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The Current Screening Regulatory Environment And How to Best Prepare for Regulatory Investigations

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The Perfect Regulatory Storm

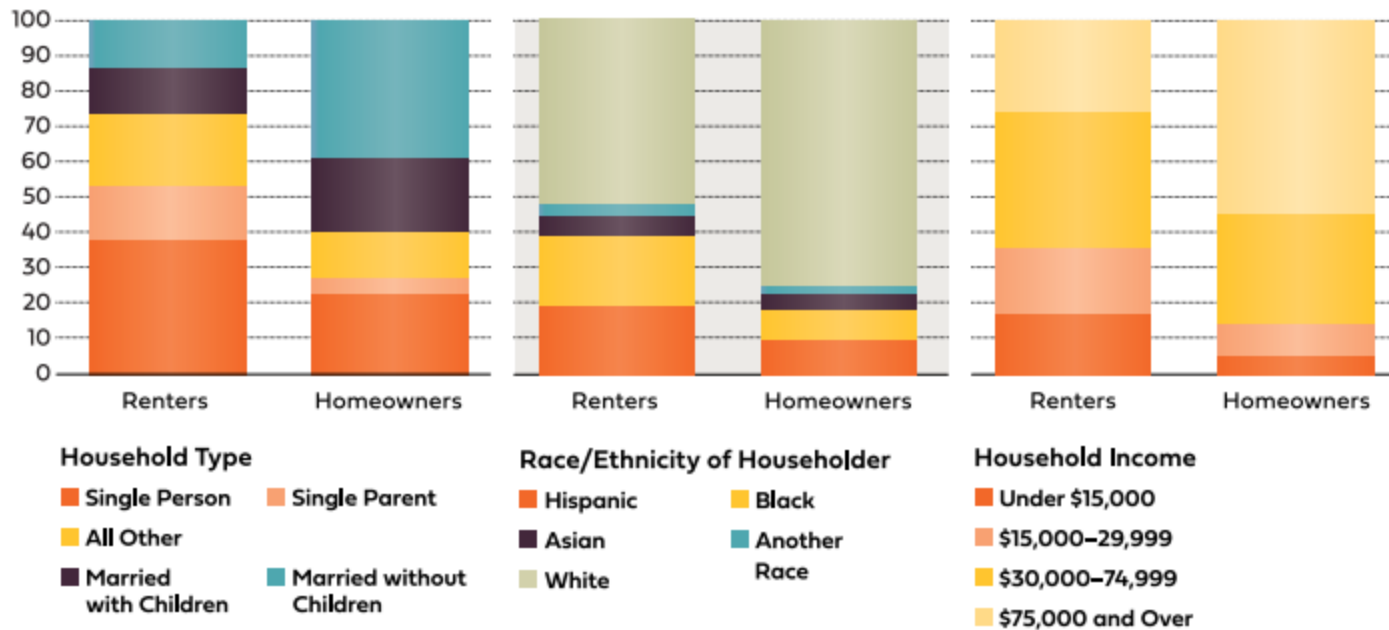
- Social justice movements nationwide placed increased emphasis on the status of minorities in the United States, with renters tending to concentrate in lower income bands, and minorities underrepresented in home ownership.
- COVID-19 lead to the establishment of national eviction moratoriums.
- Change in administration brought renewed focus to tenant rights and screenings, consumer FCRA disputes, and more enforcement-minded officials in positions of power.
- Democrats gained control of the House, Senate, and the White House.

Renter Demographics

FIGURE 9

Renters Are Much More Likely than Homeowners to Be Single, to Be Households of Color, and to Have Lower Incomes

Share of Households (Percent)



Notes: Black, Asian, white, and another race(s) householders are non-Hispanic. Hispanic householders may be of any race(s). All Other household type includes both unrelated roommates and other types of families.

Source: JCHS tabulations of US Census Bureau, 2019 American Community Survey 1-Year Estimates.

- In 2019, 58% of Black households rented their housing, 52% of Hispanic households, 43% of American Indian or Alaskan Native households, and 39% of Asian households.
- Social justice movements (e.g., protest of death of George Floyd), placed emphasis on these demographics.

Eviction Moratoriums

- Tenant rights were given increased emphasis during COVID, resulting in legislative action.
- The Coronavirus Aid, Relief, and Economic Security Act (CARES) was introduced as a substitute amendment to an unrelated existing tax bill – H.R. 748, the Middle Class Health Benefits Tax Repeal Act of 2019.
- Under Section 4024, the U.S. COVID-19 eviction moratorium was implemented. An estimated 1.6 million evictions were prevented in 2020 due to the moratorium.
- In July 2020, the initial moratorium expired. When Congress did not renew it, the Center for Disease Control (CDC) promulgated 85 Fed. Reg. 55292 (2020). This imposed an administrative moratorium. This was eventually extended through July 2021.

Eviction Moratoriums

- This moratorium was extended by President Biden's administration to October 3, 2021.
- On August 26, 2021, the U.S. Supreme Court struck the moratorium down in *Alabama Association of Realtors, et al. v. Department of Health and Human Services, et al.*, 594 U.S. ____ (2021).
- The Supreme Court vacated a stay of judgment, rendering the judgment from the District Court for the District of Columbia, enforceable. The lower court held the CDC lacked statutory authority to impose the moratorium.
- This action was originally brought by realtor associations and rental property managers in Alabama and Georgia.



CFPB Director Chopra

- On September 30, 2021, the U.S. Senate confirmed Rohit Chopra as Director of the Consumer Financial Protection Bureau (CFPB).
- He previously helped establish the CFPB following its creation through the Dodd-Frank Act.
- He served as CFPB Assistant Director from 2010 – 2015.
- Since May 2018, he served as a Federal Trade Commissioner, where he frequently advocated for more robust enforcement action.
- At the FTC he led efforts to spur competition in student loan financing, developed tools for student loan borrowers to make smarter decisions and secured hundreds of millions of dollars in refunds for borrowers victimized by unlawful loan servicing, debt collectors, and for-profit college chains.
- During his Senate confirmation hearing, he expressed concern over inaccuracies in credit reporting and its impact on consumer ability to recover from the financial impact of COVID-19.
- Previously commented on disparate impact litigation involving screening.



Senate Banking Committee Inquiry

- On April 8, 2021, Senator Brown, Chairman of the U.S. Senate Committee on Banking, Housing, and Urban Affairs, expressed “growing concern for the accuracy, development, and marketing of tenant screening reports and scores, and the consequences that inaccuracies in tenant screening reports and scores may have on individuals and families seeking affordable housing during and in the aftermath of the COVID-19 pandemic.”
- This letter emphasized the importance of accurate reporting of applicant’s criminal and civil background information as contained in tenant screening reports. This includes providing updates and validating information to accurately reflect convictions that are expunged, sealed records, and withdrawn eviction filings.



Senate Banking Committee Inquiry

- Senator Brown also expressed concern over racial disparities in civil and criminal law enforcement negatively affecting the ability of Brown and Black, along with other ethnic minority renters, to obtain affordable housing.
- He asked screening companies to provide responses to, including, their policies and procedures on accurate reporting of consumer reports in compliance with the FCRA Section 1681e(b); the steps they take to update criminal and civil public record information in these reports; and any associated scoring systems.



Senator Brown Letter to CFPB

- On October 20, 2021, Senator Brown sent a letter to CFPB Director Chopra.
- This contained “findings” from the Committee’s April 2021 inquiry to various tenant screening companies.
- This letter included findings from the Committee’s April 2021 inquiry.
- These findings found “a significant number of tenant screening reports contained inaccurate information. Inaccuracies in tenant screening reports may result in landlords denying applicants rental housing or charging higher security deposits.”



Senator Brown Letter to CFPB

- Senator Brown further emphasized that these issues are particularly problematic for “low-income, women, and Black renters who experience a higher rate of eviction filings than white renters.”
- The letter directed Director Chopra to review the tenant screening industry and to protect renters.
- This letter also requested the CFPB to begin a thorough review of the tenant screening industry and use its authority to the fullest extent possible to protect renters.

CFPB Study

- Independently, the CFPB has also been addressing screening issues, albeit in the credit context.
- On September 7, 2021, the CFPB published a study of consumer credit disputes by demographics. It found that disputes by wealthier, non-Hispanic consumers generally regarded issues about servicing of performing loans. Complaints from minority and poorer communities were generally about credit reporting, identity theft, and delinquent servicing.



CFPB Advisory Opinion

- On November 4, 2021, the CFPB issued an advisory stating name-only matching violates the FCRA's "reasonable procedures" requirement.
- It highlights name-only matching is a higher risk for minority names because of less last-name diversity.
- Under 15 U.S.C. § 1681e(b) "whenever a consumer reporting prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."



CFPB Advisory Opinion

- The CFPB made it clear that the opinion is considered an “interpretive rule” issued under the CFPB’s authority to interpret the FCRA.
- The Opinion is to be published at 12 C.F.R. Part 1022 and will be effective as of the date of publication.
- The publications reveal an emphasis by the CFPB on minority consumer protection, as well as a focus on screening and related FCRA-governed dispute processes.



Group Senate Letter to CFPB

- On November 10, 2021, a group of Democratic senators sent a letter to Director Chopra urging a proactive stance on regulating consumer reporting agencies.
- The senators, led by Sen. Brian Schatz (D-HI), and includes Sens. Elizabeth Warren (D-MA), and Sherrod Brown (D-OH).
- The letter asks the CFPB to evaluate errors and ensure equity in credit reporting.
- It emphasizes that errors in credit reporting can exacerbate the racial wealth gap and cites the CFPB's own study on demographics and consumer credit disputes.



Data Security and Privacy Practices

- In tandem with the CFPB, the Federal Trade Commission (FTC) released a report highlighting the agency's priorities. There are four key initiatives:
 1. Integrating Competition Concerns
 2. Advancing Remedies
 3. Focusing on Digital Platforms
 4. Expanding Understanding of Algorithms

Advancing Remedies

- The FTC stated it will focus on crafting strong remedies that protect consumers and deter harmful data security and privacy practices.
- This will include requiring companies to disclose data breaches and data misuse.
- The agency will also expand nonmonetary relief for affected consumers, such as requiring companies to provide identity verification services.
- These remedies will be implemented through enforcement actions.



Expanding Understanding of Algorithms

- The FTC will develop greater understanding of algorithms and the consumer protection and competitive risk they pose.
- In particular, the FTC would like to understand the ways that algorithms may create racial bias and prevent such uses of algorithms.
- It will also encourage companies to “test their algorithms, both at the outset and periodically thereafter, to make sure it doesn’t create a disparate impact on a protected class.”

FTC Proposed Rulemaking

- In December 2021, the FTC published an advance notice of proposed rulemaking (ANPRM) stating it is considering initiating a rulemaking under section 18 of the FTC Act to curb deficient data security practices, limit privacy abuses, and ensure that algorithmic decision-making does not result in unlawful discrimination.
- While the FTC indicated a potential rulemaking date of February 2022, no rulemaking has begun.



The CFPB's 2022 List of CRAs

- CFPB published its annual list of CRAs in early 2022.
- The press release accompanying the publication was notable for the surrounding commentary, which was overtly hostile to the industry. “Americans have limited legal rights they can use to keep tabs on these surveillance companies,” and the CFPB touted this list as a tool for holding CRAs accountable.
- Overall, the press release incorporates a negative tone regarding consumer reporting and data collection companies, without reference to the benefits provided and interests served by these companies to enable affordable and efficient consumer transactions.
- The press release conveys the CFPB's concern that not enough Americans are aware of or enabled to enforce their rights under the FCRA, despite the fact that FCRA filings have seen a steady increase year after year, even outpacing other consumer protection statutes.

Regulatory Pressures

- These events demonstrate that regulatory pressures have simultaneously developed on multiple fronts.
- Screening companies and CRAs are known to have received numerous subpoenas (e.g., Equifax recently told investors that it recently received a civil investigative demand from the Consumer Financial Protection Bureau tied to an investigation into the company's handling of complaints from consumers about accuracy)



Preparing for Investigation

- Conduct an internal review.
 - Review all policies, such as handling customer disputes.
 - Review all practices, such as methods used to verify identity before producing a report.
 - Understand what sources of data your company uses, including sources of different vendors, and consider audits.
 - Conduct periodic training with staff on best practices, such as updating criminal history.
 - Audit customer interactions.
 - Adopt practices to routinely test and evaluate processes for potentially biased decision making.

Preparing for Investigation

- Consider consulting with counsel to review current practices.
- Consult with counsel to undertake a risk assessment that is specific to the company.
- Create a “day 1” incident response plan.
- Designate a team that will respond if an investigation arises.
- Respond timely if an investigation arises.
- Train employees that will interact with government investigators.



Preparing for Investigation

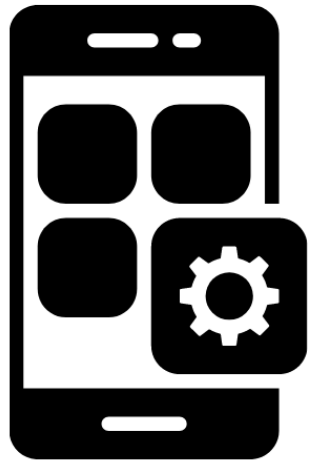
- Review recent settlement decrees to understand enforcement priorities.
- Support industry advocacy organizations and consider coordination with organizations who have also received demands.
- Review advisory opinions for best practices.
- Subscribe to publications that discuss updates and best practices.
- Track proposed rulemaking and pending legislation.
- Participate in the rulemaking process, such as by submitting comments.



Consumer Financial Services Resources

- For more information, please click [here](#) to visit our Consumer Financial Services Law Monitor which offers timely updates regarding the financial services industry to inform you of recent changes in the law, upcoming regulatory deadlines and significant judicial opinions that may impact your business. We report on several sectors within the consumer financial services industry, including payment processing and prepaid cards, debt buying and debt collection, credit reporting and data brokers, background screening, cybersecurity, mortgage lending and servicing, auto finance, and state AG, CFPB and FTC developments. To subscribe to our blog, please visit www.consumerfinancialserviceslawmonitor.com/subscribe/
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