Section Newsletter
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USE OF COMPLIANCE CONDITION CODES:
RECENT DEVELOPMENTS AND UNANSWERED QUESTIONS UNDER THE FAIR CREDIT REPORTING ACT

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Recent developments in Colorado and other jurisdictions have heightened the focus on the obligation of furnishers of credit information to report loans as disputed under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA") when they become aware that a consumer contests the accuracy of reporting. Yet, a lack of clarity surrounds how exactly furnishers are supposed to comply with that obligation. Below is a brief summary of the FCRA, the codes used in the credit industry to indicate that a consumer disputes the reporting, and recent Colorado federal court decisions interpreting use of those codes, as well as a discussion of remaining open questions to consider.

The FCRA

"Congress enacted the FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *See Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2205-06 (2007). The FCRA imposes duties on "furnishers of information" under Section 1681s-2. "Furnishers of information" are the entities, including lenders, credit card companies, and loan servicers, that provide credit information to credit reporting agencies ("CRAs").

Subsection (a) of 1681s-2 covers the duty of furnishers to provide "accurate" information. Among other things, subsection (a) prohibits furnishers from reporting information with knowledge of errors, requires furnishers to provide notice of delinquent or closed accounts, and obligates furnishers to have procedures in place to respond to notices of identity theft. 15 U.S.C. § 1681s-2(a)(1), (4)-(6). For purposes of this article, subsection (a) also requires furnishers to "provide notice of dispute" to CRAs:

If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer.

15 U.S.C. § 1681s-2(a)(3).

Conversely, subsection (b) of 1681s-2 addresses a second category of obligations on furnishers that are triggered "upon notice of a dispute" from a CRA. After receipt of a consumer dispute from a CRA, a furnisher is required by subsection (b) to:

(A) conduct an investigation with respect to the disputed information;

(B) review all relevant information provided by the [CRA];

(C) report the results of the investigation to the [CRA];

(D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other [CRAs] to which the person furnished the information and that compile and maintain files on

consumers on a nationwide basis; and

(E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a [CRA] only, as appropriate, based on the results of the reinvestigation promptly – (1) modify that item of information; (2) delete that item of information; or (3) permanently block the reporting of that item of information.

15 U.S.C. § 1681s-2(b)(1)(A)-(E).

Private Right of Action

The FCRA provides consumers with a private right of action only for claims arising under subsection (b), *i.e.*, challenges to the reasonableness of a furnisher's dispute investigation or that errors discovered by the investigation were not corrected. Consumers cannot sue for failure to report "accurate" information under subsection (a). *See* 15 U.S.C. § 1681s-2(c)(1); *see also Donna v. Countrywide Mortg.*,No. 14-CV-03515- CBS, 2015 WL 9456325, at *5 (D. Colo. Dec. 28, 2015) (Shaffer, M.J.) (collecting Tenth Circuit and District of Colorado cases). Instead, violations of subsection (a) may be enforced "exclusively" by federal and state officials. 15 U.S.C. § 1681s-2(d).

Extending the Private Right of Action

Federal courts – including the Tenth Circuit Court of Appeals and the U.S. District Court for the District of Colorado – have nonetheless extended this private right of action to claims against furnishers for failing to report a loan as disputed to the CRAs under Section 1681s-2(a)(3). To do so, federal courts – starting with the Fourth Circuit Court of Appeals in *Saunders v. Branch Banking & Trust Co.*, 526 F.3d 142 (4th Cir. 2008) – have invoked the "incomplete or inaccurate" language in Section 1681s-2(b)(1)(D), and found that a furnisher's failure to a report that a loan's credit reporting is in dispute violates the FCRA if it creates a materially misleading impression. The Tenth Circuit Court of Appeals adopted this rationale in *Llewellyn v. Allstate Home Loans, Inc.*, 711 F.3d 1173, 1186 (10th Cir. 2013). This

approach has also been followed by the federal district courts in the District of Colorado. *See, e.g., Collins v. BAC Home Loans Servicing, LP*, 912 F.Supp.2d 997, 1009-10 (D. Colo. 2012) (Daniel, J.); *Gissler v. Pennsylvania Higher Education Assistance Agency*, No. 16-cv-1673-PAB-MJW, 2017 WL 4297444, at *5 (D. Colo. Sept. 28, 2017) (Brimmer, J.).

Notwithstanding the above, Colorado federal courts have limited causes of action for failure to report the dispute status of a loan in two ways:

*1. **Direct disputes.** Judges in the District of Colorado have held that a consumer must first submit the dispute directly to the furnisher (i.e., a direct dispute) before submitting his or her dispute to the CRA (i.e., an indirect dispute) in order to pursue a private claim. The rationale for this position highlights the problem with permitting a private right of action under 1681s-2(b) for what really is a violation under Section 1681s-2(a)(3). Remember that (1) there is no requirement to report a loan as being disputed in Section 1681s-2(b), and (2) there is no private right of action under Section 1681s-2(a)(3). Thus, the furnisher must have already received a direct dispute at the time it gets notice of the indirect dispute from the CRAs such that the failure to recognize the dispute in responding to the indirect dispute could be deemed "inaccurate or incomplete" and potentially give rise to a private right of action under subsection (b)(1)(E). In other words, a consumer may not maintain a claim if he or she submitted a dispute only through a CRA and did not first dispute the reporting directly with the furnisher. See, e.g., Collins, 912 F.Supp.2d at 1009-10.*

*2. **Meritless disputes.** The Tenth Circuit has also held that a furnisher is not obligated to report a loan as being in dispute if that dispute was not meritorious. In determining whether a dispute is meritorious, courts generally consider whether the dispute is "bona fide," and find that consideration of whether a dispute is "bona fide" hinges on whether it "could materially alter how the reported debt is understood." See, e.g., Sartori v. Susan C. Little & Associates, P.A., 571 Fed. Appx. 677, 682 (10th Cir. 2014).*

Compliance Condition Codes – How to Report a Loan as in Dispute

Furnishers report that consumers have disputed the reporting on their loan by using a "Compliance Condition Code" (the "CCC") in their transmissions to the CRAs. The available CCCs are listed in the Credit Reporting Resource Guide ("Metro-2 Manual" or "CRRG"), a manual that is published annually by the credit reporting industry's trade association called the Consumer Data Industry Association ("CDIA"), and is used by credit data furnishers as the industry standard credit reporting guide. For purposes of reporting loans currently in or formerly in dispute, the following CCCs are relevant:

XB = *"Account information disputed by consumer under the Fair Credit Reporting Act. Definition: Reported when the completeness or accuracy of the account information is disputed by the consumer under the FCRA and investigation of the dispute is in progress by the data furnisher."*

XC = *"Completed investigation of FCRA dispute – consumer disagrees. Definition: Reported when the investigation of an FCRA dispute has been completed by the data furnisher; however, the consumer disagrees with the outcome of the investigation."*

XH = *"Account previously in dispute – investigation completed, reported by data furnisher (To be used for FCRA or FCBA disputes). Definition: Reported when the investigation of a dispute by the data furnisher was completed."*

Recent Decisions Considering the Compliance Condition Code Used

The first loan dispute status cases, including *Saunders* in 2008 and *Llewellyn* in 2013, involved furnishers that neglected to report the underlying loan as being in dispute altogether. More recently, consumers' claims have extended to furnishers that, in fact, reported the dispute status of the loan by using the CCCs, but the consumer contends that the furnisher's choice of the specific CCC violated the FCRA. These claims have proven challenging for courts to evaluate due to the lack of statutory or regulatory guidance. The FCRA does not provide meaningful guidance for when particular CCCs should be used as neither subsections (a) nor (b) of Section 1681s-2 specify which

CCC must be used. The Metro-2 Manual, aside from providing the above definitions, advises only that "it is important to update the [CCC] to show that the investigation has been completed or to delete the previously-reported [CCC]." Finally, while the FCRA provides that the Consumer Financial Protection Bureau ("CFPB") shall "establish and maintain guidelines" for use by furnishers, *see* 15 U.S.C. § 1681s-2(e), the CFPB regulations do not address CCCs or the manner in which consumers should report the dispute status of loans to the CRAs. *See* 12 C.F.R. §§ 1022.40-1022.42 ("Regulation V").

The particular CCC used by the furnisher can be important because each has a different ultimate impact on the consumer's credit. The "XB" code, for example, is defined to be used after a consumer disputes the reporting but the furnisher has not yet completed its investigation. It causes credit scoring systems, like the industry standard FICO and VantageScore systems, to ignore the disputed entry in the scoring model's payment history and debt related metrics. Conversely, the "XH" and "XC" codes are used after a furnisher has completed its dispute investigation; the default and payment history of the account *will* be considered when calculating the credit score even with the XH and XC codes present. While the ultimate impact each code has on a consumer's credit score may differ, many lenders, including Fannie Mae and Freddie Mac, often refuse to approve loans or allow underwriting to proceed when any of the three codes appears on a consumer's report.

Consumers use these dispute mechanisms and codes in a variety of ways. Some consumers may identify what they believe to be a legitimate error on their account and use the dispute process to correct that specific mistake. Other consumers may use the dispute process to attempt to rehabilitate their poor credit profile by disputing the negative items on their report in an effort to negotiate an unwarranted "clean up" of their credit history, resulting in an undeservedly improved set of credit scores. The latter approach has given rise to third party credit repair companies that will dispute negative credit reporting for their customers. The use of CCCs to artificially improve credit scores has given rise to more scrutiny on the CCCs

used by furnishers, resulting in increased litigation over the use of CCCs.

Whether the CCC reported by the furnisher violated the FCRA is an issue that recently arose in a case in the District of Colorado in *Gissler v. Pennsylvania Higher Education Assistance Agency*, No. 16-cv-1673-PAB-MJW, 2017 WL 4297444 (D. Colo. Sept. 28, 2017). In that case, the plaintiff challenged the furnisher's use of the "XH" code after its investigation concluded that the disputed credit reporting was accurate. The plaintiff asserted that the "XB" or "XC" codes should have been used instead of "XH" because he issued subsequent disputes of the credit reporting at issue and eventually filed a lawsuit against the furnisher.

The furnisher's choice of CCC has also been an issue in the following cases that have been decided in the last three years:

1. *Wood v. Credit One Bank*, No. 3:15-cv-594, 2017 WL 4203551 (E.D. Va. Sept. 21, 2017) (challenging furnisher's use of "XH" code).
2. *Fulton v. Equifax Info. Servs., LLC*, No. 15-14110, 2016 WL 5661588 (E.D. Mich. Sept. 30, 2016) (challenging furnisher's use of "XB" code)
3. *Armeni v. Trans Union LLC, Inc.*, No. 3:15-cv-066, 2016 WL 4098540 (W.D. Va. July 28, 2016) (challenging furnisher's use of "XB" code)
4. *Matson v. Edfinancial Services LLC*, No. 14-cv-1052-JPS, 2015 WL 5010515 (E.D. Wis. Aug. 21, 2015) (challenging furnisher's use of "XB" code)
5. *Horton v. Trans Union, LLC*, No. 12-2072, 2015 WL 1055776 (E.D. Pa. Mar. 10, 2015) (challenging furnisher's use of the "XB" code)

Given the lack of instruction for use of CCCs, the results in these cases have unsurprisingly been a mixed bag. In *Gissler*, District Judge Brimmer found that whether the furnisher's use of the "XH" code could create a materially misleading impression given the underlying circumstances was a question of fact sufficient to survive the furnisher's summary judgment motion. The federal courts in *Armeni* and *Horton* similarly found that whether the furnisher's choice of CCC – the "XB" code in those cases – violated the FCRA was question of fact. Choice of CCC, however, is not always a question of

fact. *Fulton* ruled in favor of the defendant furnisher on summary judgment when the "XB" code was unquestionably correct based on the Metro-2 Manual definitions. Conversely, *Wood* and *Matson* ruled in favor of the plaintiff consumer on summary judgment when the code used by the furnisher was unquestionably incorrect. It is clear from these cases that use of a CCC is an issue that *can* be decided at summary judgment depending on the underlying circumstances (particularly when the underlying circumstances align with the Metro-2 Manual definitions). However, beyond reciting *Saunders* and *Llewellyn's* instruction that credit reporting violates the FCRA if it creates a materially misleading impression, these district courts did not apply a common standard or test to evaluate whether the CCC used by the furnisher was misleading. The general lack of instruction on use of CCCs leaves open the questions of what factors furnishers should take into consideration when applying CCCs and when a CCC is deemed "materially misleading."

Beyond the CCC issue, District Judge Brimmer ultimately granted summary judgment to the furnisher in *Gissler* because the consumer plaintiff had failed to establish any actual damages based on the furnisher's use of the CCC (as distinguished from damages resulting from a furnisher's allegedly inadequate investigation). *Matson* reached a similar result. These rulings were significant because the sole remedy for negligent violations of the FCRA (as opposed to intentional) is a consumer's actual damages from the violation. 15 U.S.C. § 1681o. Consequently, arguing that a consumer has no actual damages is another way for a furnisher to prevail on a claim for negligent violation of the FCRA based on use of a CCC.

Unanswered Questions

The lack of uniform approach by the FCRA, Metro-2 Manual, CFPB, and district courts addressing the use of CCCs leaves a number of open questions:

- **Selecting the CCC.** The FCRA, Metro-2 Manual, and CFPB regulations are largely silent as to which and when a particular CCC should be used. The district courts have been equally silent beyond recognizing the Metro-2

Manual's definitions of the relevant codes, and noting that credit reporting violates the FCRA if it creates a materially misleading impression. This lack of guidance places furnishers in the precarious position of enacting CCC policies and procedures without any clear instruction for how to avoid being misleading beyond the Metro-2 Manual definitions. While the Metro-2 Manual's "XB" definition makes clear that the "XB" code should be used only while the furnisher's investigation is pending, the definitions of the "XH" and "XC" codes are less clear. The relevant case law does not provide guidance for the types of assumptions that furnishers should make as to consumer agreement or disagreement with the investigation's conclusion. This lack of guidance is particularly problematic given the seemingly countless forms that a consumer's "disagreement" with an investigation outcome may take. Some consumers may disagree but say nothing. Others, like the plaintiff in the *Gissler* case, may show their disagreement by submitting duplicative disputes or by filing a lawsuit. Case specific CCC determinations in these varying circumstances is easier said than done, however, as furnishers often face cost, labor, and technology limitations that make case-by-case determinations expensive and difficult to manage. This leaves open the question of whether the furnisher should be required to assume that a consumer disagrees with an investigation conclusion based on the consumer's post-investigation conduct, and, if so, at what point should the furnisher be required to do so? Of course, these ambiguities could be resolved by the Metro-2 Manual, Congress, CFPB, or judges.

Question of Fact. The lack of direction from the FCRA, CFPB, or Metro-2 Manual also creates a challenge for parties to decide how to best prosecute or defend themselves against claims for use of an allegedly incorrect CCC. While the question of whether a particular CCC was misleading is inherently going to depend on the underlying circumstances, *Fulton* makes clear that it is not something that will always be a fact question, especially when the underlying facts clearly fall under the Metro-2 Manual's definitions. As it stands now, furnishers can rely on the Metro-2 Manual definitions and other judicial precedent to support their use of a

particular CCC, but District Judge Brimmer's holding in *Gissler* supports the general notion that whether a CCC complies with the FCRA will be a question of fact when the underlying facts fall into a gray area undefined in the Metro-2 Manual. What additional authority furnishers will be able to use in the future, for instance, more detailed Metro-2 Manual definitions, CFPB regulations, or judicial opinions, remains an open question. Expanding this question beyond Colorado's borders, this open question is made more difficult by the lack of uniformity across jurisdictions and the fact that many furnishers service loans in multiple jurisdictions across the country.

Actual Damages. District Judge Brimmer's decision in *Gissler* raises additional questions as to how consumers will prove damages associated with the CCC used by the furnisher. The *Gissler* decision highlights that a consumer's damages from use of a CCC are separate and distinct from damages flowing from a furnisher's dispute reinvestigation. While consumers typically point to harm to their credit score, a growing number of courts are finding that a decrease in credit score alone, without an accompanying harm such as a credit application denial, is insufficient to prove actual damages. Even if consumers can establish some measure of actual harm, however, cases involving CCCs will inevitably require the consumer to go the extra step of proving that such credit score harm or credit denial can be traced back to the CCC used by the furnisher. This can be a difficult task, particularly if the consumer has other negative items on his credit report. In fact, other than the "XB" code's impact on credit scores as addressed above, the other CCCs have no impact, at all, on credit scores. As such, a consumer that has a credit score of 650 would still have a credit score of 650 with "XH," "XC," or no CCC at all. This makes it more difficult yet for consumers to establish actual damages from use of the "XH" code instead of the "XC" code.

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***The authors would like to thank John Ulzheimer for his contributions to this article. Mr. Ulzheimer is FCRA certified by the Consumer Data Industry Association, has four published books regarding consumer credit, and has been published and quoted in over 4,500 consumer credit articles in the past 14 years. In addition to having been retained as a consumer credit expert in over 300 cases and testifying in over 75 of those cases, he is a guest lecturer at The Westminster Schools (Atlanta, Georgia), The University of Georgia, Emory University's School of Law, and the Georgia Consortium for Personal Financial Literacy. John is a frequent commentator in various outlets, including USA TODAY, Associated Press, New York Times, CNBC, NPR, Los Angeles Times, CNN, FOX, Washington Post, Money Magazine, American Banker, Wall Street Journal, SmartMoney, MarketWatch, MSNBC.com, Chicago Tribune, and Bankrate.com.*