

---

**FCRA Focus: CFPB Advisories on Background Checks and File Disclosures****Hosts: Dave Gettings and Kim Phan****Guests: Cindy Hanson and Ron Raether****Date Aired: February 20, 2024****Kim Phan:**

Welcome to the Troutman Pepper Podcast, *FCRA Focus*. I'm Kim Phan, co-host of the podcast, along with my partner Dave Gettings. I'm glad you joined us, because we're going to be talking today about a couple of recent CFPB advisory opinions that were issued on January 11th and address accuracy in background check reports and the inclusion of data sources and other information in response to consumer file disclosure requests. But before we jump into that topic, let me remind you to visit and subscribe to our blogs, [TroutmanPepperFinancialServices.com](https://www.troutmanpepper.com/financial-services) and [ConsumerFinancialServicesLawMonitor.com](https://www.consumerfinancialserviceslawmonitor.com). In addition to *FCRA Focus*, don't forget about our other podcasts. We have [The Consumer Finance Podcast](#) about developments in the world of consumer finance, [The Crypto Exchange](#), which is about everything crypto, [Unauthorized Access](#), which is our privacy and data security podcast, and [Payments Pros](#), which of course, as it sounds, is all about the payments industry. All of those podcasts are available on popular podcast platforms just like this one.

Speaking of those platforms, if you like our podcast, please let us know. Leave us a review on your podcast platform of choice and let us know how we're doing. Now, as I said, today we're going to be talking about the recent CFPB advisories, and we're thrilled to be joined by our partners, Cindy Hanson and Ron Raether. Cindy, let's start out talking about the new CFPB guidance on background checks. The advisory focuses on the accuracy issues, mostly arising from the use of public records, public information received from other private sector entities, but generally to populate background check reports, which I think we all know has long been a struggle under the FCRA due to the nature of public records information. This includes criminal records as well as eviction records and tenant screening reports. Let me ask you, what are some of the challenges companies have historically faced in this area before we jump into the specific advisory guidance, since courts, county clerk's offices, and other public record sources are not what we would consider your traditional furnisher?

**Cindy Hanson:**

Thanks, Kim and Dave, for having me on the podcast this morning. I really enjoy coming and talking with you on all things FCRA. With regard to public records, this has been a long trouble for consumer reporting agencies to get completely up-to-date and accurate information from public record sources. As you indicated, Kim, in a traditional furnisher situation, the furnisher, let's say being some kind of financial institution or other reporter of information to a consumer reporting agency, they themselves have obligations with regard to accuracy and providing information that's up-to-date. That doesn't apply to a county clerk's office or to a court. They have other duties and responsibilities that they view as being far more important than making sure that the information that they give to consumer reporting agencies is completely up-to-date and accurate. So with courts and county clerk's offices, there are inherent delays in information actually making it to the docket sheet.

So when something does happen on a case or with an arrest record or with a charge, it can take time for that information to actually make it to the public record source, the docket sheet. Sometimes, the information just doesn't make it to the docket sheet. While an event may have happened, it never gets recorded anywhere. Since the consumer reporting agencies or their vendors are so reliant upon public access terminals or looking at the files, the information can only be as good as the information that's being recorded. This has been a struggle, a known struggle. Then of course, another area of struggle with public records is in the rise of removing PII elements from public records, whether it be dates of birth or social security numbers, you have the issue of there's definitely more of a challenge in matching records. That matching was not the focus of the CFPB's advisory opinion, but public records in general have always presented challenges to consumer reporting agencies.

**Kim Phan:**

Yes, they have. Now, the CFPB is adding onto that pile with a new advisory where they suggest that in order to assure maximum possible accuracy and reporting on that public record information, specifically in the background check context, the CFPB is now advising that reporting this type of information, a consumer reporting agency has to have procedures in place to report subsequent proceedings, in any case, or remove the information entirely, if a court should later seal or expunge those records. A couple of examples the CFPB provided in their advisory was a conviction or dismissal following an arrest or the results after reporting on a bankruptcy filing. If disposition information is unavailable, and as, Cindy, you noted, there could be lags, other problems with getting that information, what potential litigation risk would CRAs be facing under this advisory opinion, if they continue to report on that type of information?

**Cindy Hanson:**

So, getting disposition information or subsequent history information has been a hotbed of litigation now for several years against many players in the industry related to all types of records, whether it's tenant eviction records, criminal records, bankruptcy. Though, you tend not to see this issue with bankruptcy records as frequently. Frankly, the federal courts with the PACER system, bankruptcy subsequent events tend to hit the file pretty quickly. So where we see the litigation are in housing courts with tenant screening or in traditional criminal records or in liens and judgments. There's been litigation on all of those things.

The real issue for these subsequent events or this disposition is having policies and procedures in place that you or your vendor, whoever that may be, is returning to the courthouse on a periodic basis and looking for those subsequent events. The FCRA, as we all know, does not require perfection. Someday along the line, you as a consumer reporting agency, are going to report something where there was in fact a subsequent event, for whatever reason it was missed. What is really important here is that you have policies and procedures to look for and gather those subsequent events. So how frequently are you in courthouses? If you're using database searches, how frequently is that database being refreshed? If you're relying upon a vendor to gather data for you, understanding what your vendor's policies and procedures are is really important in this area.

But having a policy and procedure, something in place that you are actively aware of your obligation to look for that subsequent event, and then that you are actually doing so is very important. Also, I think it is important if you have records that are in an open status, a pending

status, and they've been pending for a very long time, something that would be outside of the norm, do you have a policy and procedure that looks at those really old pending records and says, before I report this, let me go double check with the court to make sure there's nothing? Or do I have a policy and procedure that says after a certain amount of time, if there isn't a disposition, I'm no longer going to report this, particularly in the housing field where those files tend to be churned relatively quickly. If you have something open for a really long time, it can be a signal that something is being missed.

**Dave Gettings:**

Cindy, I just wanted to interject briefly with a practice pointer based on what we've experienced in some class action litigation. You talk a lot about timing of when public records actually make it onto the docket. We've experienced that in a number of states, including, for example, New York. I've got cases now where events in the case happened six months ago, and it still hasn't appeared on a New York State docket. When we're litigating class cert in these cases, we always look for individualized issues.

One of the things we tend to focus on, and Ron's really big into it, I know, is watching against hindsight bias. Because a lot of times in these e(b) class cases, we want to show individualized issues. One of the biggest individualized issues is accuracy. Pretty often, the plaintiff's bar always says, "Well, you can clearly determine whether a record's accurate or not," but as a practice pointer, we shouldn't forget what the record looked like at the time, because it's really easy to say two years later when a case is filed what a record may or may not have looked like. But if you can recreate what it looked like at the time two years ago, it may be very different than what it looks like today, and that might introduce an individualized issue that you can have some success with.

**Cindy Hanson:**

Dave. I completely agree. From a class perspective, I do think these sorts of cases raise many individual issues of fact as to the accuracy point. So, I think in litigating these, understanding what the record looked like at the time is a very critical point for these cases.

**Ron Raether:**

Some real problems with the CFPB trying to create guidelines when it comes to the 1681e(b) standard, it was established to realize that there needs to be a balance in implementing reasonable procedures. Here's the money quote, "to assure maximum possible accuracy." I think the CFPB continues to forget value that our industry provides employers to not only employers, but employees, to landlords, but not only the landlords, but also the other individuals that are living in those same properties. I can recount for clients that have had experiences where a record was missed, there was something later discovered with respect to an applicant. The consequence was hiring somebody that stole from that employer.

Somebody in a ride-share position, more importantly, allowing somebody to be qualified for a ride-share position only to substitute their sex offender relative. I think society as a whole does not want criminals and sex offenders living next to our grandparents, next to our daughters, next to our sons. The CFPB, to me, in this recent advisory is pushing the scale way too far, expecting perfection, with respect to accuracy. I think, Cindy, that plays back into comments you made

earlier about the data ecosystem. By that, I mean taking a geeky term of respect to technology and how data works, but really we're talking about the court systems. It's not just a matter of the currency of the data and when do things get into the records.

There's also a separate question of how times within a court, different judges speak to procedural mechanisms using different terminology. I think CFPB, not just with this advisory, but with prior advisories with respect to imposing on consumer reporting agencies, some obligation to be lawyers and interpreting the law and what language a specific judge is using, and what's the legal consequence of that language, and then making sure it's displayed in a way that's clear and consistent. I think all of these things sort of come back to the main principle, which is you cannot create a black and white absolute law with respect to accuracy. You have to look at the individual circumstances, because the courts do vary. The situations do vary, and we all know that our clients ought to get accurate information out. The suggestion to the contrary based on the CFPB's conduct of late is frankly quite offensive.

**Kim Phan:**

Well, Ron, as you noted and Cindy and Dave weighed in, there are a lot of challenges in this area. One last thing to cover in this particular advisory before I let you and Dave talk more about the second advisory is this question of aging of these records. Specifically, the CFPB is taking a look at and proposing a standard for how the industry should calculate the date for removing some of this information from background checks. Specifically, the CFPB notes that consumer reporting agencies are prohibited from reporting on adverse events, that and to date, a background check by more than seven years. The CFPB is saying that the occurrence of the initial adverse event is what starts the clock running on that reporting period.

The CFPB goes on to say that reporting period cannot be restarted or reopened by the occurrence of subsequent events related to that event. For example, and this is something that Cindy and I was talking a little bit before this podcast recording, the date of the charge in a criminal case would start a reporting period based on that date. A record of a later disposition involving that charge would not be able to be reported seven years after the initial date of the charge, even though the disposition of that charge may happen at a later time. Cindy, can you weigh in? Does that analysis, does that calculation of the reporting period make sense? Is this consistent with current industry practice? What are the courts saying about this?

**Cindy Hanson:**

I believe current industry practice, and there was a case out of California, *Screening Pros*, several years ago that dealt with the calculation of the seven years. I think the industry has gone largely to a conservative view of seven years and one that I would say is more consumer friendly, more friendly to somebody who's done something illegal as well. But each event should be looked at through the seven-year lens. So for example, if you are reporting arrest data, even if that arrest subsequently turns into a charge and a conviction, let's say, and unless you're in a restricted state, that conviction can be reported forever. The arrest itself is still subject to the seven years. So if you do report arrests separate from a charge, separate from a conviction, each one of those has a different seven-year period running with it. It doesn't mean you can't report the actual conviction for seven years and thereafter under the FCRA, but if you are reporting these interim events, you need to have separate clocks running.

In addition, if you report out, let's say five charges were filed. There's five counts, but let's say only one of them results in a conviction, and the other four are dismissed. Those four are subject to the seven-year rule and cannot be reported indefinitely. This issue from a class perspective can give me a little more heartburn, because if this is all a matter of counting how long you have reported something from an ascertainability class perspective, I see more class action risk here, because you don't have this necessary accuracy issue. But plaintiff's counsel may be able to more back into a class of people that were affected by a policy. So it is important that you have policies in place with respect to the calculation of seven years that are specific to each one of those events.

**Kim Phan:**

Got it. Anything else, Cindy, that you wanted to discuss about this particular advisory before we turn things over to Dave and Ron to talk about file disclosures?

**Cindy Hanson:**

I'd only add two further comments, and if anybody's ever heard me speak, my first one is one I talk about all the time. Your dispute process is your best friend. So, look at your disputes and look at what they're telling you, because if, for example, you see a vendor or you see a court where you're having problems getting disposition information, look at that issue and find ways to deal with that issue. Put in additional policies and procedures. Talk to your vendor, but listen to your disputes, because they are your best friend in finding issues. They will also become very relevant in litigation on a willfulness claim. The other thing is also talk to your vendors. To the extent that you are relying upon a vendor to gather up-to-date information from a court, your vendor's procedures in essence become your policies and procedures, because you're relying upon them. So make sure you understand what your vendors are doing and not doing, because in a litigation context, that can become very relevant.

**Kim Phan:**

Well, thank you, Cindy. Dave, do you want to go ahead and talk about file disclosures with Ron?

**Dave Gettings:**

Yeah, of course. Thanks, Kim. So just a few notes, Cindy, we will be having you back for a podcast called Your Disputes Are Your Best Friend. Keep that on your calendar at some point.

**Cindy Hanson:**

Okay, I will.

**Dave Gettings:**

Kim, your intro was way better than my intro has ever been, so you are doing intros from now on. Actually, you might've stolen a little thunder from my outro coming up, so I may have to work on that in the interim.

---

**Kim Phan:**

I'm sure our subscribers and podcast listeners can hear it again.

**Dave Gettings:**

Okay, that's true, as many times as you want on your favorite podcast platform. Okay, so we're going to talk a little bit about the CFPB's advisory opinion, and it's just that, an advisory opinion, related to file disclosures. We'll do a little bit of information, or I guess, a lot of information and then provide some of our color and our commentary on the opinion. Just starting with the nuts and bolts, a little bit of background on section 609(a), if you are the CFPB, or 1681g, if you're like me and tend to refer to it as the statutory cite. That provision pertains to a CRA's obligation to provide a file disclosure. It says, "Every consumer reporting agency shall, upon request, clearly and accurately disclose to the consumer among other things, all information in the consumer's file at the time of the request, the sources of information," and so forth.

So those are really the two topics we're going to talk about today. The first was the CFPB's opinion on what you have to do to make a request for a file disclosure. The CFPB really tried to simplify it, as it typically does in a pro-consumer bend. According to the CFPB, you only have to make a request and provide proper documentation in order to get a file. Words that trigger a file disclosure request are more than "complete file" or even "file." It might be, I want a copy of my credit report. I want a copy of my consumer report. I want a copy of my file. I want a copy of my record. Really, anytime, according to the CFPB, a consumer provides proper documentation and asks for something that resembles a file or a consumer report, in the CFPB's opinion, the CRA has to now provide a full copy of the file disclosure. Ron, over to you a little bit. Any advice for our clients in dealing with this new world or at least this seemingly new world on what it means to get a file disclosure request?

**Ron Raether:**

Again, I think this is another instance in which the CFPB isn't listening to industry and is taking form over substance. So the underlying issue to me is what does 1681g or 609(a) require? What it requires is that the consumer reporting agency provides what's in the current file, what that consumer reporting agency has about that consumer currently, presently. For some CRAs, that may be just the historic copy of the consumer report. For other consumer reporting agencies, there may be differences in the data. So let me say this more directly. A consumer comes in. They're either coming in because they're curious. They want to know what the CRA has about them. More likely than not, they're coming in because there has been some action taken with respect to a consumer report issued by that consumer reporting agency. So now, with the CFPB's quote, unquote, "mandate," how do we interpret what the consumer wants when they ask for a copy of their consumer report?

Are we giving them what we currently have in our file, which is what is required by 609? Or do we provide them a historical copy? There's going to be a separate debate as to whether that historical copy meets the definition of file, and we've had that with clients. Coming back to your question, Dave, about how do we advise clients, I'm with Cindy. I think when I look at 609 and I look at 611, the whole intention behind that is to assist the consumer and help the consumer get an understanding of what is being reported about them and giving them the tools to be able to correct that information to the extent it's inaccurate. So historically, what I've advised clients is

regardless of what language the consumer presents when they're asking for information about them, provide them both a historical copy, what might be seen by our customer that was used to make a decision on that individual consumer, as well as giving them what's in the current file of that consumer to the extent that it's different from what's in the historic consumer report.

**Dave Gettings:**

Thanks, Ron. The CFPB actually touched on that in the second section of what it means to comply with a file disclosure request. As you noted, that's typically been a subject of debate. Is a file everything conceivably that a CRA has? Or is it information that can or does appear in a consumer report that the CRA provides to the user? So according to the CFPB in this advisory opinion, the file includes not only all information that does or may appear in a consumer report. It also includes all the information that may form the basis of summarized information that the CRA provides to a user, even if that underlying information is never included in a report.

For example, if a CRA provides a score or a recommendation, even though some of that information underlying that score, underlying that recommendation will never appear in a consumer report and has never appeared in a consumer report, the CFPB takes the position that information must be included in the file disclosure, which is slightly different than the current state of law. Because for the most part, the current state of law was that courts were saying a file is only something that does appear or may appear in a consumer report. Ron, does the CFPB's advisory opinion in this regard change anything with respect to advice you've been giving to clients?

**Ron Raether:**

Yes and no. I agree to list the 11th Circuit opinion I think you're referring to that started the question of the difference between a file and a consumer report. That should remain good law, and it is going to come up later on in a podcast when we're talking about whether the CFPB can exert its opinions in a way that creates a willfulness risk, right? Is it controlling authority? And does the CFPB trump a circuit court's opinion on what the FCRA means or doesn't mean? I think on this point, a file is what could be included in a consumer report, and we know that the definition of file under 609 excludes credit scores. You don't have to include a credit score in response to a 609 request. I would go back to a point that we made earlier, which I think the intent of this is to assist consumers.

I always have told clients that if I have a consumer centered process that helps consumers and makes them feel like they're being listened to and responding to their legitimate issues, I'm going to see fewer lawsuits. Now, I'll step back a moment and say the FCRA is being abused. We're seeing plenty of individuals that are fabricating cases because they've learned that they can file a lawsuit and get a couple thousands of bucks and frankly are abusing the system. But putting that aside, thinking of the normal consumer who just wants their information corrected, I think giving access to the data that's used to provide any analytics, whether it's a score or other suggestions with respect to an eligibility decision, is what a consumer reporting agency ought to do.

It ought to give the consumer access to that information and the ability to correct it, again because I think our clients want a healthy data ecosystem. They want to provide accurate information. They want their tools to enable, for example, property to have 100% occupancy and

occupancy with people that meet their qualifications. If there is inaccurate information in that ecosystem, they are not meeting their function to their customers. They're not putting people in apartments when they actually qualify. So I think that accuracy is good for everyone. It's good for consumers. It's good for the users. It's good for our CRA clients. So as a consequence, I think giving a file disclosure that displays the information in that ecosystem so it can be corrected, if needed, is the right thing to do and it's good for everyone.

**Dave Gettings:**

I'll skip ahead, Ron, to the discussion you highlighted. At the end of the CFPB's advisory opinion, they talked a little bit about willfulness. They suggested that if you don't comply with this advisory opinion, you are running the risk of committing a willful violation of the FCRA, which exposes a company to statutory damages and potential punitive damages. So in the biggest softball in the history of softball questions on the FCRA Focus Podcast, Ron, do you agree with the CFPB in that a failure to comply with the advisory opinion should set the stage for willfulness?

**Ron Raether:**

I'm not sure the question is a softball question, but I know you anticipate what my answer is going to be. That may be the least surprise of any host in terms of how a participant's going to answer a question. It's going to be an interesting issue that I'm sure will be litigated within the courts, not just with respect to willfulness and whether these types of advisories can constitute controlling authority under *Safeco* that puts an actor governed by the FCRA on notice of law, even if it's putting aside whether the issue is ambiguous or not. I think more centrally and of interest to me is where the CFPB is making pronouncements that go against what the courts are interpreting the FCRA, especially when it comes to circuit courts, that ought to be on par at a minimum under *Safeco* with respect to a controlling authority. How do those conflicts between pronouncements by the circuit courts and these advisories from the CFPB, how do we work those out?

I think from a compliance perspective, that becomes a sticky situation for entities that are governed by the FCRA. Because on the one hand, I think righteously, we should be able to follow what the courts are saying. The courts ought to be the final arbiter in terms of interpreting a statute, not a regulatory agency. I think the arguments last week on *Chevron* could influence even further arguments that are made with respect to which controlling authority ought to be followed under *Safeco* first, a circuit court or the CFPB. I think ultimately as that issue works its way through the courts, I am hopeful that the courts in having this adjudicated in a forum where both sides are heard, I may not always agree with what a judge rules in an FCRA case, but at least not just the plaintiff, but also the defendant's voice gets to be heard and considered.

Obviously, the plain language of the statute ought to be followed. So ultimately, a client trying to decide, do I listen to the CFPB? Do I follow the guidance from the courts? I think we're going to have to balance that out within the context of each issue that comes up. But I do come back to a theme for me at least in this podcast. As somebody regulated by the FCRA, I think what we all ought to be working towards is having a data ecosystem that achieves with regional procedures maximum possible accuracy. So that's the filter I'm going to be using in trying to navigate where I think the CFPB is issuing pronouncements inconsistent with the law.



---

**Dave Gettings:**

Thanks, Ron. just to wrap up the last section of the CFPB's advisory opinion, they focused on sources and the source aspect of 1681g to address what they view as a concern about CRAs not disclosing all of the sources in their file disclosures. On that point, the CFPB came down and said that in a file disclosure, CRA should be disclosing both the original source and any intermediary or vendor source that provide the item of information to the CRA. Not only the courthouse and jurisdiction, but in the CFPB's view, also the vendor or intermediary from whom the CRA received the information. So with that, I think we're close to wrapping up. Cindy or Kim, any last minute thoughts?

**Kim Phan:**

Just what Ron and Cindy communicated today with their frustrations with the CFPB here, that I agree 100% with Ron, that there is alignment in what the industry wants and what consumers want with regard to accuracy, that the CFPB's interference just makes it more difficult, especially for smaller entities. As the CFPB tightens the reins and imposes unrealistic expectations on the industry, we see barriers to entry. We see smaller entities leaving the marketplace, and we see the larger entities continuing to struggle in a way that the CFPB just makes worse by then saying that they're being anti-competitive in some of their practices, when really they're just trying to comply with many of these unrealistic expectations. So I share his frustration, as well as Cindy's on where the CFPB is going with these advisories, which again, are not formal rulemaking, but merely the CFPB offering their insight on how they would interpret this. As you noted, Dave, noting that these aren't willful violations. If someone doesn't comply with these advisory opinions, it makes for a very difficult and challenging FCRA compliance environment.

**Cindy Hanson:**

It does, and whether the CFPB follows the litigation, or the litigation follows the CFPB, or they join hands and are walking together at the same time, when the CFPB comes out with these types of pronouncements, litigation will pick up on these issues. So if nothing else, for a player in this industry, it is important that this is a good time - take a look at your policies and procedures, recognizing there are challenges, recognizing you'll never get to a level of perfection. But look at your policies and procedures on these issues, and are you addressing the issues that are being raised? Because if you're not being sued about this now, you will be likely in the future.

**Dave Gettings:**

Don't forget, disputes are your friends.

**Cindy Hanson:**

Always.

**Dave Gettings:**

So Kim, here's my outro. Thanks again for listening to another edition of *FCRA Focus* and don't forget to read more about all things credit reporting at our blog Consumer Financial Law. Sorry,

---

redo the outro. Keep that in. Don't cut that out, [ConsumerFinancialServicesLawMonitor.com](http://ConsumerFinancialServicesLawMonitor.com), and please make sure to subscribe to this podcast wherever you get your podcasts. Have a great day. Kim, how did I do, except for the middle where I totally screwed it up?

**Kim Phan:**

You did great. I love the outro, short, sweet, sending people on their way.

**Dave Gettings:**

That's a wrap. Thanks, everybody.

Copyright, Troutman Pepper Hamilton Sanders LLP. These recorded materials are designed for educational purposes only. This podcast is not legal advice and does not create an attorney-client relationship. The views and opinions expressed in this podcast are solely those of the individual participants. Troutman Pepper does not make any representations or warranties, express or implied, regarding the contents of this podcast. Information on previous case results does not guarantee a similar future result. Users of this podcast may save and use the podcast only for personal or other non-commercial, educational purposes. No other use, including, without limitation, reproduction, retransmission or editing of this podcast may be made without the prior written permission of Troutman Pepper. If you have any questions, please contact us at [troutman.com](http://troutman.com).