

A New Era Of FCRA Scrutiny For Consumer Data Furnishers

By **Jessica Pollet and Frida Alim**

Furnishers provide information to consumer reporting agencies on over 1.3 billion consumer credit accounts or other tradelines each month, with the three largest national consumer reporting agencies holding the personal information of over 200 million consumers. Given the extent of the consumer data that is shared, scrutiny of the consumer reporting industry is intense, with consequences for those who run afoul of relevant laws and regulations.

Within the past month, the Consumer Financial Protection Bureau filed a consumer reporting enforcement action against a furnisher, Fair Collections & Outsourcing Inc., and announced a joint consumer reporting workshop with the Federal Trade Commission.

This attention underscores the need for furnishers to revisit their consumer reporting and dispute handling policies and procedures. In particular, furnishers should ensure that those policies and procedures are drafted and implemented in a manner consistent with increasing expectations around Fair Credit Reporting Act and Regulation V compliance.

The Original Big Data Law Back in Focus

Originally enacted in 1970, the FCRA was the first federal law to regulate the use of consumers' personal information. Since the 1990s, the FCRA and, subsequently, its implementing regulation, Regulation V,[1] have imposed an intricate set of requirements on, among others, furnishers — persons and entities that report information about consumers to consumer reporting agencies (e.g., banks, nonbank lenders, marketplace lenders, servicers, debt collectors, etc.).[2]

Among these is the requirement that furnishers "establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers" that they furnish to a consumer reporting agency, or CRA.

When drafting policies and procedures, furnishers are required to consider and incorporate, as appropriate, guidelines found in Appendix E to Regulation V that include, among other things, principals on the use of standard reporting formats; implementation of appropriate internal controls; maintenance of records; conducting reasonable investigations of disputes; training staff that participates in furnishing activities; and evaluating furnishers' own practices as well as the practices of CRAs of which furnishers are aware.[3]

While the Appendix E guidelines have existed since 2009, there has been a spike in regulatory and Congressional interest in furnishers' consideration and incorporation of such in their policies and procedures.

FTC and CFPB Consumer Reporting Agenda

The FTC and the CFPB are united in their effort to ensure accuracy in credit reporting, as underscored by their recent announcement of a December 2019 public workshop on the



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topic.[4] This workshop will include discussions on CFPB supervisory reviews, and CFPB and FTC enforcement actions related to furnisher accuracy.[5]

Indeed, over the last several years, the agencies have brought public enforcement actions and issued public statements suggesting a need for furnishers to tighten their credit reporting functions and, in particular, enhance their policies and procedures to better protect against the furnishing of inaccurate information.

FTC

In 2016, for example, the FTC settled an action against a debt collector furnisher for its failure to maintain adequate policies and procedures concerning training, maintenance of documentation provided by consumers in the context of disputes, which had not yet been resolved, and audits of employees' dispute handling practices.[6] Although the FTC focused its 2018 and 2019 FCRA enforcement efforts on CRAs[7] and users[8] of information, its public statements suggest that it has not abandoned its interest in furnishers' practices.

The just-announced FTC and CFPB consumer reporting workshop, for example, will focus in large part on issues impacting the accuracy of information that furnishers provide to CRAs.[9] Likewise, speaking at the Consumer Data Industry Association's Law & Industry Conference in June, FTC Commissioner Rebecca Kelly Slaughter highlighted her concern over the burden that the consumer reporting industry, at large, places on consumers to find and dispute errors on their consumer reports.[10]

She stressed, in particular, that "[consumers] and your customers should know how accurate your credit information is and how responsive you are being to resolving potential inaccuracies." [11] Her statements suggest that the FTC may begin to focus more on how furnishers communicate with their customers regarding information reported to CRAs including how furnishers handle and resolve consumer reporting disputes.

CFPB

The CFPB considers complaints concerning consumer reporting a key priority.[12] In 2018 alone, the CFPB received over 126,000 consumer complaints regarding consumer reporting, of which 61% concerned inaccurate information on the consumer's credit report.[13]

In 2018, the CFPB announced a settlement against an established bank furnisher, State Farm Bank FSB, for alleged violations of FCRA and Regulation V, including the furnisher's alleged failure to establish and implement written policies regarding the accuracy of information provided to CRAs.[14]

The CFPB continues to use its powers to evaluate and investigate furnishers' practices, with a current focus on deposit accounts and debt collectors.

Indeed, the CFPB's just-published summer 2019 "Supervisory Highlights" dedicates almost half of its observations to those involving furnisher activities and, in particular, failures of furnishers of deposit account information to maintain reasonable written policies and procedures, consistent with Regulation V's provisions, on topics such as training and monitoring, internal audits related to the dispute handling process, and prompt notification to CRAs after identification of errors in reporting.[15]

Furthermore, in July 2019, the CFPB published a report focused entirely on tradeline reporting by third-party collectors.[16] The report conveys the CFPB's concern that the high

number of collection tradeline disputes it sees may "reflect differences in the underlying accuracy of the data" provided to CRAs and signaled that further scrutiny of debt collectors' reporting might be on the horizon.[17]

At the end of last month, the CFPB filed a complaint against Fair Collections & Outsourcing, a third-party debt collector, for violations of the indirect dispute provision of the FCRA and policy and procedure provision of Regulation V.[18] In the complaint, the CFPB alleges that FCO failed to perform reasonable investigations of indirect disputes as evidenced, in part, by its additional failure to maintain policies and procedures that included true guidance for employees on how to adequately investigate certain types of disputes, including those related to identity theft.[19]

In further support of its allegations, the CFPB highlighted the small number of employees responsible for investigating disputes as compared to the large number of disputes received. Specifically, the CFPB alleged that FCO designated only four employees to handle approximately 10,000 indirect disputes per month, with the pace at which employees reviewed disputes being between 17 and 33 per hour, and finding that employees confirmed disputed information as accurate approximately 92% of the time.[20]

This underscores the need for furnishers to monitor statistics and trends related to their receipt and investigation of, and responses to, disputes and to consider those statistics and trends when evaluating the need for potential enhancements to their dispute handling processes.

Congressional Concerns

Regulators aren't the only ones concerned with consumer reporting issues. The House Committee on Financial Services recently passed a series of bills to reform the credit reporting industry.[21] One of the bills, the Improving Credit Reporting for All Consumers Act, would, as currently written, have significant implications for furnishers by requiring them, for example, to:

- Send a specific notice to each consumer for which they furnished negative information to the CRAs no later than five business days after furnishing the first piece of negative information;
- Cease designation of consumer disputes as "frivolous or irrelevant";
- Enhance dispute result notifications to include a copy of all information relating to the consumer that was used in carrying out the investigation; and
- Establish a process, consistent with the statute, through which consumers can appeal a dispute investigation decision.[22]

While the bill is a long way from becoming law, it, together with the actions of the FTC and CFPB, signifies a consensus that furnishers should do more to ensure the accuracy of information transmitted for inclusion in consumer reports.

Conclusion

Although the FCRA is an old law, regulators are using it just as much as ever to scrutinize the practices of data furnishers. The time is therefore ripe for furnishers to revisit their consumer reporting policies and procedures.

While specific actions will vary, the following guideposts can help furnishers manage their FCRA responsibilities:

- Engage with legal and compliance: A strong consumer reporting function depends on firm policies, procedures and reporting strategies. The process for reporting and, at the same time, complying with FCRA and Regulation V's many provisions, is complicated and warrants the dedication of compliance and legal support. Failure to prioritize the creation and maintenance of effective and compliant policies, procedures and reporting strategies that are particular to the types of information being furnished may leave furnishers vulnerable to regulatory criticism or enforcement.
- Establish controls: Appendix E to Regulation V provides that developing policies and procedures requires "establishing and implementing appropriate internal controls" and conducting "periodic [evaluations]." These types of controls can help furnishers detect systemic issues, in both furnishing and dispute handling, that, if not identified, could cause significant consumer harm or result in substantial legal exposure.
- Establish a plan to promptly address reporting errors: Although the FCRA is not a strict liability statute and, thus, the existence of an inaccuracy in a consumer report does not automatically result in liability, prompt correction of identified or known inaccuracies is critical. Accordingly, furnishers will benefit from establishing a defined process through which root cause analyses and correction of errors can be completed efficiently and effectively.
- Train staff on dispute investigations and consumer communications: In the age of heightened privacy concerns, there is a reasonable push for furnishers to communicate more effectively with consumers about their consumer report data. To that end, furnishers should ensure that those involved in the dispute investigation process document their actions so that the entity is in a position to communicate with the consumer, in a comprehensive way, information reported on the consumer's account.

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[1] 12 C.F.R. §§ 1022.1 et seq.

[2] See 15 U.S.C. § 1681 et seq.; Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[3] 12 C.F.R. 1022.42(a)-(b); 12 C.F.R. § Pt. 1022, App. E(III).

[4] Press Release, CFPB, CFPB and FTC to Host December Workshop on Accuracy in Consumer Reporting (Sept. 19, 2019), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-ftc-host-december-workshop-accuracy-consumer-reporting/>.

[5] Id.

[6] See Complaint, Fed. Trade Comm'n v. Credit Protection Association LP, No. 3:16-cv-01255-D (N.D. Tex. May 9, 2016), <https://www.ftc.gov/system/files/documents/cases/160509cpacmpt.pdf>; Stipulated Final Order for Permanent Injunction & Civil Penalty Judgment, Fed. Trade Comm'n v. Credit Protection Association LP, No. 3:16-cv-01255-D (N.D. Tex. May 9, 2016), <https://www.ftc.gov/system/files/documents/cases/160509cpaorder.pdf>.

[7] Indeed, at the end of 2018, the FTC resolved allegations against a CRA for providing tenant screening reports that associated certain prospective tenants with criminal records of different individuals, resulting in the prospective tenants' denial for housing or other opportunities. See Stipulated Order for Permanent Injunction & Civil Penalty Judgment, Fed. Trade Comm'n v. RealPage, Inc., No. 3:18-cv-02737-N (N.D. Tex. Oct. 16, 2018), https://www.ftc.gov/system/files/documents/cases/152_3059_realpage_inc_stipulated_order_10-16-18.pdf; Complaint, Fed. Trade Comm'n v. RealPage, Inc., No. 3:18-cv-02737-N (N.D. Tex. Oct. 16, 2018), https://www.ftc.gov/system/files/documents/cases/152_3059_realpage_inc_complaint_10-16-18.pdf.

[8] See Complaint, Fed. Trade Comm'n v. Alliance Security Inc., No. 1:18-cv-10548-GAO (D. Mass. Mar. 22, 2018), https://www.ftc.gov/system/files/documents/cases/alliance_-_complaint.pdf; Stipulated Final Order for Permanent Injunction & Civil Penalty Judgment, Fed. Trade Comm'n v. Alliance Security Inc., No. 1:18-cv-10548-GAO (D. Mass. July 31, 2019), https://www.ftc.gov/system/files/documents/cases/alliance_security_stipulated_final_order_as_to_alliance.pdf.

[9] Press Release, CFPB, CFPB and FTC to Host December Workshop on Accuracy in Consumer Reporting (Sept. 19, 2019), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-ftc-host-december-workshop-accuracy-consumer-reporting/>.

[10] Fed. Trade Comm'n, Remarks of Commissioner Rebecca Kelly Slaughter at CDIA Law & Industry Conference (June 5, 2019), https://www.ftc.gov/system/files/documents/public_statements/1525705/slaughter_-_remarks_at_2019_cdia_law_industry_conference_6-5-19.pdf.

[11] Id.

[12] CFPB, Consumer Response Annual Report (Mar. 2019), https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2018.pdf.

[13] Id. at 17, 19.

[14] Consent Order, In re State Farm Bank, FSB, No. 2018-BCFP-0009 (Dec. 6, 2018), https://files.consumerfinance.gov/f/documents/bcftp_state-farm-bank_consent-order.pdf.

[15] CFPB, Supervisory Highlights, Issue 19 (Summer 2019), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf.

[16] CFPB, Market Snapshot: Third-Party Debt Collections Tradeline Reporting (July 2019), https://files.consumerfinance.gov/f/documents/201907_cfpb_third-party-debt-collections_report.pdf.

[17] *Id.* at 14.

[18] Complaint, Bureau of Consumer Financial Protection v. Fair Collections & Outsourcing, Inc., 19-cv-02817-GJH, (D. Md. Sept. 25, 2019), https://files.consumerfinance.gov/f/documents/cfpb_fair-collections-outsourcing-inc_complaint_2019-09.pdf (the lawsuit was brought against FCO Holding, Inc. and its subsidiaries, Fair Collections & Outsourcing, Inc., Fair Collections & Outsourcing of New England, Inc., and FCO Worldwide, Inc. collectively operating under the names Fair Collections & Outsourcing and FCO).

[19] *Id.*

[20] *Id.*

[21] Press Release, U.S. House Comm. on Fin. Servs., Waters Opening Statement at Markup (July 11, 2019), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=404066>.

[22] H.R. 3642, 116th Cong. (2019).