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Professional Perspective

Accurate FCRA Reporting During Covid-19

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As financial institutions respond to a flurry of regulatory recommendations and mandates in response to the Covid-19 crisis, those relating to consumer reporting may be among the most difficult to decipher and operationalize. Federal and state authorities have made it clear that they expect furnishers of information to mitigate the effect of delinquencies on the credit reports of consumers affected by the pandemic.

This expectation is underscored by actions taken by regulators, attorneys general, and legislatures, the most significant of which is an amendment to the federal Fair Credit Reporting Act. Furnishers are left with a number of practical questions about how to align their credit reporting practices with Covid-19-driven changes to the FCRA. This article outlines considerations for furnishers grappling with the new reporting requirements.

The federal Coronavirus, Aid, Relief, and Economic Security Act (CARES Act), signed into law in March 2020, amended the FCRA to require that, between Jan. 31, 2020, and the later of July 25, 2020, or 120 days after the date on which the national emergency concerning Covid-19 ends, if a furnisher makes a payment "accommodation," the furnisher must either report the obligation as current or, if the obligation or account was delinquent before the accommodation, freeze the delinquent status during the period in which the accommodation is in effect.

However, if the consumer brings the obligation or account current during the accommodation period, the furnisher must report the obligation or account as current. For purposes of this provision, an "accommodation" is defined as "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."

Although this provision has focused attention on furnishers of information on federally backed mortgages, as the CARES Act requires servicers to provide a forbearance on these loans for up to 180 days for a borrower who requests one, it applies to all furnishers of information. All furnishers must therefore develop a reporting approach that complies with the new law and, at the same time, accurately conveys information about consumer accounts to the consumer reporting agencies.

Indeed, the FCRA, through Regulation V, continues to require that furnishers maintain reasonable policies and procedures to ensure the accuracy and integrity of information reported to consumer reporting agencies. To that end, the Consumer Financial Protection Bureau said in a recent Policy Statement that it "expects furnishers to comply with the CARES Act" and also report in a manner that "accurately reflects the payment relief measures they are employing."

While the CFPB said in the Policy Statement that it will adopt a "flexible supervisory and enforcement approach during this pandemic regarding compliance with the Fair Credit Reporting Act … and Regulation V," and will consider institutions' "good faith efforts to comply" with statutory obligations regarding reporting and dispute-handling timelines, that does not mean that furnishers are off the hook. More than 20 state attorneys general signed a letter to the CFPB criticizing the Policy Statement as implying that the bureau would not enforce the FCRA amendment or well-established dispute-handling timelines, in particular with respect to consumer reporting agencies. The AGs pledged to "continue to defend" their consumers and families throughout the Covid-19 crisis. As a result, activist states may pick up any slack left by the CFPB regarding enforcement of FCRA's provisions.

Against this backdrop, furnishers must think through the reporting approach they have adopted—or will adopt—to comply with the FCRA amendment to ensure that it also "accurately reflects the payment relief measures" being applied to the account. The Consumer Data Industry Association (CDIA) has held a series of webinars and issued guidance on how furnishers can utilize codes available in Metro 2, the standard format they use to report information to consumer reporting agencies, to comply with the CARES Act.

Notwithstanding the field-level guidance provided, furnishers must make tailored decisions about how and what will be reported (including what is reasonably possible based on their systems), and what will be communicated to consumers when they grant a Covid-19-based accommodation. As furnishers do so, they may want to consider the following:

- **Consumers for whom reporting updates are required.** The FCRA amendment applies if an "accommodation" is made—which, by definition, is a form of payment relief given to an individual "affected by the coronavirus disease 2019 (COVID-19) pandemic." It does not specifically define when someone is "affected" by Covid-19 such that an accommodation must be granted on that basis and leaves institutions to make that determination. In doing so, institutions may take into consideration that Section 4022 of the CARES Act requires servicers of federally-backed mortgages to grant a forbearance to any borrower who affirms through a request for payment relief that he or she is experiencing hardship during the Covid-19 emergency. Therefore, credit reporting on such borrowers must be consistent with the FCRA amendment. While the law does not require this for other types of loans, it emphasizes that the net of who is considered an "affected" borrower should be cast widely.

- **Reporting options available under the CARES Act.** If an "accommodation" is granted, furnishers may either report the obligation or account as current or, if the account was delinquent prior to the accommodation, freeze the delinquent account status during the pendency of the accommodation (unless the account is brought current). In determining the account status approach to adopt, institutions should research whether their servicing and reporting systems have limitations that would prevent information from being furnished consistently with either approach.

  In addition, to ensure that the information reported on the accommodation "accurately reflects the payment relief measure" applied to the account, furnishers must consider how fields beyond the "account status" field, such as the "scheduled monthly payment amount," "amount past due," and "payment history profile" should be reported. They may also use special comment codes in Metro 2 to further define the relief measure applied to the account, such as a forbearance, deferment, loan modification, or relief driven by a natural or declared disaster. A special comment code may not always be applicable, and, thus, as reflected in guidance issued by the CDIA, reporting consistently with the FCRA amendment may be achieved without placing a code on particular accounts.

- **Disclosures to consumers.** The reporting requirements under the CARES Act apply only while a granted "accommodation" is in effect. Accordingly, at some point, the consumer's account will be reported based on the terms of the consumer's actual contractual obligation, which may be different than the terms required by the CARES Act. To mitigate the risk of potential unfairness or deception claims, furnishers should consider the disclosures they will make to consumers regarding reporting that will occur following termination of the accommodation. Further, furnishers should ensure that any statements made to a consumer about reporting on the consumer's account, during and after the accommodation period, are consistent with the actual reporting approach being employed by the furnisher.

- **Disputes.** The widespread reporting updates as a result of the FCRA amendment are likely to drive up the number of disputes. Although the CFPB has indicated that it "does not intend to cite in an examination or bring an enforcement action against a consumer reporting agency or furnisher making good faith efforts to investigate disputes as quickly as possible, even if dispute investigations take longer than the statutory timeframe," furnishers should still prepare for the potential increase in disputes and make efforts to respond within statutory timeframes. While the CFPB may be flexible, state attorneys general and private plaintiffs may not be.

As furnishers approach the end of their first months of reporting under the CARES Act, it may be prudent for them to revisit their reporting approach by reviewing a sample of accounts that have Covid-19-based accommodations or disputes. Furnishers may then be able to identify whether the fields that they determined should be updated for the FCRA amendment were, in fact, updated. Similarly, in reviewing disputes submitted by those granted a Covid-19-based accommodation, furnishers may be able to identify both individual and systemic issues regarding application of their reporting approach. Quality assurance could be critical in ensuring compliance with the CARES Act and the well-established requirement to maintain policies and procedures that safeguard the accuracy and integrity of information reported to the consumer reporting agencies.

Furnishers should also continue to monitor legislative responses, including the status of the Health and Economic Recovery Omnibus Emergency Solutions Act, passed by the U.S. House of Representatives on May 15, 2020. The HEROES Act, if passed by the Senate and signed by the president, would likely prevent adverse reporting relating to consumers that is the result of any action or inaction that occurs during the period the Covid-19 emergency, as declared by the president, is in effect, plus an additional 120 days. If enacted, furnishers likely will need to further adjust their approach for reporting information about individuals impacted by Covid-19.