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Navigating the FCRA in the heavy wake and possible undertow of the CARES Act changes to the FCRA

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MAY 5, 2020

On March 27, 2020, the President signed the Coronavirus Aid, Relief and Economic Security Act ("CARES Act"). Amongst its many provisions is an amendment to the Fair Credit Reporting Act, 15 U.S.C. § 1681 ("FCRA") that adds Section 1681-s(2)(a)(1)(F): a temporary reporting requirement for furnishers of credit information concerning consumers affected by COVID-19. See Section 4021 of the CARES Act.

Due to its placement in the CARES Act as the section immediately preceding similar sections concerning foreclosures, evictions, and mortgage forbearance, it appears some have misinterpreted the scope of Section 4021 as limited to mortgage loans. However, this is a mistake because Section 4021 has no such limitation, it is applicable to **all furnishers**.

Therefore, this new provision concerns the non-secured lender and the landlord reporting credit information just as much as it concerns the mortgage servicer. With recent reports reflecting as many as 31% of households having failed to make their April rent payment on time[1] and a similar uptick in payment delinquencies expected universally, the impact of making such a misinterpretation cannot be overstated. Simply put, if you report information to a consumer reporting agency then you need to be cognizant of Section 4021 of the CARES Act and its addition of Section 1681s-2(a)(1)(F) of the FCRA.

Section 1681s-2(a)(1)(F) provides as follows:

(F) Reporting information during COVID-19 pandemic.

(i) Definitions. In this subsection:

(I) Accommodation. The term "accommodation" includes an agreement to defer 1 or more payments, make a partial payment, 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 during the covered period.

(II) Covered period. The term "covered period" means the period beginning on January 31, 2020 and ending on the later of--

(aa) 120 days after the date of enactment of this subparagraph [enacted March 27, 2020]; or

(bb) 120 days after the date on which the national emergency concerning the novel coronavirus disease (COVID-19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.) terminates.

(ii) Reporting. Except as provided in clause (iii), if 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 obligation 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.

(iii) Exception. Clause (ii) shall not apply with respect to a credit obligation or account of a consumer that has been charged-off.

Cut to its core, the new section provides that if a lender accommodates a consumer affected by COVID-19 regarding an outstanding debt during the covered period and the consumer complies with that accommodation, whether that includes not making payments or making reduced payments, the lender must report the account to the credit reporting agencies as having the same (or better) status it had before the accommodation. Therefore, if the account was current then the status must remain current while the accommodation is in effect, and if it was delinquent then the reported length of delinquency cannot increase during the accommodation.

Notably, the "covered period" begins on January 31, 2020, nearly two months prior to enactment of the CARES Act. As a result, furnishers will need to ensure they retroactively apply these new reporting obligations. In addition, although the statute requires

the consumer to have been "affected" by COVID-19, it does not explain **how** the consumer needs to have been affected by COVID-19, nor does the statute expressly limit its application to "accommodations" that were provided because of the impact of COVID-19. Further, the statute provides that an "accommodation" can include "any other assistance or relief granted to a consumer," leaving its precise contours and outer limits somewhat ambiguous. Conspicuously absent is any requirements or direction as to how to report accounts upon completion of the accommodation and/or termination of the "covered period." Therefore, care must be used when determining how to comply with these new reporting obligations.

Simply put, if you report information to a consumer reporting agency then you need to be cognizant of Section 4021 of the CARES Act

Three examples may illustrate the issues furnishers may face when trying to comply with this new provision. For this first example, assume a consumer has an open credit card account with a financial institution. As of February 15, 2020, the account is in good standing and has never been late and has been reported as "paid as agreed". The consumer calls the financial institution and contends that he/she has been affected by COVID-19 and requests a payment accommodation. If the furnisher grants the accommodation request and forbears all payments until the national emergency terminates, the furnisher must continue to report the account as current per § 1681s-2(a)(1)(F)(ii)(I). Similarly if the accommodation consists of making reduced payments from what ordinarily would be due, the account must still be reported as current. Note however that the statute does not address how to report information beyond the account status, such as the payment amount, during an accommodation. Therefore, while care must be taken to ensure the other fields are reported accurately, it will also be imperative to ensure this additional information does not create a misleading picture. For example, consider how to report the amount past due during a partial payment plan and whether using special comment codes could arguably conflict with the statutes directive.

This second example will illustrate potential pitfalls related to the retroactive application of the covered period. Imagine the above consumer's payment was due on February 3, 2020 and the consumer requested and received an accommodation the day before the payment was due. This accommodation falls within the covered period and the new reporting requirements apply, but the account may have already been reported in the ordinary course based upon the payment accommodation before enactment of the CARES Act. Therefore, it will be necessary to consider how this historical reporting may need to be adjusted while maintaining the accuracy of the reporting. To further complicate the matter, imagine that the accommodation was provided due to a car accident the consumer was in rather than for anything related to COVID-19 but the consumer was impacted by COVID-19.[2] This is an example of the many potential complications in retroactively applying the CARES Act's mandate and it behooves all furnishers to develop an efficient system to address these concerns given that a cumbersome process will likely strain an already strained workforce.

This third example will illustrate what appears to be the statute's intent to freeze the credit reporting as it existed just prior to the national emergency being declared. Assume a consumer is 30 days past due in the amount of $2,500.00 as of March 2, 2020 on his or her mortgage. The consumer became past due during the Covered Period since the Covered Period commenced on January 31, 2020. Assuming the consumer requests and receives a payment forbearance, the creditor must maintain the delinquent status during the period of the accommodation. See § 1681s-2(a)(1)(F)(ii)(II)(aa). If the consumer was 30 days past due the furnisher may not report the account as 60 days past due but must continue to report the account as 30 days past due. However, if the consumer makes a payment and cures the delinquency during the accommodation period, the creditor shall then report the account as current. See § 1681s-2(a)(1(F)(ii)(II)(bb). However, if the consumer that was 30 days past due does not cure the delinquency during the accommodation, and assume the accommodation lasts six months, the statute does not address whether the first post-accommodation reporting should reflect 60 days past due or 180 or more days past due.

This third example also highlights one area where these new reporting obligations could actually make the consumer worse off than he or she would have been prior to the enactment of the CARES Act. The CARES Act on its face requires accounts to be reported during an accommodation, and if the account was delinquent before the accommodation then that means reporting a delinquency status for the duration of the accommodation. However, Fannie Mae's guidelines provide for the suppression of reporting during certain accommodations made that are attributed to a disaster events and/or the injury or death of an active duty U.S. servicemember. In Fannie Mae's COVID-19 related guidelines about credit reporting issued prior to the CARES Act, Fannie Mae extended this reporting suppression to COVID-19 related accommodations.[3] However, on April 8, 2020 in response to the CARES Act, Fannie Mae rescinded this guidance and expressed its acknowledgement that the CARES Act mandates reporting on these accounts. This change is likely detrimental to consumers with Fannie Mae backed loans who will now be reported as delinquent instead of having the reporting of their account suppressed.

One issue that naturally arises is whether and how a consumer may waive the "protections" afforded by the statute. For example, can a furnisher agree to delete a tradeline in a settlement agreement as part of resolving a debt despite what appears to be a mandatory reporting obligation? Allowing a consumer to waive the "protections" appears to be consistent with the legislative purpose of the statute, however the statute is silent on this question. Therefore ordinary waiver considerations should be contemplated which will naturally require a case by case analysis.

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There has also been agency guidance that assuages some concerns regarding navigating these new reporting obligations, particularly where the requirements are ambiguous or require a prohibitive level of resources. On April 1, 2020, the Bureau of Consumer Financial Protection (CFPB) issued a statement[4] on supervisory and enforcement practices regarding the FCRA and Regulation V in light of the CARES Act. The CFPB recognized the evolving challenges faced by both consumers and the industry and indicated that it will be flexible regarding the timeline for investigating disputes. While the CFPB expects furnishers to comply with the CARES Act, it will also work with furnishers to help them do so.

The general rule is that furnishers must respond to disputes within 30 days, and that 30 day period may be extended to 45 days if the consumer provides additional information relevant during the 30 day period. However, in evaluating compliance with the FCRA because of the pandemic, the CFPB will consider a furnisher's individual circumstances and does not intend to cite or bring an enforcement action against a furnisher making good faith efforts to investigate disputes as quickly as possible, even if the dispute investigation exceed the statutory timeframe.

Nonetheless, even if the CFPB will be more lenient and there is no private right of action under 15 U.S.C. § 1681s-2(a), it behooves all furnishers to update their systems to account for these new obligations. If a consumer is alleging the credit reporting is inaccurate and an ACDV is received, the furnishers employees charged with investigating the dispute must know this new provision of the FCRA. This will require furnishers to make sure that the credit reporting is corrected in compliance with the CARES Act. One approach is for contemporaneous notes to be taken while the employee investigates so those notes can show the investigation undertaken was reasonable. Although it is impossible to avoid all litigation, the greater the notes and record, even if there is no clear-cut answer, should minimize the risk of a finding that a reasonable investigation was not undertaken so liability under the FCRA can be better managed.

Notes

[1] This represents a 13% increase of missed payments from the same time last year and a 12% increase from last month. See https://www.nmhc.org/research-insight/nmhc-rent-payment-tracker/

[2] To take this one step further, it is difficult to imagine a consumer that has not been affected by COVID-19 in some manner, whether due to a stay at home order, employment issues, or even the inability to find toilet paper and water in the supermarket.

[3] Fannie Mae's existing disaster related guidelines do not apply to COVID-19, necessitating this extension.

[4] https://files.consumerfinance.gov/f/documents/cfpb_credit-reporting-policy-statement_cares-act_2020-04.pdf

This article first appeared in Consumer Financial Service Law Report on May 5, 2020.

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