



Ep. 05: Credit Reporting and COVID: What did the CARES Act change?

July 13, 2020

*The CARES Act requires that borrowers need to have been (1) affected by COVID-19 and (2) received an "accommodation" for his or her creditors to be subject to the new CARES Act credit reporting obligations, but it does not explain **how** the consumer needs to have been affected, nor does the statute expressly limit its application to accommodations provided **because of** the impact of COVID-19. Therefore, care must be used when determining not only how to report accommodations (such as forbearances) consistent with these new FCRA reporting obligations, but also what can be discussed with borrowers regarding the credit impact of accommodations being offered.*

Gregg Stevens:

Hi, I'm **Gregg Stevens**. I'm a partner in the Dallas office of McGlinchey Stafford. I am joined today by my colleague, **Joe Apatov**, who works in the Fort Lauderdale office. Both of us work in the firm's Financial Services practice area. Having spent time both as an attorney at the Department of Justice and in-house counsel at a large bank, I have a deep well of knowledge on the alphabet soup laws that I enjoy sharing with our clients. Joe is an Associate in our Consumer Financial Services Litigation group, and focuses his practices on several areas, including the Fair Credit Reporting Act (FCRA), and is always on top of the current trends. He anticipates new trends in litigation, including those that we may see as a result of COVID-19.

Today, we're going to talk about credit reporting in the COVID era, a topic that is on the minds of many of our clients. On March 27th, the President signed the Coronavirus Aid Relief and Economic Act, or as it's better known, the CARES Act. One of the provisions of the CARES Act amended the Fair Credit Reporting Act, and it added another whole section to the Fair Credit Reporting Act, which is now 1681s-2(a)(1)(F). Basically what it did was describe how to report accounts where there's been an accommodation based on COVID-19. However, it's not as simple as it sounds.

Today in our session, we're going to talk about what an "accommodation" is, what the "covered period" is, as well as how you report. In addition, we're going to discuss some of the trends, including how the statute will be enforced. Joe, I thought I would turn it over to you to discuss. What is a "borrower accommodation"?

Joe Apatov:

So, that's actually an interesting question. The statute defines "accommodation" in an extremely broad way. There's really three components to the definition. The first identifies various consumer payment-related relief options, but it closes with stating "or any other assistance or relief granted to a consumer," which is obviously very broad. At the same time, it identifies who receives it, which is 'those affected by the coronavirus disease pandemic.' And then it defines a time period of "during the covered period." One thing to note is that, because of the way it's worded, it's unlikely you're going to find anyone who is not affected by COVID at this time. It doesn't say how you have to have been affected, and people can be affected in any way, shape, or form. And the second part is that because it has that language "or any other assistance or relief granted to a consumer," it's really difficult to say where the contours are. But when you look at the leading language, it talks about payment-related accommodations, so it does seem to be that's the focus of what they're concerned with. Where it gets a little more confusing, again, is that it identifies the "accommodation" as something that's provided "during the covered period." And the covered period, actually, if you notice, predates the enactment of the CARES Act. So Gregg, do you see anything that kind of flows from that?

Gregg Stevens:

Yeah, I actually do see some things that flow from that. And Joe, before we get into that, do you think a good way to define "accommodation" really would be any deviation from the terms of the original contract?

Joe Apatov:

I think that's a very good way to put it. I think that's the best rule of thumb to identify what an "accommodation" is.

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Gregg Stevens:

Now, when we transition over to "covered period," it's very interesting because the CARES Act was not enacted until March 27th of this year. However, the covered period begins on January 31st, which was nearly two months prior to the enactment of the CARES Act. And it keeps continuing until the national emergency is over. And it keeps continuing for 120 days after the national emergency is over. And as we record this podcast today, the national emergency has not been terminated. So for example, if President Trump determines that the national emergency is over as of July 1st, the reporting requirements of the CARES Act still will continue until November 1st of this year. So it started prior to the enactment of the CARES Act and will continue for several months after the national emergency terminates. So there's a little bit of a gap period there, and some furnishers may have to go back, if they've given an accommodation, and look at how they were reporting the account prior to the enactment of the CARES Act.

- Joe Apatov:** So, Gregg, one thing that I noticed is that when you see the language "covered period" in the statute, it's not defined in terms of the credit reporting obligation, but it's actually defined in terms of an accommodation. So how does that impact a furnisher's obligations?
- Gregg Stevens:** The furnisher has to continue the reporting as long as the accommodation is in effect. And that may even exceed the time period of when the national emergency ends, and potentially more than 120 days after the national emergency ends. You have to remember that the statute was passed in a hurry, and at its core it's a consumer protection statute. So you have to look at it and make your reporting decisions with that in mind. So Joe, how would you report an account that's where there's been an accommodation?
- Joe Apatov:** You're going to have to look at what the accommodation is, obviously. But as long as the borrower is performing under the accommodation - and in a forbearance that means you don't really have to do anything, you're not making any payments. As long as they're performing, if the account was current prior to the accommodation, you need to continue reporting the account as current. And if the account was delinquent prior to the accommodation, you have to keep reporting the delinquency status as it was at the time of the accommodation. So if it was 30 days delinquent, you keep it at 30 days. If it's 60 days delinquent, you keep it as 60 days. The one exception to that is that you can improve the reporting and report a loan as current if it was 60 days, 30 days or however many days, delinquent. What is actually an odd little nuance, is that the statute doesn't appear to permit you to improve someone's status from 60 days to 30 days during the covered period of the accommodation. But it seems like that is consistent with the intent of the statute and is probably not going to receive a lot of pushback, since it's benefiting the consumer.
- Gregg Stevens:** Joe, after the CARES Act was passed, didn't the CFPB issue some guidance on how they would look at a furnisher's attempt to comply with the statute and the new rules?
- Joe Apatov:** Yes, the CFPB issued guidance that was useful for furnishers, which had an eye towards recognizing the difficulties of the situation, with keeping up with a furnisher's obligations because of staffing issues and these other concerns that they're dealing with. The CFPB basically said it would be flexible with furnishers who are making a good faith effort to comply with the guidance, and this had drawn some pushback from Attorney Generals. There was actually 23 Attorneys General that requested that the CFPB actually flip this and require more strict enforcement. So you kind of recognize the tension between different portions of the government, where in one side, you're recognizing the difficulties for the industry in complying, given the short staffing, given all the issues there. But at the same time, the Attorneys General were focused with the consumer protection angle of it. And there's a tension between those two different views.
- Joe Apatov:** So Gregg, when we're looking at these competing views, one of the things that comes up is, sometimes you're going to have state guidance that conflicts with federal guidance. What do we do there?

Gregg Stevens: That's been very interesting. Several states have come out with their own guidance on how accounts should be reported. For example, some states have required that there should be no negative credit reporting. In theory, and in practice, those state laws are most likely preempted by the Fair Credit Reporting Act. But once again, it goes back, I think, to the core of the statute, that it is a consumer protection statute. And I think that has to be kept in mind. Another issue that comes up quite a bit is that consumers will probably call their banks, their credit card companies, their auto lenders, wanting to know: if they were to obtain an accommodation and/or a forbearance, they'd want to know how it would affect their credit score. And I think the answer is, it's not necessarily supposed to affect their credit score. However, there's so many different elements that go into the calculation of a credit score -- how you report several different elements, and several different boxes they have to check to comply with CDIA (Consumer Data Industry Association) -- it's hard to say that their credit would not be affected. For example, Fannie Mae has said that they will not fund a new loan unless the loan has come out of forbearance, and the borrower is current on three payments post-forbearance. So a representation really cannot be made that it will not affect their credit. Joe, do you agree with that assessment?

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Joe Apatov: Yeah, I think that's a perfect assessment, because the issue here is that credit reporting is not binary. It's not "current" or "not current." There's other fields that are in play, and ultimately a furnisher does not control how that information is reported to the end user when they're deciding what credit to provide. And the Fannie Mae example is a perfect one, where the furnisher doesn't know what Fannie Mae's ultimately going to do with it, just as any lender could take the information provided and decide to do something that could be negative to a consumer that you don't anticipate. So when you're fielding a question, it's really difficult to try and answer what's going to happen because, frankly, the furnisher doesn't know usually. And at the same time, you're generally speaking to someone who's not sophisticated, who's not going to understand, necessarily, the nuance of what you're telling them. They're not going to understand these different fields that are in play. And, frankly, a customer service representative is probably not going to be qualified to really get into that information without the risk of misleading someone. So really for both the furnisher and the consumer's protection, it's going to help everyone to not over-explain what's going to happen, because frankly, no one really knows what's going to happen down the road.

Gregg Stevens: That's very true. And to the extent an investigation needs to be done in response to a consumer dispute, I think it's always a good practice for contemporaneous notes to be taken while the employee investigates, so those notes can show [that] any eventual, underlying investigation was reasonable. The bottom line is, it appears that it will be impossible to avoid all litigation. But hopefully, we've given you some insight and knowledge about the changes to the Fair Credit Reporting Act and the CARES Act.

Further information can be gleaned from our website, and Joe and I may be contacted through our website, which contains our email addresses.

Gregg Stevens: That's it for today. I hope you enjoyed this podcast. I'm **Gregg Stevens**.

Joe Apatov: I'm **Joe Apatov**.

Gregg Stevens: Until next time. Thank you.

Thanks for tuning into this episode of "More with McGlinchey." If you have a question or would like to propose a topic, we'd love to hear from you at podcast@mcglinchey.com. For additional resources on this topic, please visit mcglinchey.com. On behalf of the law firm that brings you more, we hope you'll join us next time.



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