

***FRCA Focus: Year in Review and a Look Ahead: The Evolving Landscape of Background Screening and Credit Reporting***

**Hosts: Dave Gettings, Kim Phan, and Chris Willis**

**Guests: Cindy Hanson and Alan Wingfield**

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**Dave Gettings:**

Hey, everybody. Welcome to another edition of *FCRA Focus*, the podcast that discusses all things credit reporting.

Now that the holidays are over, the eggnog is finally out of the fridge, and NFL playoffs are in full swing, we're going to take a brief look back at 2023 as part of our Year in Review podcast series. In this episode, we're going to discuss some of the most impactful developments in background screening and credit reporting in 2023.

This will also be one of our crossover episodes with our friends over at *The Consumer Finance Podcast* hosted by Chris Willis. To recap the year, me and my co-host, Kim Phan, will have two guests that are extremely well-versed in both topics on background screening and credit reporting: Cindy Hanson and Alan Wingfield. They're both partners at Troutman Pepper who focus most of their day, actually more than most people probably focus in a lifetime, on background screening, credit reporting from both the compliance and litigation perspective.

Alan and Cindy, welcome to the show.

**Cindy Hanson:**

Thanks for having me, Dave.

**Alan Wingfield:**

Yes, thanks.

**Dave Gettings:**

Kim, as the inaugural co-host episode, anything to add before we get started?

**Kim Phan:**

Dave, no. Looking forward to hearing what Cindy has to say and chatting with Alan in just a little bit.

**Dave Gettings:**

All right, so Cindy, first question, since this is the Year in Review episode, we just got through the holiday season, are you an eggnog fan or not an eggnog fan?

**Cindy Hanson:**

I am not an eggnog fan, Dave, not my cup of tea, so to speak. I would rather find a different drink over the holidays.

**Dave Gettings:**

Are you a unified no eggnog family or are you a lone wolf there?

**Cindy Hanson:**

We are a unified no eggnog family. Since I do the shopping, if I don't buy it, we don't have it.

**Dave Gettings:**

All right. We are a divided family, so we'll have to talk about that some other time.

Cindy, let's start off in early 2023, and again we're talking about background screening, with the CFPB and the FTC jointly seeking comment on what was, as we're used to, of course a neutrally worded press release on how background screening may shut renters out of housing. Can you talk a little bit about the CFPB's early 2023 press release, what they were looking at, and how it guided the year to come?

**Cindy Hanson:**

Sure, Dave. And again, thanks for having me.

We started last year off in February of 2023 with the agencies sending a coordinated joint request for information regarding tenant screening. Regardless of how it was worded, I'm sure none of us thought it was going to be very neutral.

The request basically saw public comment on a variety of issues affecting tenant background screening, including how landlords and property managers set screening criteria, the collection and accuracy of criminal and eviction records for tenant screening, and the use of algorithms for matching or predictive purposes. These requests demonstrated a particular focus on the agency's goals to prevent discrimination and to empower consumers to dispute any inaccuracies they perceived on their tenant screening report.

In response, and probably not surprisingly, the agencies received over 1700 public comments, which is quite a fair amount. In their initial press release, they stated that these comments will be used to "help inform enforcement and policy action under each agency's jurisdiction."

Again, I think they cast a wide net. They got comments from industry, from consumer advocates, from everybody within the tenant screening process, and now they have a lot to chew on.

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**Dave Gettings:**

Chris, I'm going to ask you a question, which you probably didn't expect because you're the co-host and you probably shouldn't get asked questions on your own podcast.

But I noticed a lot in 2023 the CFPB and the FTC were doing things jointly. Is that a strategy designed to get at jurisdictional challenges of both agencies? In other words, if some would argue the CFPB doesn't have jurisdiction over an entity, then maybe the FTC does and vice versa?

**Chris Willis:**

That's part of it, Dave. By the way, you should always feel free to ask me questions, and I'm very happy to be asked questions on my own podcast or anybody else's podcast.

**Dave Gettings:**

Well, do you like eggnog? Next question.

**Chris Willis:**

I don't, I'm sorry.

**Dave Gettings:**

You people in Atlanta.

**Chris Willis:**

Yeah, I apologize for that, Dave.

But in terms of the agencies working together, I think the explanation is partially what you mentioned, which is jurisdictional. Because although the CFPB has jurisdiction under the Fair Credit Reporting Act, to the extent that it wants to assert some sort of unfair and deceptive acts and practices claim, that jurisdiction only extends to consumer financial products and services, which probably would not include tenant screening.

Whereas the FTC's UDAAP statute section five of the FTC Act has no such limitation, so there is a jurisdictional advantage to having both agencies involved.

But the other thing is that during the current administration we've seen an unprecedented level of cooperation between the two agencies. They are hand-in-hand like we have never seen them before, and so it never surprises me to see them doing something together even if there's not an obvious exigency like the jurisdictional issue you mentioned.

**Dave Gettings:**

That was my sense, Chris. Thanks for confirming.

Cindy, back to you. In February, the agencies laid out some of their regulatory priorities with respect to tenant screening companies. Did we actually see examples of those agencies taking action? In other words, was it more than press releases? Was it action against companies in the space?

**Cindy Hanson:**

It was action. In October, the CFPB and FTC, and again to Chris's comment again working in conjunction with each other, initiated a significant enforcement action with TransUnion and its tenant screener subsidiary, TransUnion Rental Screening Solutions.

The settlement stemmed from allegations that the companies failed to ensure maximum possible accuracy in consumer reports and did not disclose the sources of information to consumers. In addition to monetary terms, the settlement included injunctive relief components, which required the company to institute procedures designed to do several things. Among those various items they were addressing were the following: they were to prevent inclusion of unresolved eviction cases, tenant screening reports, to accurately reflect the disposition of eviction cases, to ensure that sealed records were not being reported, to disclose the sources of information to consumers, and to monitor and perform root cause analysis on consumer disputes to identifying correct issues with public record reporting.

The settlement demonstrates that the agencies are very serious this year about moving to enforce the regulatory priorities. The whole issue of tenant screening, housing, the availability of housing, and any perceived obstacles for a consumer to obtain housing is definitely high on the list for both of these agencies.

And so this settlement with TransUnion I think reflects one strategy that these agencies are attacking, which is let's go after those who supply the data and ensure that the data they are providing is accurate, up-to-date, complete. And that if they do see systemic problems from their disputes, they're looking at them and they're solving any problems they find.

**Dave Gettings:**

Thanks, Cindy. This is not just a regulatory podcast, obviously it's *FCRA Focus*. All things credit reporting.

What are you looking at in terms of litigation in 2023? What were some of the big areas that you saw? Hopefully that can help some of our listeners predict what they may see and need to prepare for in 2024.

**Cindy Hanson:**

I'll get to what I'll call the typical Fair Credit Reporting Act-type cases, but what we are seeing a rise in are cases against screening companies to hold them liable for alleged fair housing violations.

We very much see plaintiff's attorneys and plaintiffs coupled with, I think, we'll see it from the regulators as well, but they're pushing in litigation that a background screening company, because they play some role and their role is simply to provide data, but because they are

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providing that data in a housing context, you see plaintiffs trying to somehow cloak the background screening companies in the obligations that arise from fair housing legislation.

I think that is going to be an area that we're going to continue to see more litigation as plaintiff's lawyers try to bring the consumer reporting agencies as a player who can be sued under fair housing laws.

**Dave Gettings:**

Cindy, is there a lot of law that's developed in this area, or is it still a pretty fertile landscape for both sides to try to stake out their positions?

**Cindy Hanson:**

I would say it's still pretty fertile. There are some initial decisions that have come out.

One in particular in a case brought by Connecticut Fair Housing Organization where the background screening and screener in that case was found not to have been liable under the Fair Housing Act because it didn't apply. But I do think this will continue to be fertile ground as cases are brought in other jurisdictions under other theories and with different products at issue in the cases.

I think the more that background screening companies are playing a role in scoring data, in providing decisions on data, I'm not here to say that they're definitely under the authority of the fair housing rules. But I will say you're inching a little bit closer. And so I do think you will see plaintiff's lawyers test all different types of products and services to see if they can find that a particular service or product sticks and creates liability under the fair housing laws.

**Dave Gettings:**

That's why we're always cognizant of clients making initial recommendations, applying customer criteria, not the consumer reporting agency making the decision itself, correct?

**Cindy Hanson:**

That is absolutely correct. The more of that burden that the tenant screener takes on, the more the risks rise for the tenant screener that they were going to be brought into the purview of a fair housing case and potentially liability under the fair housing law.

**Dave Gettings:**

In addition to fair housing, what else are we seeing? What were some of the big litigation trends you saw against screening companies?

**Cindy Hanson:**

Again, most of these cases being brought under the Fair Credit Reporting Act, but I'll make a comment about that in the end.

We continue to see the same sorts of issues in terms of if you are reporting out housing records, eviction records that you're definitely being clear. If there was a disposition as to that suit, what was the actual disposition? A lot of litigation continuing on the completeness of the record or the record being up-to-date.

Continue to see issues as to reporting a record that has been sealed. There was a record of some type, but it has been expunged for whatever reason. Seeing a lot of litigation where the record was still being reported nonetheless. Continue to see matching logic and the accuracy of matches. It's always a good idea to look at your matching criteria. Are you getting middle names? Are you paying attention to junior and senior situations? Are you paying attention to hyphenated last names or hyphenated first names? All of these variations can be instrumental in making sure that you have a valid match between your actual applicant and the record you are receiving.

The other thing is, it is always in these litigations - if the litigation gets into discovery, there will be discovery about your disputes. Have you had similar types of disputes in the past? We continue to see in litigation what can come from those dispute records will dramatically impact litigation. Very, very important to be monitoring your disputes, root cause analysis. Because in litigation that continues to be a trend. Those records are being requested in litigation, and courts are ordering those types of records to be produced. Definitely want to pay attention to that.

The other thing, at the beginning I said cases brought under the Fair Credit Reporting Act. We continue to see an uptick in the trend of cases brought under state laws, California of course being the hotbed of litigation. Almost every Fair Credit Reporting Act case I see in California also has claims under the CCRAA or ICRAA. We see those in an individual case. They do allow for a higher rate of statutory damages.

The other trend we continue to see is cases that in federal court there may not be Article III standing. We're really talking about just a pure statutory violation. We are seeing those cases brought in state court, and there have been some successes by plaintiff's counsel to keep them in state court. Though I recently read a decision where state court said, "No, you're not coming to the state court to bring this FCRA claim where you didn't have standing." Going to state court, having state claims continues to be another rise we are seeing.

**Dave Gettings:**

Yeah, and there's been a lot of litigation in that with respect to state claims.

For example, in California now there are cases coming out talking about the standing requirement in California, like you mentioned. It's not necessarily true that if you don't have standing in federal court, you still have standing in state court. It's somewhere where defendants are making some headway.

**Cindy Hanson:**

That is true. There is *Limon*, which is a court of appeals case out of California, which actually dismissed on standing grounds very standard disclosure and authorization-type case. But that was definitely a shift in California law on standing and a good decision for defendants. These purely statutory based claims maybe are going to start to come to an end.

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**Dave Gettings:**

Yeah, thanks, Cindy.

The last point for background screening, and I don't want to take up the entire podcast because I know Alan's been waiting patiently to talk about credit reporting, is the FCRA rulemaking. We can't talk about 2023 without talking about the CFPB's foray into rulemaking, and we'll probably be talking about it on the 2024 year in review and the 2025 year in review, too.

Can you just touch real briefly on that rulemaking and high level how we expect it to potentially impact screening companies in the future?

**Cindy Hanson:**

The rulemaking is vast, but let me focus on two points of the rulemaking quickly.

The first is how the rulemaking may impact the definition of data broker and who is potentially covered by the Fair Credit Reporting Act. Within the background screening industry, there are definitely companies who consider themselves to be data brokers, not consumer reporting agencies. They simply supply data directly from a courthouse or other source to a consumer reporting agency. These entities are now potentially within the purview of the Fair Credit Reporting Act depending upon the CFPB's rulemaking and whether or not that is ultimately held to be valid.

But regardless, if data brokers are going to come within the purview of the FCRA, I think for tenant screeners, they may see fewer players in the industry. They may have difficulty getting data from courthouses and other sources because there won't be the intermediary anymore.

And to the extent that the data brokers are now going to become CRAs, the downstream tenant screener consumer reporting agency, they're now a reseller. Now, they have some perhaps different obligations. Even if you are not yourself in the category of entities that are data brokers, you consider yourself to be a consumer reporting agency, I think the data broker rulemaking could definitely impact them.

The only other piece I'll mention is credit header data. Credit header data is typically thought of as the PII data that is held by a consumer reporting agency. This data has historically not been considered FCRA governed. This data is frequently sold by consumer reporting agencies for a variety of purposes not covered by the Fair Credit Reporting Act. If this data is now covered by the Fair Credit Reporting Act, it could impact tenant screeners and their ability to augment the PII data that they are receiving in inquiries and in other circumstances.

**Dave Gettings:**

Thanks, Cindy. Certainly a lot more to come in 2024 on background screeners.

Kim, I know you've been waiting patiently chomping at the bit to talk about credit reporting, so I'm going to turn it over to you for the second half.



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**Kim Phan:**

Thank you, Dave and Cindy. Great insights of what has been happening in the world of background screening. I just want to establish right off the bat that I do not like eggnog.

But we're now going to hear from our partner, Alan Wingfield, to talk about other significant developments in the FCRA from 2023, including a more in-depth look at how the CFPB's proposed rulemaking will impact other industries and participants in the consumer reporting ecosystem.

Cindy has already highlighted for us how the data broker and credit header proposals will impact background screeners. Alan, are there other types of companies that should be concerned about these proposals?

**Alan Wingfield:**

Thank you for having me on. I agree with Cindy's basic characterization of the rulemaking. The rulemaking is vast. Anybody in the ecosystem has major issues in front of them if this rulemaking goes forward. That includes anybody who knowingly is applying information to consumer reporting agency as a furnisher, anybody that's knowingly using data from consumer reporting agencies.

Indeed, I think it goes beyond people who know they're dealing with ecosystem, but people who are going to be dragged into the ecosystem willy-nilly. That'd be people who are getting data, as Cindy talked about, data from data brokers currently not considered to be governed by the FCRA and using it in various processes. People who are getting credit header data from the big three and using that in various processes. Suddenly, all that's going to be within the purview of the Fair Credit Reporting Act.

I think two groups in particular need to be on alert here. A lot of the publicity, so to speak, for the rulemaking focuses on the impact on consumer reporting agencies and use of medical debt reporting. There's some hot button issues that get a lot of attention, but I think others really need to be focusing on the rule, and that include the furnishers, people are providing data to consumer reporting agencies, and people who are using data both from consumer reporting agencies and from non-consumer reporting agency sources for identity theft prevention and fraud prevention-type activities. I think people are going to discover that there's a lot of bad news in those two areas in this rulemaking.

**Kim Phan:**

In addition to the changes the CFPB is proposing with regard to data brokers and credit header, the CFPB is also suggesting that there should be a new interpretation of what it means to assemble or evaluate data.

Are there additional companies that should be worried about this new interpretation?



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**Alan Wingfield:**

Absolutely. This is part and parcel, the overall effort of the CFPB's thought process here to drag as many people into the regulated ecosystem as possible. Also, have the net effect perhaps of clamping down on what information is even available through that system.

Currently, there is a non-FCRA regulated world of companies who provide essentially delivery systems of data. That is people who take data from point A and deliver it to point B. The rubric there is typically thought of as being "the mere conduit" of data. People who are really involved not in substantively building databases or revising or evaluating data, but companies that really are just involved in transmitting data from an original source, like a public record, to an end user without much happening to data in transit. The CFPB is signaling and its comments on what it's looking at for the proposed rule of bringing as many companies like that as possible into the FCRA world by making them consumer reporting agencies.

That has implications for those entities themselves and people use the services of those entities to get data. It's yet another example of a theme in the rule making of expanding the reach to FCRA and cracking down on what information actually can move through the ecosystem.

**Kim Phan:**

As you note, there's lots of different participants in the credit reporting ecosystem, not just CRAs. The CFPB is looking specifically to expand some of the obligations of those other industry participants.

The CFPB is looking at end users, those entities that request consumer reports from consumer reporting agencies, and looking hard at the permissible purposes that are available to those end users for obtaining consumer reports.

Now, when the FCRA was first enacted, there was a recognition that these companies may interact with consumers in a myriad of different ways for any number of different types of products and services.

There weren't really a lot of restrictions placed around the methods that companies could use to obtain written instructions from consumers. But the CFPB is proposing to change that. Put a framework around what those written instructions have to say and how you can obtain them from consumers. What do you see as the potential impact of these new restrictions on that permissible purpose?

**Alan Wingfield:**

Well, it reminds me of what happened under a Telephone Consumer Protection Act, where in 2015 the Federal Communication Commission by rulemaking enacted a fairly elaborate set of standards for collecting permission from consumers to call them on their cell phone or at home for various purposes.

What happened was since 2015, we've been happily litigating, disputing, compliancing, spending money on standing up systems to deal with specific criteria requirements for obtaining, tracking, allowing revocation of consumer consent.

My take is that the CFPB is contemplating a similar regime where there's going to be some specific requirements attached to taking written authorization from consumers to pull their credit. There's going to be a writing requirement. There's going to be some type of clear conspicuous disclosure requirement. There's going to be a right to the consumer to revoke consent in specific ways. And so all those technicalities that can provide opportunities for litigation and claims being brought against the users for not filing the technicalities of that process.

There'll be a transition process even for good faith people to really lean into this process and try to figure out how to do it exactly right. Because you need a little detail, of course, will be subject to scrutiny of plaintiff's lawyers and regulators for potential claims and arguments.

I'll close this by saying this proposal in particular is a solution for there's no problem, unlike other areas of the FCRA, I'm just not personally familiar with any line of cases or regulatory problems with the way that the industry has been getting written instructions with consumers currently.

This seems like a particularly useless part of the proposal in the sense of not addressing any known problems in the industry rather than just adding a new requirement from which new claims and disputes can arise.

**Kim Phan:**

The CFPB is essentially finding a solution to an unknown problem in the industry?

The CFPB is also proposing to narrow the way that companies rely on the legitimate business need permissible purpose, which has often been referred to as the catchall for requesting a consumer report. If a company doesn't have a credit application or clear permissible purpose under one of the other FCRA permissible purposes, how's this going to impact different industries that can no longer rely on legitimate business need?

**Alan Wingfield:**

The CFPB's proposal here is to add rigor to the elements necessary to be satisfied to rely on the legitimate business permissible purpose. It will have the effect of trimming out people who are currently relying on that permissible purpose as a strategy for getting consumer reports.

The proposal is that it can only be invoked when the consumer initiates a transaction, can only be used for personal family household purpose transactions. It can only be used when the user is going to use it for an eligibility determination.

It's going to create a narrow pathway to invoking that permissible purpose to get consumer reports. If you don't fit into that narrow pathway, then you will no longer be allowed to use that exception.

I believe that what that will do is force more and more focus on the written authorization pathway for more and more companies. And then of course, as I mentioned before, they're going to create its own rigor and risks and compliance burdens for that pathway. Again, it's just part and parcel the theme here of cracking down on ability to use consumer reporting information through this ecosystem.

**Kim Phan:**

The last area that we're planning to discuss with regard to the CFPB rulemaking today is their approach toward furnishers. I think all of us are very much aware that consumer disputes are a heavy source of litigation under the FCRA. Not just in 2023, but in any year.

The CFPB in their proposed rulemaking is proposing to eliminate the distinction between legal and factual disputes as well as introduce a brand new category of systemic disputes. Is this something that you are seeing is consistent with litigation in this area? Or do you think this is going to overturn years of FCRA interpretation as well as judicial interpretation?

**Alan Wingfield:**

The effort by the regulators, it's been not just to the proposed rulemaking, but also through amicus brief and regulatory positioning, is to require furnishers and consumer reporting agencies to investigate the maximum amount of disputes possible.

One distinction that courts have generally accepted is that if a dispute is fundamentally legal in character, requires basically making a legal decision about the validity of a debt or something like that, that the requirement of a CRA or furnisher to investigate and resolve a dispute ends. That there's only certain types of disputes where objective facts are really the key issue that the furnisher or CRA has to investigate.

Well, the regulators are not like that, and the proposed rule would wipe out any kind of distinction like that and there would be a requirement to investigate all disputes, regardless of whether it's fundamentally law or fact. That raises the compliance burden and legal risks for participating in the ecosystem as a furnisher or consumer reporting agency, increases the cost, increases legal risks, which may have the fact of reducing people who are willing to participate in it because of raising the bar there.

**Kim Phan:**

Yeah, it's troubling to see the CFPB taking that position.

But the CFPB has already set themselves a goal of releasing draft rules later this year, and I'm concerned that 2024 is looking very doom and gloom. Was there anything helpful that came out of 2023, or anything we should be looking forward to in 2024 to give our audience a silver lining?

**Alan Wingfield:**

Boy, you asked me a question I cannot answer. What is the silver lining here? All the trends are going against us. FCRA is the number one type of consumer protection lawsuit brought in federal court. I don't see any reason why that should change in 2024. The current CFPB is on the path of really majorly affecting the consumer reporting ecosystem. Indeed, the current leadership of the CFPB from the very beginning seized upon the FCRA is going to be one of the primary laws they would use generally to invoke their privacy agenda. That's happening in front of our very eyes.

In fact, I'm the opposite of seeing a silver lining. I just see more doom and gloom. One thing we have not mentioned that I have to mention is that this proposed rulemaking really would radically change the litigation and exposure world for furnishers. Because they have this idea of a systemic dispute in the proposed rulemaking, which would allow, through a fairly complicated set of interactions with FCRA and case law and the rule 23 of the Federal Rules of Civil Procedure, which I won't get into now, but basically would open the door to potential class actions against furnishers in a way that did not exist before based on allegations of inaccurate credit reporting.

I really think it's going to upset the fundamental dynamics of being a furnisher in America. Remember, furnishing is a voluntary activity. There's no law that requires people to provide information to the credit reporting system. Now, we're just going to load up more compliance burdens, more risks, and even the possibility of class actions on being a furnisher in the ecosystem.

Of course, the willingness of people to participate in the ecosystem as furnishers may have limits. The net impact of all this may be to reduce the willingness of people to participate in the credit reporting system, reducing the quality and amount of information in the system, and reduce the quality of underwriting and other decisions people are making using the credit reporting system.

**Dave Gettings:**

Do you think, as responsible podcast hosts, we need to make a public service announcement that if you're driving, please pull over before you start drinking based on Alan's comments?

**Kim Phan:**

We should always encourage our clients to be safe and, for purposes of the FCRA, to strap in because this is going to be a bumpy ride.

Alan, Cindy, thank you for joining Dave, Chris, and myself and for sharing your insights with us today. Thanks to our audience for tuning into today's episode. It's always a pleasure to find opportunities to collaborate with the Consumer Finance Podcast on our Year in Review podcast series.

Chris, would you like to close by telling our audience about how they can hear more from us?

**Chris Willis:**

Of course, and thank you, Kim. Thanks to our audience for listening today and thank you to all my colleagues for doing this crossover episode with me. One of the things I love about being at Troutman Pepper is the collaboration that we have together, and this is just another example of it.

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