



FCRA Overview

July 19, 2023



1

FCRA Overview

- **Legislative History**
 - Enacted in 1970 to regulate the collection, dissemination, and use of consumer information
 - Part of the Consumer Credit Protection Act (15 U.S.C. §§ 1601 *et seq.*)
- **Purpose**
 - Prevent the misuse of sensitive consumer information by limiting recipients to those who have a legitimate need for it;
 - Improve the accuracy and integrity of consumer reports; and
 - Promote the efficiency of the nation's banking and consumer credit systems



2

FCRA Overview

- **Significant Amendments:**

- Consumer Credit Reporting Reform Act of 1996
- Gramm-Leach-Bliley Act of 1999 (GLBA)
- Fair and Accurate Credit Transactions Act (FACTA)
- Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010 (Dodd-Frank Act)
- Economic Growth, Regulatory Relief & Consumer Protection Act (2018)
- Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (2020)



3

FCRA Scope

- **Covered Persons**

- Consumer Reporting Agencies (CRAs)
- Users of consumer reports
- Furnishers of information to CRAs
- **Consumer Reporting Agency:** any person which, **for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages** in whole or in part in the practice of **assembling or evaluating consumer credit information** or other information on consumers **for the purpose of furnishing consumer reports to third parties**, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports



4

FCRA Scope

- **Consumer Report:** any written, oral or other communication of any information by a CRA bearing on a consumer's
 - credit worthiness, credit standing, credit capacity,
 - character, general reputation, personal characteristics, or
 - mode of living

which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for

- **credit or insurance** to be used primarily for personal, family or household purposes;
- **employment purposes;** or
- any other purpose authorized by the Act



5

FCRA Key Requirements

- Permissible purposes for obtaining consumer reports
- Prescreened reports & firm offers of credit
- Consumer disclosures
- Consumer right to obtain free copy of credit report
- Adverse action notices
- Risk-based pricing
- Furnishing accurate information/disputes
- Identity theft/address discrepancies/security freezes/"red flags"/fraud and active duty alerts
- Affiliate information sharing (marketing)
- Safeguarding and disposal of information



6

FCRA Rulemaking

- **Rulemaking Authority:**
 - CFPB, Regulation V (12 CFR Part 1022)
 - Does not extend to sections 1681m(e) (Red Flags) and 1681w (Disposal of Records)
 - FTC, SEC, CFTC, federal banking agencies & NCUA:
 - Disposal of Records & Red Flags
 - FTC, 16 CFR Part 600, includes the Disposal of Records & Red Flags rules, and rules that apply only to motor vehicle dealers



7

FCRA Enforcement

- **Enforced By:**
 - Private litigants/individual consumers
 - States (AGs)
 - Federal Agencies: CFPB, FTC, federal banking agencies, NCUA
- **Statute of Limitations:**
 - An action may be brought not later than the earlier of:
 - 2 years after date of plaintiff's discovery of the violation that is the basis for such liability; or
 - 5 years after the date on which the violation that is the basis for such liability occurs



8

FCRA Potential Liability

- **Possible Damages:**
 - Actual, statutory, punitive
 - Criminal:
 - Fines, imprisonment up to 2 years, or both for:
 - Any person who knowingly & willfully obtains information on a consumer from a CRA under false pretenses or
 - Any officer or employee of a CRA who knowingly & willfully provides information concerning an individual from the CRA's files to a person not authorized to receive that information
 - Each failure to comply is a separate violation; a consumer may be entitled to multiple awards of statutory damages for multiple violations



9

FCRA Potential Liability

- | | |
|--|---|
| <ul style="list-style-type: none">• Negligent Violations<ul style="list-style-type: none">• Actual damages• Court costs• Reasonable attorney fees | <ul style="list-style-type: none">• Willful Violation<ul style="list-style-type: none">• Actual OR statutory damages (\$100 to \$1000)• Punitive damages• Court costs• Reasonable attorney fees |
|--|---|



10

Adverse Action Notices

- When any person takes any adverse action against a consumer based on information from a consumer report, the person must provide notice of the adverse action to the consumer.
- This notice should include a disclosure with the numerical credit score, the range of possible credit scores, all of the key factors adversely affecting the credit score, the date the score was created, and the name of the entity providing the credit score.
- The notice should also provide the consumer with the name, address, and telephone number of the consumer reporting agency, as well as information about the consumer's right to review or dispute the information contained in the report.



11

Consumer Reports for Employment Purposes

- Furnishers who provide consumer reports for employment purposes have a duty to notify the consumer of the report and provide the name and address of the entity requesting the report.
- Furnishers have an obligation to maintain strict procedure to help insure information which is likely to have an adverse effect is complete and accurate before being reported.



12

Accuracy of Information

- Under 15 U.S.C. §§ 1681s-2(a), furnishers have a duty to provide accurate information and shall not furnish information if they know or have reasonable cause to believe that information is inaccurate.
- Furnishers have a duty when preparing consumer reports to follow reasonable procedures to assure maximum accuracy of the information concerning the consumer.



13

Disputed Information

- After a furnisher receives notice of a dispute about completeness or accuracy of information provided by a person, the furnisher shall:
 - Conduct an investigation of the disputed information
 - Review all relevant information provided by the consumer
 - Report the results of to the consumer reporting agency
 - If the investigation finds that the information is incomplete or inaccurate then that must be reported to all of the consumer reporting agencies to which the information was originally furnished.



14

Furnisher Liability

- Although the FCRA mandates that furnishers provide accurate information, it specifically does not provide consumers with a private right of action to police the furnishing of inaccurate information.
- Instead, consumers try to shoehorn claims in under their private right of action regarding a furnisher's failure to conduct a reasonable investigation of disputed inaccurate information.
- The key takeaway: if the consumer did not submit a notice of dispute to the CRA (which was then provided to the furnisher), then the furnisher probably does not have legal liability in a private lawsuit.



15

Limitations on Consumer Reporting

- Consumer reporting agencies cannot make any consumer reports containing any of the following types of information:
 - Bankruptcy proceeding older than 10 years, all civil and criminal suits that are older than 7 years, tax liens that have been predate the report by 10 years, accounts that have been in collections for over 10 years before the report, and any other adverse items other than conditions that are predate the report mor 7 years.
 - This does not apply to credit transaction for a principal amount \$150,000 or more; the underwriting of life insurance for \$150,000 or more; and the employment of an individual at an annual salary of \$75,000 or more.



16

Additional Limitations on Consumer Reporting

- Consumer reporting agencies should also take extra care when reporting medical debts and not report the name, number, or address of any medical information furnisher.
- With respect to veterans, a consumer reporting agency may not share any information about a veteran's medical debt if the medical services from which that debt arises occurs within 1 year before the report.
- Further, a consumer reporting agency may not include information about fully paid or settled veterans' medical debt that was previously categorized as delinquent, charged off, or in collections.



17

Overview of Metro2

- Metro2 is a data specification created by the Consumer Data Industry Association (CDIA) – the “language” by which furnishers provide data to CRAs.
- Extensive codes and specifications designed to standardize a wide range of credit history information while complying with federal laws and regulations.
- Guidelines cannot cover all possible variations of consumer's credit history. Thus, careful compliance decisions will inevitably be required.
- Failure to comply with Metro2 “standards” is not independently actionable but may inform reasonableness analysis.



18

Metro2 “Hot” Compliance Issues

- **Bankruptcy** – Detailed standards and codes for properly reporting status of bankruptcy as it progresses, including a discharge notice. It is not a violation of a bankruptcy stay to report an account included in bankruptcy.
- **Closed and Charged Off Accounts** – Frequent litigation issue: properly reporting closed accounts and charged-off accounts, including using correct Metro2 codes to indicate the status and charged-off balance.
- **Disputes** – Specific guidelines for dispute coding; issues related to ACDV response data (e.g., “XB” coding).
- Takeaway: Carefully review Metro2 standards and stay up-to-date.



19

Overview of State FCRA Equivalents

- Numerous states have “mini FCRA” statutes that can impose more onerous reporting requirements and restrictions.
- Several states are moving to restrict furnishing of certain types of information, such as medical debt. (Examples: Texas, Maine)
- Compliance question: How do you determine what state law applies? *E.g.*, state of residence, location of property, or something else? Unsettled nationally, and must be considered from a compliance perspective.



20

State FCRA Equivalents – California Statutes

- California has two credit reporting statutes: ICRAA and CCRAA.
- CCRAA notable provisions:
 - Direct disputes from consumers are actionable.
 - Unlawful to furnish information that furnisher knows or should know to be inaccurate. Furnisher must employ reasonable procedures.
 - Authorizes recovery of actual damages, punitive damages up to \$5,000 per violation, and attorney's fees.
- Takeaway: Compliance program must be tailored to both federal and state laws.



21

Overview of FCRA Preemption

- Not field preemption: Needs to be grounded in a specific FCRA provision.
- FCRA has two preemption provisions:
 - § 1681h(e) – Preempts claims for invasion of privacy or defamation based on furnishing or reporting FCRA-governed information, unless willful.
 - § 1681t – Broader preemption provided for state laws that conflict or relate to specific listed FCRA provisions. Very granular in scope, with significant nuance on a provision-by-provision basis.
- Timing limitation: Many of the preemption provisions in § 1681t exempt state laws that were in effect as of September 30, 1996.



22

Recent Cases and Interpretations of FCRA Preemption

- Preemption is being read narrowly by courts and agencies.
- CDIA filed cases in Maine and Texas challenging laws as preempted. First Circuit held Maine laws were not preempted. Texas case on appeal to Fifth Circuit.
- In June 2022, CFPB issued interpretive rule stating its view that FCRA preemption is “narrow and targeted,” and state laws that are not inconsistent with the FCRA are generally not preempted.
- Takeaway: A carefully considered approach is required on preemption issues; consult with counsel.



23

Regulatory Enforcement of FCRA

- From passage in 1970 until 2011, FCRA was enforced and interpreted by FTC; now, CFPB has primary rulemaking and interpretive role, shares enforcement authority with FTC.
- Open question regarding investigative vs. enforcement authority.
- CFPB’s constitutionality is in question, due to ongoing challenge to funding structure.
- Recently, FTC and CFPB have teamed up by initiating joint enforcement actions, filing amicus briefs, and intervening in private litigation.
- Takeaway: Be aware of regulatory agencies’ evolving focus areas, activities, and enforcement mechanisms.



24

Questions?

