

Insights

MID-YEAR CHECK-IN: CFPB TAKING AIM AT THE FAIR CREDIT REPORTING ACT

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Earlier this year, we wrote that the Consumer Financial Protection Bureau (CFPB) was signaling a not-so-quiet transition to aggressive compliance activities in 2022 after an extended period of flexibility during the COVID-19 pandemic. The Fair Credit Reporting Act (FCRA) is one of many consumer financial laws that have been directly in the CFPB's cross-hairs during the first-half of 2022. In a series of amicus briefs, advisory opinions, and interpretive rules, the CFPB has communicated new positions that significantly raise the bar for FCRA compliance and limit state-law preemption, even going as far as to take positions that contradict long-standing judicial precedent. These ongoing developments will be worth monitoring as we proceed into the second-half of 2022 and beyond.

The CFPB

The CFPB is a federal agency created in 2010 that is responsible for consumer protection in the financial sector. In this capacity, the CFPB regulates banks, mortgage lenders, mortgage and loan servicers, credit reporting agencies, and debt collectors by, among other things, rulemaking, informal written guidance, and investigating consumer complaints.

The FCRA

The FCRA was enacted by Congress in 1970 to, among other things, ensure "fair and accurate credit reporting" that is "essential to the continued functioning of the banking system." See 15 U.S.C. § 1681(a)(1). The FCRA imposes obligations on furnishers of credit information (Section 1681s-2), users of credit information (Sections 1681b and 1681m), and consumer reporting agencies (Sections 1681b, 1681c, 1681e, and 1681i).

The CFPB's Guidance in 2022

So far in 2022, the CFPB has taken the following positions with regard to the FCRA:

- **Investigations of "Legal" Disputes.** In an amicus brief filed in the U.S. Court of Appeals for the Eleventh Circuit in April ([link](#)), the CFPB took the position that furnishers are required by

Section 1681s-2 of the FCRA to investigate credit reporting disputes raising “legal” questions (for instance, whether the borrower owes a debt). This position conflicts with a long line of federal court precedent holding that furnishers are required to investigate only disputes of factual inaccuracy. In support of its position (which reiterated a similar position taken in an amicus brief in 2021), the CFPB argued that the prior precedent was “incorrectly decided” because (a) the FCRA text does not distinguish between legal and factual disputes, (b) furnishers of credit information (such as loan servicers) are in a position to assess legal questions, and (c) as a practical matter, it can be difficult to draw the line between factual and legal questions. It remains to be seen if the Eleventh Circuit will adopt the CFPB’s position. However, even if the CFPB’s position is rejected by the Eleventh Circuit, there is no indication that the CFPB will stop there. The CFPB appears focused on greatly expanding the scope of credit reporting and dispute investigations that can give rise to FCRA claims against furnishers under Section 1681s-2(b). The ultimate result could be the creation of a split between federal circuits that adopt the CFPB’s position (expanding enforcement to legal disputes) and those that do not (limiting civil enforcement to factual inaccuracies).

- **State-Law Preemption.** In an interpretive rule published in June ([link](#)), the CFPB also took the position that the scope of FCRA preemption of state laws is “narrow” and “targeted.” Section 1681t of the FCRA generally provides that the FCRA preempts inconsistent state laws, and federal courts have long relied on that section to hold that state law claims covering the same subject matter as is regulated by the FCRA are preempted. In its new rule, however, the CFPB confirms its belief that state can—and should—pass laws that are more strict than the FCRA, and even goes as far as to suggest that state law prohibitions on certain credit reporting (for instance, barring the reporting of medical debt, evictions, or rental arrears) would not be preempted. While the new rule may lead to more state-level regulation of the credit reporting industry, it remains to be seen how—or if—courts will change their interpretation of FCRA preemption in light of the CFPB’s interpretation.
- **“Permissible Purpose.”** In an advisory opinion released this month ([link](#)), the CFPB most recently turned its focus to the “permissible purpose” requirement in Section 1681b of the FCRA. Section 1681b lists the circumstances in which a consumer reporting agency may provide a credit report to user of information, and in which a user may request a report from a consumer reporting agency, including when the user has a “permissible purpose” to request the report (for instance, when the user “intends to use the information in connection with a credit transaction involving the consumer”). With regard to consumer reporting agencies, the CFPB’s opinion imposes further obligations by stating that an agency violates the “permissible purpose” provision if its poor procedures result in the agency providing information about the wrong consumer. Similarly, with regard to users, the CFPB took the remarkable step of rejecting the “reason to believe” standard applied by courts to determine whether the user had a “permissible purpose,” which is a common defense to FCRA liability in the context of identity theft claims. This opinion potentially broadens the scope of FCRA liability by imposing “strict

prohibitions” on consumer reporting agencies and users of information, though only time will tell whether courts follow the CFPB’s guidance.

Mid-Year Takeaways

The CFPB has confirmed its focus on the FCRA at each turn throughout the first-half of 2022. The common thread across the CFPB’s guidance has been heightened obligations—narrowing state law preemption and broadening investigation and permissible purpose obligations. Consumer reporting agencies, furnishers, and users of information will be wise to continue monitoring the CFPB’s activity because the CFPB is sure to continue issuing FCRA guidance throughout 2022 and into 2023. However, while the CFPB’s guidance will be relevant to regulatory compliance under the current CFPB regime, it remains to be seen whether courts interpreting the FCRA will go along with the CFPB’s guidance. In each of the instances identified in this article, doing so would require courts to break from long-standing precedent, which can take time and result in circuit splits that serve only to increase uncertainty and litigation costs.

For questions or further information, please reach out to your regular Bryan Cave Leighton Paisner LLP contact, a member of BCLP’s [Business and Commercial Disputes](#) or [Financial Services Disputes & Investigations](#) practices, or the authors of this Client Alert.

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