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# Mitigating FCRA Risks in the COVID-19 World

*By Abigail M. Lyle, Aliza Pescovitz Malouf, Rachael Craven, and Nikki Skolnekovich\**

*Although there has been a slight decrease in Fair Credit Reporting Act (“FCRA”) filings since the COVID-19 pandemic began, claims will once again be on the rise as courts reopen and the relief measures under the Coronavirus Aid, Relief, and Economic Security Act are tested. The authors of this article anticipate an onslaught of FCRA complaints over the next year and discuss why it is critical for financial institutions and financial services companies to ensure that adequate policies and procedures are in place to comply with the FCRA and recent credit reporting guidance.*

In the years leading up to the current COVID-19 pandemic, consumer litigation claims related to the Fair Credit Reporting Act (“FCRA”) doubled.<sup>1</sup> Although there has been a slight decrease in FCRA filings since March 2020 (due in large part to court closures and stay at home orders resulting from COVID-19), we expect FCRA claims will once again be on the rise as courts reopen and the relief measures under the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)<sup>2</sup> are tested. Indeed, in the months following the initial COVID-19 outbreak, the Consumer Financial Protection Bureau (“CFPB”) received its highest number of FCRA consumer complaints, with over 14 percent mentioning coronavirus keywords.<sup>3</sup>

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<sup>1</sup> See e.g., *2019 Consumer Protection Litigation Report*, Lex Machina (2019) available at <https://lexmachina.com/lex-machina-releases-its-first-consumer-protection-litigation-report/>.

<sup>2</sup> *Coronavirus Aid, Relief, and Economic Security Act*, Pub. L. No. 116-136, 134 Stat. 281 (2020).

<sup>3</sup> *Complaint Bulletin: Complaints mentioning coronavirus keywords*, Consumer Financial Protection Bureau (May 2020), available at [https://files.consumerfinance.gov/f/documents/cfpb\\_complaint-bulletin\\_coronavirus-complaints.pdf](https://files.consumerfinance.gov/f/documents/cfpb_complaint-bulletin_coronavirus-complaints.pdf). In fact, complaints related to credit and consumer reporting topped the list of complaints received by the CFPB, with 52 percent of the

Given the anticipated onslaught of FCRA complaints over the next year, now, more than ever, it is critical for financial institutions and financial services companies to ensure that adequate policies and procedures are in place to comply not only with the FCRA, but also the myriad of recent credit reporting guidance issued by the federal banking and consumer regulators since the initial coronavirus outbreak.

## BACKGROUND

The increase in FCRA litigation over the past 10 years has been driven by the possibility that a successful plaintiff may recover actual damages, statutory damages between \$100 and \$1,000 per violation, attorneys' fees, costs, and punitive damages, depending on whether the violation was intentional or negligent.<sup>4</sup> Importantly, the FCRA allows for recovery of these damages even where the alleged violation is merely technical in nature, resulting in little, if any, actual damages to the plaintiff.

As a result, the financial impact can be severe due to the FCRA's fee shifting provision, particularly where furnishers of credit information do not have the necessary policies and procedures in place to adequately investigate and respond to credit disputes. Further, because of the fee shifting provisions, plaintiffs' attorneys often file FCRA claims in bulk, with the goal of extracting significant settlements.

A large portion of consumer FCRA litigation relates to a furnisher's failure to accurately report and/or conduct a reasonable investigation after receiving a dispute.

As background, the FCRA requires any entity that "furnishes" information to a consumer reporting agency ("CRA") to ensure such information is accurate.<sup>5</sup> If a consumer disputes the accuracy of reported information in accordance with FCRA procedures, furnishers must conduct a "reasonable investigation," report the results of the investigation to each CRA, and modify, delete, or block the reporting of any information determined to be inaccurate or which "cannot be verified" as a result of the investigation.<sup>6</sup> The furnisher generally must complete

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143,609 total complaints so far in 2020 related to consumer reports. Of these consumer reporting-related complaints, 14 percent mention coronavirus keywords, with the top credit reporting issue identified by consumers being incorrect information shown on the consumer's report.

<sup>4</sup> 15 U.S.C. §§ 1681o; 1681n.

<sup>5</sup> 15 U.S.C. § 1681s-2(a).

<sup>6</sup> *Id.* at (b)(1).

its investigation and make appropriate notifications within 30 days of the date the consumer filed the dispute.<sup>7</sup>

Whether an investigation is “reasonable” is often a contested issue. Several courts have reasoned that a furnisher must go beyond merely verifying that the information matches a summary display of the customer’s account.<sup>8</sup>

For instance, a reasonable investigation may require a furnisher to review prior customer correspondence or notices such as bankruptcy filings, loan documents, litigation files, or prior settlement agreements.<sup>9</sup>

Courts may also look to the integrity or completeness of a furnisher’s database in determining whether reliance on such information constitutes a reasonable investigation.<sup>10</sup>

### IMPACT OF COVID-19 ON FCRA REPORTING OBLIGATIONS

In response to the current pandemic, Section 1681s-2 of the FCRA was amended to require that consumer accounts be reported as current when offered a payment accommodation (e.g., temporary payment deferral, forbearance, loan modification, etc.) due to a COVID-19 related hardship.<sup>11</sup> If the consumer’s account was delinquent prior to the accommodation, the furnisher must maintain the delinquent status as it existed before the accommodation unless the consumer brings the account current, in which case the account must be reported as current.<sup>12</sup>

Several regulators have issued credit reporting guidance<sup>13</sup> concerning forbearance or accommodation agreements resulting from COVID-19 related

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<sup>7</sup> *Id.* at (b)(2).

<sup>8</sup> *Marchisio v. Carrington Mortgage, LLC*, 919 F.3d 1288, 1301–02 (11th Cir. 2019) (holding that the furnisher’s investigative efforts were not reasonable because it “failed to create a reliable system for inputting information regarding settlement of litigation” that impacted the manner in which an account should have been reported).

<sup>9</sup> *Id.*; see also *Hrebal v. Nationstar Mortgage LLC*, 385 F. Supp. 3d 849, 852 (D. Minn. 2019) (furnisher failed to conduct a reasonable investigation where it reviewed only the information contained in its system of record and did not escalate the dispute to its internal bankruptcy department to review the bankruptcy records despite the consumer specifically noting that he recently received a Chapter 13 bankruptcy discharge).

<sup>10</sup> *Marchisio*, 919 F.3d at 1302.

<sup>11</sup> See *Coronavirus Aid, Relief, and Economic Security Act*, Pub. L. No. 116-136, 134 Stat. 281 (2020).

<sup>12</sup> *Id.*

<sup>13</sup> See *Interagency Statement on Loan Modifications and Reporting for Financial Institutions Working with Customers Affected by the Coronavirus (Revised)*; Board of Governors of the Federal



financial hardships. Regulators have consistently emphasized that non-payment arising from a COVID-19 related forbearance agreement should not be reported as delinquent and no derogatory reporting should be reported based on the accommodation.

For example, the Interagency Statement from the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation (“FDIC”), National Credit Union Administration (“NCUA”), Office of the Comptroller of the Currency (“OCC”), and the CFPB clarifies that a COVID-19 related accommodation agreement is a legal agreement impacting a loan’s payment date such that a loan which was “current” before the accommodation should continue to be reported as “current” and not delinquent for the duration of the accommodation period.

Furnishers must also ensure that all trade line information is consistent with the reported account status. “For example, information a furnisher provides about an account’s payment status, scheduled monthly payment, and the amount past due may all need to be updated.”<sup>14</sup>

The CFPB’s guidance also provides that after a COVID-related forbearance ends, a furnisher cannot advance the delinquency of a consumer based on nonpayment during the forbearance period. Thus, an account that entered a six-month forbearance as 30 days delinquent cannot be reported as 180 or more days past due after exiting the forbearance period.<sup>15</sup>

## POST-COVID LITIGATION TRENDS

As COVID-related accommodations begin to be tested, factual disputes are likely to rise, including disputes related to inconsistent trade line information arising from an accommodation or failure to satisfy arrears from the forbearance period. Against this backdrop of changing consumer reporting guidance and consumer challenges, it is exceedingly important to ensure that all credit reporting is as accurate as possible, and that consumer disputes are reasonably investigated.

Thus, it is critical that furnishers ensure that all credit reporting related to forbearance and payment accommodations is accurate and reflects the actual

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Reserve System (April 7, 2020); *see also* COVID-19: *What are the requirements for using the COVID-19 Forbearance?*, Department of Housing and Urban Development (“Any Borrower who is granted a COVID-19 Forbearance and is otherwise performing as agreed is not considered to be delinquent for purposes of credit reporting”).

<sup>14</sup> *Consumer Reporting FAQs Related to the CARES Act and COVID-19 Pandemic*, Consumer Financial Protection Bureau (June 16, 2020).

<sup>15</sup> *Id.*

terms agreed to by the lender and consumer. For example, there have been several recent class action lawsuits filed against furnishers alleging improper COVID-19 accommodations and willful reporting of inaccurate and misleading information to CRAs.

These recent filings illustrate the importance of maintaining effective FCRA policies and procedures to ensure that employees accurately report credit information and, when a dispute is received, make an inquiry into the specific factors raised in the consumer dispute, such as a bankruptcy filing or, potentially, a COVID-19 related accommodation or hardship.

Similarly, effective policies are necessary to ensure that all COVID-19 related accommodations or modifications are documented and available to verifying employees.

### **BEST PRACTICE TIPS**

As COVID-19 forbearances and financial accommodations begin to expire, furnishers should ensure that policies are in place to report individual accounts in a manner consistent with the terms of the individual COVID-19 accommodation. Nevertheless, the economic impact of COVID-19 continues to cause financial hardship for consumers, which is likely to cause continued delinquencies and defaults. As these two issues converge, we expect to see an increase in consumer complaints and regulatory scrutiny. Therefore, it is essential that furnishers take steps now to prepare policies and procedures to address FCRA reporting in the COVID-19 world. A few ways to mitigate against the risk include:

- Ensuring reasonable policies and procedures are in place to comply with the FCRA, including policies and procedures to investigate and review the accuracy of consumer disputes;
- Updating or developing policies and procedures to address the regulations and guidance specific to credit reporting during the COVID-19 pandemic, including the reporting requirements for COVID-19 accommodations;
- Training employees on the FCRA's accuracy and investigation requirements, as well as the accurate reporting of COVID-19 accommodations;<sup>16</sup>

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<sup>16</sup> Several courts have recently rejected defenses that verification of inaccurate information constituted an isolated, bona fide error by an individual employee where it was foreseeable based on the furnishers' database or procedures that an employee would "yield an incorrect conclusion" in a credit dispute investigation. *Marchisio*, 919 F.3d at 1301; see also *Austin v. Pawtucket Credit Union*, No. CV 18-10699-FDS (D. Mass. May 17, 2019) (furnisher failed to conduct a

- Instituting policies and procedures to continue monitoring regulatory guidance for your industry and revising policies, as necessary, to remain compliant with regulatory changes;
- Taking all consumer disputes seriously, conducting full and detailed investigations, and providing a carefully documented explanation based on a reasonable review to support any decisions made with respect to a consumer dispute; and
- Establishing a repository for your company's policies and procedures so that employees can easily access documents necessary to comply with the FCRA.

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reasonable investigation in response to plaintiff's credit dispute where its employee verified reporting that plaintiff was an obligor on the car loan despite plaintiff referencing that she had not signed the loan documents based on the employee-investigator's mistaken belief that a notice to a co-obligor indicated that the plaintiff was obligated on the account).