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Background Screening and CFPB Rulemaking

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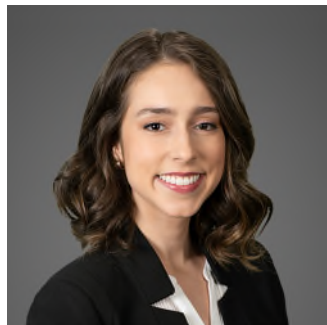
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○ Setting the Scene

- CFPB FCRA Authority and Activity
- The Evolving Privacy Environment
- The upcoming FCRA Rulemaking

○ Potential Issues to be Addressed in the New Rule

- Definitions of Consumer Report and Consumer Reporting Agency
- Permissible Purposes
- Disputes
- Medical Debt
- Implementation Period

○ End-User Employment Screening Developments

- CFPB FCRA Summary of Rights Update
- FCRA Disclosure and Authorization Litigation
- Fair Chance and Ban-the-Box Legislation
- Salary History Legislation

CFPB FCRA ACTIVITY

- CFPB FCRA Authority
- CFPB and FTC FCRA Amicus Briefs
- CFPB FCRA Preemption Interpretive Rule (June 2022)
- CFPB FCRA Advisory Opinions
 - Consumer reporting agencies' matching practices (November 2021)
 - Permissible purposes for furnishing, using, and obtaining consumer reports (July 2022)
 - Facially False Data (October 2022)
 - Accuracy in Background Check Reports (January 2024)
 - File disclosures (January 2024)

○ Pending Supreme Court Decisions

- Constitutionality of CFPB Funding Mechanism
 - *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited*
- Chevron Deference Cases
 - *Loper Bright Enterprises v. Raimondo*
 - *Relentless, Inc. v. Department of Commerce*

○ Presidential Executive Order

- Preventing Access to Bulk Sensitive Personal Data and U.S. Government-Related Data by Countries of Concern
- Calls for CFPB Action regarding data brokers

○ Evolving U.S. Privacy Environment

- Proposed American Privacy Rights Act of 2024
- Developments in the States
 - Daniel's Law Litigation
 - Consumer reporting laws and other state privacy legislation and litigation

- September 2023, CFPB announces plans for an FCRA rulemaking
 - Medical Debt, but much more
- Small Business Advisory Review Panel
 - Role
 - Report (December 15, 2023)
- Rulemaking Timeline
 - This year, but when...
- Post Rulemaking Possibilities
 - Congressional Review Act
 - Litigation

Potential Issues for CFPB FCRA Rulemaking

- Definitions of Consumer Report and Consumer Reporting Agency
- Permissible Purposes
- Disputes
- Medical Debt
- Implementation Period

Potential Issues for CFPB FCRA Rulemaking

- Definitions of Consumer Report and Consumer Reporting Agency
 - Data Brokers
 - Assembling or Evaluating
 - Credit Header Data
 - Targeted Marketing and Aggregated Data

- “Consumer Report” and “Consumer Reporting Agency” definitions are central to applicability of the FCRA
- The CFPB is considering using the rulemaking to interpret these definitions to address multiple issues:
 - Data Brokers
 - Assembling or Evaluating
 - Credit Header Data
 - Targeted Marketing and Aggregated Data

- CFPB characterizes “data brokers” broadly
- CFPB considering expanding FCRA applicability
 - Use alone may trigger coverage
 - Sale of data typically used for credit/employment determinations may be covered
 - Data collected for permissible purposes may not be sold for other purposes
 - A data broker may not obtain consumer report information from a consumer reporting agency without a permissible purpose or sell such information to a user unless the user has a permissible purpose

- Part of the definition of “consumer reporting agency”
- Not defined in the statute but interpreted in case law
- CFPB is considering “a more bright line definition”
- A particular focus is on intermediaries/vendors that transmit public record information from public record databases

- “Credit header” data is certain consumer-identifying data maintained by consumer reporting agencies.
- Credit header data has historically been considered to include, for example, an individual’s:
 - Name (and any other names previously used)
 - Current and former addresses
 - Social Security number
 - Phone numbers
- CFPB is considering “clarifying” the extent to which credit header data constitutes a consumer report.

- The CFPB is considering proposals to “clarify” that certain activities consumer reporting agencies undertake to help third-party users market to consumers violate the FCRA
- Use of consumer report information by CRAs, as well as providing aggregated or anonymized consumer report information, may be deemed to constitute consumer reports in some cases

Potential Issues for CFPB FCRA Rulemaking

- Permissible Purposes
 - Written Instructions
 - Legitimate Business Need
 - Data Breaches

○ Written Instructions

- steps that must be taken to obtain a consumer's written instructions
- who can collect written instructions
- limits on the scope of authorization to ensure the consumer has authorized all uses of the consumer's data (including limits on the number of purposes or entities that can be covered by a single instruction)
- methods for revoking any ongoing authorization

○ Legitimate Business Need

- Considering limiting to business transactions for personal, family or household purposes and only to determine the consumer's eligibility for the transaction
- Considering limiting account review to instances where "actually needed to make a decision about whether the consumer continues to meet the terms of the account."

○ Data Breaches

Potential Issues for CFPB FCRA Rulemaking

- Disputes

○ Disputes involving legal matters

- The CFPB is considering codifying earlier CFPB positions regarding disputes regarding whether a reported debt is collectible and contractual liability disputes regarding obligations to pay

○ Disputes involving systemic issues

- Proposals may address how furnishers and consumer reporting agencies must investigate and address such systemic issues
- Whether to provide consumers with a specific process through which they could notify a consumer reporting agency or furnisher of possible systemic consumer reporting issues that affect other similarly situated consumers
- Whether a notice to consumers affected by systemic issues may be appropriate

Potential Issues for CFPB FCRA Rulemaking

- Medical Debt
- Implementation Period

○ Medical Debt

- CFPB has been emphasizing this aspect of its proposals
- The CFPB is considering proposals to:
 - prohibit creditors from obtaining or using medical debt collection information to make determinations about consumers' credit eligibility (or continued credit eligibility); and
 - Prohibit consumer reporting agencies from including medical debt collection tradelines on consumer reports furnished to creditors for purposes of making credit eligibility determinations

○ Implementation Period

- To be determined, but the time needed for many stakeholders may be substantial

End-User Employment Screening Developments

- Updated CFPB FCRA Summary of Rights
 - Updated in March and August 2023
 - Use required by March 20, 2024
- Employment Disclosure and Authorization Litigation
- Ban-the-Box and Fair Chance Laws
- Salary History Laws

- Per Section 604(b)(2), the following are required in the employment context:
 - A clear and conspicuous disclosure that consists solely of the disclosure; and
 - A written authorization
- Per 9th Cir. case law:
 - No extraneous language (including state disclosures and information regarding the right to a copy of your consumer report)

Questions & Contacts



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