

Client Alert.

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Brave New World for Data Furnishers

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On September 4, 2013, the Consumer Financial Protection Bureau (“CFPB”) issued a [Bulletin](#) warning data furnishers that they face potential disciplinary action if they do not properly review information submitted to the credit bureaus in conjunction with consumer disputes of credit report information. Last week’s Bulletin appears to have been prompted by recent changes that the nationwide credit bureaus have made to their dispute handling procedures: information submitted by consumers with disputes is now imaged and communicated to the furnisher. Data furnishers, including banks, finance companies and debt collectors, might take this opportunity to review their data furnishing policies and procedures to ensure that they take into account the additional information being provided by credit bureaus with consumer disputes and meet CFPB’s supervisory expectations.

CFPB Intends a Long-Term Focus on Credit Reporting

The Fair Credit Reporting Act (“FCRA”) obligates companies that provide information about their transactions and experiences with consumers (“data furnishers”) to consumer reporting agencies (“CRAs”), including credit bureaus, to investigate disputes about that information. The obligation arises when the consumer disputes information directly with the data furnisher, or when a CRA advises the data furnisher that it has received a dispute from the consumer.

Last week’s Bulletin is a culmination of a number of developments at the CFPB over the past several months. From a policy perspective, CFPB Director Richard Cordray has clearly [stated](#) that credit reporting is one of the “four classes of problems” on which the CFPB will focus its rulemaking, supervision and enforcement efforts in the coming years, because in this market consumers “can become largely incidental to a business relationship between others,” and “the paying business relationship lies between the credit reporting firm and a third party that is interested in evaluating the risks of offering credit to consumers ... [, the] interests [of consumers] are an afterthought at best[, and] ... inaccurate reports may be no more than a statistic or an error rate.” Cordray has reiterated this point on several occasions throughout 2013, and has made clear that consumer reporting will continue to be a major priority of the CFPB in the future.

Recent Credit Reporting Enforcement Actions and Guidance

But the CFPB has gone beyond policy statements in pursuit of its regulatory objective. In its enforcement action against American Express, the CFPB [alleged](#) that American Express violated the FCRA when it created a system for handling disputes received directly from consumers that failed to report to the CRAs that previously reported information was being disputed. Once it concluded its investigation of the dispute, American Express either asked the CRAs to delete the information, or reported the information to the CRAs without indicating the dispute. The CFPB also took issue with American Express’s representations to consumers that paying old unreported debts would be reflected on their credit reports and improve their credit scores.

In July 2013, the CFPB expanded upon this last aspect of its enforcement action against American Express, and issued a [Bulletin](#) warning companies that furnish information about their customers or accounts to CRAs that they should not

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misrepresent to consumers the effect of payment on consumers' credit scores. The CFPB focused on statements that: (a) repayment will have a positive effect on a consumer's credit report, when the company does not furnish information to a credit reporting agency or the debt is no longer reportable (e.g., the default occurred more than seven years ago); (b) repayment will improve a consumer's credit score, in light of the numerous factors that influence an individual consumer's credit score; and that (c) repayment will improve a consumer's creditworthiness or enhance the likelihood that a consumer will subsequently receive credit from a lender, in light of the fact that the nature and extent of the impact of a payment on a particular debt in collection to a prospective borrower's creditworthiness may depend on all of the information potential lenders consider and how they weigh that information, factors that debt owners or third-party debt collectors often do not know.

Bulletin Focuses on Investigations of Disputed Information

The current Bulletin is another demonstration of the CFPB's continuing interest in data furnishing. The Bulletin stresses that furnishers are responsible for investigating consumer disputes forwarded by CRAs, and for reviewing all relevant information provided with the disputes, including documents submitted by consumers.

Recent Changes Made to Credit Bureau Processing of Disputes

The Bulletin appears to have been prompted by recent changes to the e-OSCAR automated consumer dispute verification system operated by the three nationwide credit bureaus – Equifax, Experian and TransUnion. Last month, following years of work by the nationwide credit bureaus, e-OSCAR began passing along to data furnishers documents submitted by consumers in connection with disputes, such as proof that a debt reported as outstanding has in fact been paid.

Previously, the credit bureaus would summarize consumer disputes into two digit codes that conveyed the substance of the dispute. Advances in document scanning, storage and transmission technology, however, have enabled the credit bureaus to image documents submitted by consumers and attach them to disputes forwarded to furnishers. These documents are typically accessed by a link to a secure website. This project went live on August 13.

Bulletin Seems Prompted by These Recent Changes

While the Bulletin broadly discusses furnishers' obligations to investigate consumer disputes received from credit bureaus, this is not news: the duty of furnisher to investigate disputes was added to the FCRA in 1997, and since then has been the subject of a great deal of consumer class action litigation. Moreover, the e-OSCAR system itself is designed to accomplish many of the goals highlighted in the Bulletin – for example, the Bulletin notes that following an investigation furnishers must "provid[e] corrected information to every nationwide [credit bureau] that received the information," but the e-OSCAR system automatically forwards corrected information to all nationwide credit bureaus, as required by FCRA § 611(a)(5)(D).

What is new is the bureaus' imaging of supporting documents. We believe that the Bulletin is intended to put furnishers on notice of their obligation to review and consider this additional information that the credit reporting bureaus are now attaching to dispute files in the e-OSCAR system. Specifically, the CFPB expects furnishers to:

- Maintain a system reasonably capable of receiving from the CRAs information regarding disputes, including supporting documentation; and
- Conduct an investigation of the disputed information including by reviewing "all relevant information" that the

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CRA's include with the notice of dispute or transmit during the investigation, and the furnisher's own information with respect to the dispute.

Supervision and Enforcement Risks

The Bulletin closes with a warning that the CFPB will "continue to review furnisher compliance with [FCRA] requirements during examinations and investigations," and "will take appropriate supervisory and enforcement actions to address violations and seek all appropriate corrective measures, possibly including remediation of harm to consumers." The CFPB's press release accompanying the Bulletin adds that this remediation might include "restitution to harmed consumers." We would note that pecuniary harm to consumers in the case of failures to reinvestigate adequately is notoriously difficult to demonstrate: the information furnished must actually be inaccurate; that inaccuracy must be the proximate cause of some harm to the consumer (such as a denied or priced-up loan); the damages to the consumer must be quantifiable; and this determination is generally fact-specific, and must be made on a case-by-case basis.

In addition to CFPB enforcement, however, there is a private right of action for failure to conduct a reasonable investigation of a consumer dispute received through a credit bureau. Moreover, consumers may, and frequently do, bring class actions under the FCRA, and can obtain statutory damages of \$100 to \$1,000 for each "willful" violation of a clearly established statutory obligation – some courts have held that consumers need not even allege actual harm to obtain such statutory damages. A plaintiff need not prove actual intent to violate the statute; it is sufficient to show recklessness, which includes creating an unreasonably high risk of violating the law. The law requires that furnishers "review all relevant information provided by" a credit bureau with respect to a consumer's dispute. FCRA § 623(b)(1)(B). While the additional information being communicated by e-OSCAR may not be "relevant" to the resolution of a consumer's dispute, a furnisher will not be able to make a relevance determination without reviewing that material. Unless a furnisher develops the ability to review documents forwarded by CRA's in connection with disputes, the furnisher will be exposed to a claim that the furnisher systematically failed to review "all relevant information" provided by a credit bureau in connection with consumer disputes. The obligation to review relevant evidence seems sufficiently clear – particularly in light of the Bulletin – that such a failure might support a claim for statutory damages.

Recommended Response to CFPB Bulletin and e-OSCAR Changes

Data furnishers are required to "establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information" about consumers furnished to credit bureaus. 12 C.F.R. § 1022.42. These policies and procedures "should be reasonably designed to promote ... [the] conduct [of] reasonable investigations of consumer disputes." 12 C.F.R. pt. 1022, App. E.

In response to the Bulletin and the recent changes to the manner in which the e-OSCAR system processes consumer disputes, we believe that furnishers should:

- Familiarize themselves with the new e-OSCAR functionality;
- Review and revise their written "accuracy and integrity" policies and procedures to ensure that the policies and procedures address the review and consideration of materials attached to or linked from the e-OSCAR dispute form; and
- Train and supervise dispute resolution staff on any revisions to the investigation procedures.

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