Avoiding the Perils and Pitfalls of The Fair Credit Reporting Act

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Today’s presenters and some notes...

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Fair Credit Reporting Act (FCRA)

The FCRA is a federal law put in place to protect consumers. The consumer reporting industry is big business. Information about consumers is sought by:

- lenders,
- credit sellers,
- insurance companies,
- employers, and
- others every day.
Fair Credit Reporting Act (FCRA)

Consumer reporting agencies (CRA’s) aggregate and store information on individuals and sell it to those who need it (creditors, banks, retailers, employers, landlords, insurers, etc.).

CRA’s play an integral and expansive role in the U. S. economy – they can facilitate and/or frustrate a consumer’s access to credit and employment.

Thus, accuracy and completeness of consumer reports are critical – especially due to the ever increasing use of electronic information. Identity theft and privacy issues are also of paramount importance.
**Fair Credit Reporting Act (FCRA)**


President Obama named Richard Cordray, former Ohio Attorney General, as CFPB Director on Jan. 4, 2012.

MOU between FTC and CBPB (1/20/12) – concurrent FCRA jurisdiction:

- “the parties shall consult promptly on formal comprehensive agency guidance documents by either party”
- “publishing party shall notify other party no later than 30 days before publication of Advance Notice of Proposed Rulemaking,. Such notification shall include description of issues that document may address. If 30 days notice not practicable, notice shall be provided as soon as practicable.”

Let’s review the FCRA as it relates primarily to employment.
Definitions
15 U.S.C. § 1681a

Consumer—
An individual.

Consumer Report—
The term “consumer report” means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing eligibility for:
Definitions
15 U.S.C. § 1681a
For:

(A) credit or insurance to be used primarily for personal, family, or household purposes;
(B) employment purposes; or
(C) any other purpose authorized under section 604 (see permissible purposes).

Note: Business/commercial credit for the most part is not governed by the FCRA.

Caveat: Decisions exist where poor business credit was reported under individual’s name which led to rejection of credit for personal, family and household purposes, thus leading to FCRA violations.
Definitions
15 U.S.C. § 1681a

The term “consumer reporting agency” means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.
Definitions
15 U.S.C. § 1681a

The term “investigative consumer report” means a consumer report or portion thereof containing information on a consumer’s:

- character;
- general reputation;
- personal characteristics; or
- mode of living.

Information often times is gathered through personal interviews with neighbors, friends, or associates of the consumer or with others with whom he is acquainted or who may have knowledge concerning any such items of information.
Some Important Exclusions

A couple of key exclusionary provisions which take a consumer report out of the FCRA include:

- when a report contains information solely as to the transactions or experiences between the consumer and the person making the report; and
- when the communication of information in a consumer report is among persons related by common ownership or affiliated by corporate control.

- Employee Misconduct Investigation Reports
- Employment Agency communications

Examples: Drug testing, affiliated companies.
Definitions
15 U.S.C. § 1681a

Adverse Action

The term “adverse action” means:

- the same as in the Equal Credit Opportunity Act;
- a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;
- an action that is adverse to the interests of the consumer.

Very broad language.

(Beverly case – did not hire, then later hired – still constituted an adverse action.)
Permissible Purposes of Consumer Reports
15 U.S.C. § 1681b

A consumer reporting agency may furnish a consumer report to a person only under permissible circumstances which include:

- in response to a court order;
- in accordance with written instructions of the consumer;
- to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished, and involving the extension of credit to, or review or collection of an account of, the consumer;
- to use the information for employment purposes;

Certification from user:

A CRA may furnish a consumer report for employment purposes if:

- person who obtains report certifies to CRA that:
  - person has complied with disclosure to consumer and that he will comply with conditions on use of consumer reports for adverse actions; and
  - Information from report will not be used in violation of EEO laws.
Disclosure Required to Consumer

Generally, a person may not procure a consumer report, or cause one to be procured, for employment purposes unless:

- a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured that a consumer report may be obtained; and

- this must be in a document that consists solely of the disclosure that a consumer report may be obtained for employment purposes.
Disclosure Required to Consumer

The consumer must also authorize in writing the procurement of the report. This can be on the same document as the disclosure:

- cannot obtain written signature after you have or caused to have the consumer report procured;
- cannot have release or waiver language on same page.
Disclosure Required to Consumer

If you are an employer with positions governed by Secretary of Transportation (such as truck drivers), then different rules apply:

- if consumer applies for job by mail, telephone, computer, or other similar means, then employer must provide, before report is procured, to consumer, by oral, written or electronic means, notice that consumer report may be obtained for employment purposes and

- a summary of rights; and
Disclosure Required to Consumer

- consumer must consent orally, in writing or electronically to the procurement of the report.

- Caveat: Follow above procedures only if at time consumer report is procured – the only interaction between the consumer and employer has been by mail, telephone, computer or other similar means.

Conditions on Use of Consumer Reports for Adverse Actions

In using a consumer report for employment purposes, BEFORE taking any adverse action, the person (employer) shall provide to the consumer:

- a copy of the consumer report; and
- a summary of Rights prescribed by the Bureau of Consumer Protection.

*Commonly known as the “pre-adverse action” notice.*

If a person (employer) takes any adverse action with respect to a consumer that is based on any information contained in a consumer report, that person shall:

- provide notice of the adverse action to the consumer (orally, in writing, or electronically); and

- provide the consumer with the name, address and telephone number of the consumer reporting agency (toll-free if CRA does it on a national basis). This can be done orally, in writing or electronically.

and (cont.)

- provide the consumer orally, in writing or electronically with a statement that the CRA did not make the decision to take the adverse action and it is unable to provide the specific reasons why the action was taken; and

- provide the consumer orally, in writing or electronically with notice of the consumer’s right to obtain a free copy of the consumer’s consumer report from the CRA within 60 days of receipt of the adverse action notice from the employer; and

- provide notice to the consumer orally, in writing or electronically that he/she can dispute with the CRA the accuracy/completeness of the information in the report.

*Commonly known as the “post-adverse action” notice.*
Conditions on Use of Consumer Reports for Adverse Actions

If position governed by Secretary of Transportation and if the consumer applies by mail, telephone, computer or other similar means, and if employer procures consumer report and it takes adverse action on application based in whole or in part on the report, then the employer must provide to consumer, instead of notices under § 1681b(b)(3)(A) (so no pre-adverse action letter) or under § 1681m, within 3 business days of taking adverse action, oral, written or electronic notice that:

- an adverse action has been taken in whole or in part based on consumer report;
- name, address, telephone number of CRA who furnished report (toll-free number if CRA does this on a national basis).
Conditions on Use of Consumer Reports for Adverse Actions

- The CRA did not make decision to take adverse action and it cannot provide specific reasons for the adverse action; and

- Consumer may, upon proper identification, request free copy of consumer report and may dispute with the CRA the accuracy/completeness of information in report.
Conditions on Use of Consumer Reports for Adverse Actions

If consumer requests copy of report from employer, then within 3 business days of receiving consumer’s request, together with proper identification, employer must send/provide to consumer a copy of report and copy of summary of rights.

Caveat: Follow above procedures only if at time consumer report is procured the only interaction between the consumer and employer has been by mail, telephone, computer or other similar means.

If in person contact, then general rule applies under 15 U.S.C. § 1681b(b)(3)(A).
Civil Liability for Willful Noncompliance  
15 U.S.C. § 1681n

A person who willfully fails to comply is liable to the consumer for:

- actual damages sustained by the consumer as a result of the failure, or
- damages between $100 and $1,000; and
- punitive damages as the court may allow (Saunders case – 526 F.3d 442 (4th Cir. 2008) punitive damages award of $80,000.00 based on a $1,000.00 violation upheld); and
- costs and reasonable attorney’s fees as determined by the court.
Civil Liability for Negligent Noncompliance
15 U.S.C. § 1681o

A person who is negligent in failing to comply is liable to the consumer for:
- actual damages sustained by the consumer as a result of the failure; and
- costs plus reasonable attorney’s fees as determined by the court.
Administrative enforcement
15 U.S.C. § 1681s

- FTC: Civil penalties for knowing violations, up to $3500 per violation.
- *Determining Penalty Amount:* “In determining amount of civil penalty, court shall take into account degree of culpability, any history of such prior conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.”
- Violation of FCRA=Violation of FTC Act; gives FTC power to seek broad equitable injunctive relief, even consumer redress.
- **States:** after prior written notice to FTC and CFPB [they can intervene, remove to federal court, or bring own action and stay state case], states may sue for injunctive relief, damages to residents, and fines up to $1000 per knowing or negligent violation.
Illustrative Cases

Significant litigation has occurred over the last several years under the provisions reviewed today.

– **Williams v. Telespectrum, Inc. (E.D. Va.)**
  - Filed as a class action alleging violations of FCRA that employer failed to provide all information required in pre-adverse and post-adverse action notices and timing of notices was improper.
  - Allegations were that employer brought candidates in – handed them a copy of the consumer report and then terminated them on the spot.
  - Court denied summary judgment for employer regarding issue that employer did not provide notice of adverse action before it took adverse action.
  - FTC opinions state that some reasonable period of time must elapse between these two notices.
Illustrative Cases
– Williams (contd.)

- Consumers need an opportunity to correct any inaccuracies.
- FTC opinion states 5 business days could be reasonable.
- Summary judgment for employer also denied regarding punitive damages. Court stated that repetitiveness or multiplicity of conduct alone could prove punitive damages.
- This was the employer’s general practice so applied to every candidate for past several years.
Illustrative Cases

- **Williams** (contd.)
  - Plaintiffs moved for class certification which was denied because failed FCRP 23(b)(3) predominance criteria.
  - This is because plaintiffs asked for *individual* damages and punitive damages for *each* class member which would require extensive individual, as opposed to, class calculations.
Illustrative Cases

— Williams (contd.)

- Case settled on an individual basis and plaintiffs’ counsel learned not to ask for individual, actual damages.
- Now they ask for statutory damages of $100 to $1,000, plus punitive damages.

Caveat: Contract with CRA wherein employer delegates responsibility to CRA. Indemnification?
Illustrative Cases

– Hunter, et al v. First Transit, Inc. (Northern District of Illinois)

- Plaintiffs filed a class action lawsuit against both First Transit (a CRA) and employer First Student alleging that the defendants failed to provide the required disclosures to applicants before running a background check on them and also failed to follow the required adverse action process when they denied employment information obtained in credit reports.
- In March 2011, the federal court approved a settlement of $5.9 million – the largest public settlement of an FCRA claim against an employer.
Illustrative Cases

(Pending case in District of Maryland)

- Pending class action lawsuit against national financial institution brought by former employees and applicants.
- Plaintiffs claim that the defendant improperly “buried” FCRA authorization forms in job applications and failed to provide the requisite copies of consumer reports prior to an adverse action (including termination, failure to hire, and failure to promote).
- Plaintiffs seek statutory damages ($1,000) for every employee and applicant of the employer for the prior three years, as well punitive damages and attorneys’ fees.
FTC Enforcement Actions

- FTC has brought actions against employers for violations of adverse action and pre-adverse action notice requirements; most recently:
  
  - August 2009: FTC charged Quality Terminal Services and Rail Terminal Services, railroad contractors, with failing to provide pre-adverse action and adverse action notices to employees who were fired and job applicants rejected based on information in their consumer reports.
  
  - Under consent orders, companies had to pay penalties of $1000 per violation [$53K and $24K] and agreed to injunctive, recordkeeping, and reporting requirements to ensure compliance with FCRA.
FTC Enforcement Actions (contd.)

- FTC has also brought actions against CRAs for failing to provide required notices to consumer report users [including employers], informing them of their FCRA obligations:
  - TALX Corp., subsidiary of Equifax that sells income/employment history info about consumers to pre-employment screeners and others for use in determining eligibility for employment, etc. (thus making it CRA subject to FCRA), agreed in July 2009 to settle FTC charges that it violated FCRA by failing to provide:
    - “Notice to Users of Consumer Reports: Obligations of Users Under FCRA” (notifying users of duty to notify individuals if user takes adverse action based on consumer report)
    - “Notice to Furnishers of Information: Obligations of Furnishers Under FCRA” (notifying furnishers of duty to provide accurate info, correct and update inaccurate info, and reinvestigate consumer disputes)
  - Consent order: enjoined future violations, imposed $350,000 penalty
FTC Enforcement Actions (contd.)
Social Media: Employers Beware!

- Employment background checks can include even social media. But regardless of type of info in report you use when making hiring decisions, rules are the same: Companies providing reports to employers, and employers using reports, must comply with FCRA.
- FTC staff looked at Social Intelligence (selling background reports including info from social media) to see if it complied with FCRA. Staff’s May 2011 closing letter stressed that when reports include info derived from social media, same rules apply: companies selling background reports must take reasonable steps to ensure maximum possible accuracy of what’s reported from social networks and that it refers to correct person.
- They have to comply with other FCRA sections, too – like providing copies of reports to people and having process in place if people dispute what’s said about them in report. Also, companies must give employers who use their reports info about employers’ responsibilities under FCRA, like their obligation to provide employees or applicants with advance notice of any adverse action taken on basis of reports.
FTC Enforcement Actions (contd.)

Social Media: Employers Beware!

- Another key requirement: Companies selling background reports for employment must require that employers certify the report won’t be used in a way that would violate federal or state equal employment opportunity laws or regulations.

- And, given sensitive nature of info in reports, everyone - companies selling reports and employers using them - has duty to keep them secure and dispose of them properly.
FTC Enforcement Actions (contd.)
Mobile Apps: Employers Beware!

- January 2012: Warning letters from FTC staff tell **Everify, InfoPay, and Intelligator**, developers of 6 apps, that their products involve background screening reports that include info about criminal histories - info employers are likely to use when screening job applicants.

- "If you have reason to believe that your reports are being used for employment or other FCRA purposes, you and your customers who are using reports for such purposes must comply with FCRA."

- But what if app developer has disclaimer saying reports shouldn't be used for employment or other FCRA purposes? Disclaimer or not, FCRA would still apply.

- How would FTC determine if company has reason to believe app is used for purposes that trigger FCRA?

- Fact-specific inquiry; staff didn’t conclude whether app companies have violated FCRA. But, as letters say, FTC “encourages you to review your mobile application and your policies and procedures for compliance with the FCRA."
FTC Enforcement Actions (contd.)
Mobile Apps: Employers Beware!

Three key points to take from warning letters:

- If you sell mobile apps like this, read the "you" in that last sentence to apply to your company. When it comes to your FCRA policies/procedures, now's the time for a compliance double-check.
- Same holds true if your business uses mobile apps like this. Make sure you're honoring your obligations under FCRA.
- Even if your work doesn't involve FCRA, "App law" is a developing area, and businesses should understand that existing laws and well-settled consumer protection principles carry forward, as transactions “go mobile.”
Questions?
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