the file disclosure.

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Thank you for the opportunity to submit these comments. If you have any questions about them, please contact Chi Chi Wu, National Consumer Law Center (cwu@nclc.org or 617-542-8010).

National Groups
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