

Insights

U.S. COVID-19: THE CARES ACT - CFPB PROVIDES ADDITIONAL GUIDANCE FOR CREDIT REPORTING DURING THE COVID-19 PANDEMIC

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It has been nearly three months since the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) was signed into law. As we’ve written in previous Client Alerts (see [here](#) and [here](#)), the CARES Act modifies the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq* (“FCRA”) and imposes a number of credit reporting obligations on credit reporting agencies and furnishers of credit information during the COVID-19 pandemic. However, the CARES Act was vague as to the timing or enforcement of certain of those obligations, which left credit reporting agencies and furnishers on their own to fill in the blanks.

In April 2020, the Consumer Financial Protection Bureau (“CFPB”) issued a policy statement (see [here](#)) in which it struck a tone of flexibility, and indicated that the CFPB would be looking for furnishers and credit reporting agencies to attempt to comply with the FCRA and CARES Act’s requirements in “good faith.” Most recently, on June 16, 2020, the CFPB issued new FAQs that provide additional clarity to many of the CARES Act open issues, including enforcement of the CARES Act’s requirements and the manner in which furnishers should report “accommodations” (see [here](#)). The CFPB’s new guidance will be critical for credit reporting agencies and furnishers to ensure that they are complying with the CARES Act credit reporting obligations in a manner that promotes regulatory compliance and avoids litigation risk.

The CARES Act’s Modification of the FCRA

The FCRA imposes duties on “furnishers of information” under Section 15 U.S.C. § 1681s-2. As a reminder, Section 4021 of the CARES Act modifies Section 1681s-2(a)(1) of the FCRA, which addresses the types of reporting that is prohibited under the statute, by adding a subsection (F) to the end. The new subsection (F) provides, in pertinent part:

[I]f 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—

(l) report the credit obligation or account as current; or

(II) if the credit obligations 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.

The CARES Act defines “accommodation” to include “an agreement to defer 1 or more payments, make partial payments, 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.” The relevant time period for when such an “accommodation” can occur and impact a furnisher’s credit reporting is from January 31, 2020 until 120 days after the federal COVID-19 national emergency is terminated.

CFPB’s New Guidance

The CFPB issued a total of ten new FAQs to assist credit reporting agencies and furnishers with CARES Act and FCRA compliance. These ten FAQs provide the following guidance:

1. Timing. In FAQ #1, 2, and 3, the CFPB confirms that it expects furnishers and credit reporting agencies to comply with the FCRA and CARES Act throughout the COVID-19 pandemic, including deadlines to investigate consumer disputes throughout the pandemic. While the CFPB recognizes that furnishers and credit reporting agencies may “face” a number of “individual circumstances” that could make compliance difficult, the CFPB expects credit reporting agencies and furnishers “to make good faith efforts to investigate disputes as quickly as possible,” and will hold credit reporting agencies and furnishers to the applicable FCRA deadlines “absent impediments due to COVID-19.” Recognizing the varying size and circumstances for each furnisher and credit reporting agency, the CFPB clarifies that it will “evaluate individually the efforts and circumstances of each furnisher and consumer reporting agency in determining if it made good faith efforts to investigate disputes as quickly as possible.”

Based on this new guidance, credit reporting agencies and furnishers should understand that they do not have a free pass from the CFPB on issues of FCRA and CARES Act compliance. They should be keenly aware of the relevant FCRA deadlines and dispute investigate obligations, and do their best to meet those obligations at every turn. To the extent that they are unable to do so, credit reporting agencies and furnishers should be prepared to explain why they were unable to do so and measures that have been put into place to ensure compliance moving forward.

2. “Accommodation” requirements. In FAQ #4, and 5, the CFPB provides further clarity as to “accommodations” covered by the CARES Act and how they should be handled by credit

reporting agencies and furnishers. The CFPB confirms that “accommodations” contemplated by the CARES Act are broadly defined to include “any assistance or relief granted to a consumer who is affected by the COVID-19 pandemic,” which, by way of example, the CFPB advises is likely to include most or all of the deferments, forbearances, and modifications provided to borrowers during the pandemic. However, while confirming that the definition of “accommodation” is broad, CFPB also makes clear that the scope of loans in which creditors are *required* to provide such accommodations is quite narrow and is limited to federally-owned student loans (see [Client Alert](#)) and federally-backed mortgages, though all creditors are strongly encouraged to work with borrowers effected by the pandemic.

Based on this guidance, credit reporting agencies and furnishers should construe “accommodations” broadly for CARES Act and FCRA purposes. From a compliance and litigation mitigation standpoint, they would be wise to assume that most or all accommodations entered during the pandemic are covered by the CARES Act modifications of the FCRA.

3. Credit Reporting Obligations. In FAQ #6 and #7, the CFPB addresses credit reporting obligations when a furnisher grants an accommodation to a borrower during the pandemic. Regardless of whether or not the “accommodation” granted was required by law, the credit reporting consequences are the same. The CFPB confirms that, under the CARES Act, furnishers and credit reporting agencies should report accommodations as follows:

- *Loans that were current pre-accommodation.* “If the credit obligation or account was current before the accommodation, during the accommodation the furnisher must continue to report the credit obligation or account as current.” The CFPB makes clear that “current” reporting is not limited to account status—rather, it includes all “data fields” reported for the loan, including “an account’s payment status, scheduled monthly payment, and the amount past due.”
- *Loans that were delinquent pre-accommodation.* “If the credit obligation or account was delinquent before the accommodation, during the accommodating the furnisher *cannot advance the delinquent status*” (emphasis added). By way of example, the CFPB clarifies that, if a loan was 30-days at the time that the accommodation was entered into, the furnisher should continue to report the loan as 30-days delinquent and should *not* report the loan as 60-days or more delinquent during the CARES Act’s accommodation period. The furnisher should, however, begin to report the account as current if it is brought current during the accommodation, which could happen, for instance, “if the consumer makes past due payments” or if a “loan modification ... resolves amounts past due.”

Based on this guidance, credit reporting agencies and furnishers will want to ensure that they are closely monitoring account status during the time period just before and during the accommodation to ensure that the status reported complies with the CARES Act obligations.

4. Use of Special Condition Codes. In FAQ #8, the CFPB clarifies that furnishers cannot comply with the CARES Act requirements simply by reporting the Special Comment Code for natural disasters, which is the “AW” code. This guidance makes clear that, although the Special Comment Codes can be used *in conjunction with the appropriate account status reporting*, the Special Comment Code alone will not allow the furnisher to comply with the CARES Act.

5. Do consumers have to request the accommodation? In FAQ #9, the CFPB confirms that furnishers should not report an accommodation (for instance, a forbearance) if the consumer did not request one. Specifically, the CFPB’s guidance cautions that “reporting forbearances on accounts for which consumers have neither requested a forbearance nor are delinquent increases the risks of inaccurate reporting and consumer confusion.” Consequently, furnishers *should not* (a) report blanket accommodations for an entire portfolio of loans without specific borrower requests, or (b) report accommodations for all of a particular borrower’s loans just because he or she requested an accommodation for one loan. This means that furnishers will need to be careful to ensure that its reporting matches the status of each loan.

6. What happens at the end of the accommodation? In FAQ #10, the CFPB confirms that the furnisher should not change its reporting during the CARES Act accommodation period after the accommodation has ended. In other words, a furnisher *should not* retroactively change its prior reporting after the accommodation period and COVID-19 pandemic ends. To the extent that the CARES Act required an account to be reported as current because it was current when the accommodation began, that current reporting during the pandemic should remain on the account after the pandemic and accommodation period ends. Furnishers and credit reporting agencies will want to ensure that measures are in place to prevent retroactive changes from occurring.

We at Bryan Cave Leighton Paisner LLP have extensive experience helping clients with all issues related to the FCRA from regulatory compliance to major class action litigation. We will continue to monitor FCRA developments amid the COVID-19 pandemic and are happy to address your questions and concerns. Please reach out to your regular BCLP contact, a member of BCLP’s [Regulatory & Compliance](#), [Commercial Disputes](#) or [Class Actions](#) practices, or the authors of this Client Alert.

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