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Insights

THE CARES ACT: MODIFICATIONS TO FCRA OBLIGATIONS ON FURNISHERS OF CREDIT INFORMATION

Mar 26, 2020

On the evening March 25, 2020, the Senate passed the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") in response to the coronavirus (COVID-19) outbreak. The House of Representatives passed the CARES Act on March 26, 2020, and President Trump is expected to sign it into law on March 26 or 27, 2020. Among other things, the CARES Act permits consumers to defer loan payments, obtain a forbearance, or obtain other loan assistance (called "accommodations") during the COVID-19 pandemic if certain conditions are met. The CARES Act then modifies the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq* ("FCRA") by precluding furnishers of credit information (i.e., creditors that report consumer credit information to credit reporting agencies) from reporting the accommodation. Instead, furnishers will be required to continue reporting the consumer using the consumer's account status (i.e., current or delinquent) at the time that the accommodation began. The CARES Act requires a careful operational review of credit information reporting/tracking systems to ensure both regulatory compliance and to minimize litigation risk.

The FCRA

Congress enacted the FCRA in 1970 because "the banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." *See* 15 U.S.C. § 1681(a)(1). 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).

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).

Modifications in the CARES Act

Section 4021 of the CARES Act modifies Section 1681s-2(a)(1) of the FCRA, which addresses the types of reporting that is prohibited under the statute, by adding a subsection (F) to the end. The new subsection (F) provides, in pertinent part:

[I]f a furnisher makes an accommodation with respect to 1 or more payments on a credit obligation or account of a consumer, and the consumer makes the payments or is not required to make 1 or more payments pursuant to the accommodation, the furnisher shall—

(I) report the credit obligation or account as current; or

(II) if the credit obligations or account was delinquent before the accommodation—

(aa) maintain the delinquent status during the period in which the accommodation is in effect; and

(bb) if the consumer brings the credit obligation or account current during the period described in item (aa), report the credit obligation or account as current.

The CARES Act broadly defines “accommodation” to include “an agreement to defer 1 or more payments, make partial payments, forbear any delinquent amounts, modify a loan or contract, or any other assistance or relief granted to a consumer who is affected by the coronavirus disease 2019 (COVID-19) pandemic.” Thus, nearly any type of alteration of loan obligations could conceivably fall under this definition as long as the furnisher and consumer reach an “agreement.”

Moreover, the relevant time period for when such an "accommodation" can occur and impact a furnisher's credit reporting is from January 31, 2020 to the "later of" 120 days after the date that the CARES Act is enacted or 120 days after the COVID-19 national emergency declared by President Trump is terminated—meaning that this requirement is likely to extend well into the Fall of 2020. Although this means that furnishers will need to monitor their reporting dating back to January 2020, most "accommodations" are likely to have occurred in March or in April as the COVID-19 pandemic becomes more acute.

Takeaways

There are a number of items that furnishers should consider with regard to the CARE Act's modification of the FCRA:

1. **Impact on furnishers**. These modifications on furnishers' credit reporting obligations are significant. Furnishers typically follow the industry standards published by the Consumer Data Industry Association in the Metro-2 Credit Reporting Resource Guide ("Metro-2"), which provide industry specific codes for the "accommodations" addressed by the CARE Act and instructs furnishers when those codes should be used. The CARE Act is a departure from those industry standards, and adds yet another item for furnishers to track and report to the CRAs.

2. **"Agreement" requirement**. The "agreement" requirement found in the definition of "accommodation" will be significant as it provides a level of certainty for furnishers regarding when the new FCRA requirements will apply. Although the CARE Act does not specify whether the agreement must be in writing, requiring an agreement ensures that furnishers will **not** be required to change their reporting practices for consumers who unilaterally stop, delay or short their payments. Thus, having an agreement requirement ensures furnishers will have notice of the borrowers for whom credit reporting should be amended under the CARES Act.

3. **Relevant time period**. The CARES Act specifies that the new credit reporting requirements imposed on furnishers apply from January 31, 2020 and will extend into the future depending on when the COVID-19 national emergency is terminated, but does not specifically provide that its requirements are retroactive to January 31, 2020 to the extent that the accommodation is entered into after that date. Typically, furnishers are not required to change prior credit reporting due to accommodations (loan modifications, forbearances, etc.) entered into at a later date. The fact that the CARES Act is silent on this issue, however, means that furnishers will need to take a close look at each account to determine the relevant time period of the accommodation and the credit reporting that it impacts.

4. **FCRA litigation**. Furnishers will not automatically be subject to litigation if they fail to fully comply with the new FCRA modifications. The CARES Act itself does not have a private right of action. Similarly, the FCRA does not provide a private right of action for claims relating to the **accuracy** of credit reporting under Section 1681s-2(a). *See* 15 U.S.C. § 1681s-2(c)(1). The FCRA

permits litigation against furnishers only under Section 1681s-2(b), which allows consumers to assert claims based on the reasonableness of a furnisher's investigation of credit reporting disputes received from CRAs. This means that any consumer looking to sue their furnisher for alleged failure to comply with the CARES Act would need to submit a dispute to a CRA and the CRA will have to send the dispute to the furnisher, which would then have an opportunity to correct its mistake to the extent that the reporting did not fully comply with the obligations imposed by the CARES Act.

Moreover, even if a furnisher does not comply with the CARES Act modifications to the FCRA, consumers will have considerable difficulty establishing any damages as a result. For those consumers that should have been reported as current under the CARES Act, showing any actual damage will be difficult because whether the account is reported as current or under an accommodation, such as a forbearance or deferment, is likely to have little impact on a consumer's credit score. Additionally, for those consumers that should have been reported as delinquent instead, the furnisher's reporting of the forbearance or deferment instead of the delinquency would actually help the consumer's credit score in most circumstances.

We at Bryan Cave Leighton Paisner LLP *have extensive experience helping clients with all issues related to the FCRA from regulatory compliance to major class action litigation. We will continue to monitor FCRA developments amid the COVID-19 pandemic and are happy to address your questions and concerns.* Please reach out to your regular BCLP contact, a member of BCLP's Regulatory & Compliance, Commercial Disputes or Class Actions practices, or the authors of this Client Alert.

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