Consumer Finance Monitor (Season 3, Episode 41): CFPB Exam Findings in Summer 2020 Supervisory Highlights Related to Credit Reporting (Fair Credit Reporting Act) and Deposit Accounts (Regulations E and DD)

Speakers: Chris Willis, John Culhane, and Bo Ranney

Chris Willis:

Welcome to the Consumer Finance Monitor podcast where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers and the industry. I'm your host Chris Willis, the Deputy Practice Leader of Ballard's Spahr Consumer Financial Services Group and I'll be moderating today's program.

Chris Willis:

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Chris Willis:

And if you like our podcast, let us know. Leave us a review on Apple Podcasts, Google Play or wherever you get your podcasts. Today I'm going to be joined by two of my colleagues from our Consumer Financial Services regulatory group, John Culhane and Bo Ranney. And we're going to be discussing the credit reporting and deposit account/Regulation E issues in the CFPB's most recent edition of Supervisory Highlights a publication that we've come to know and love and follow very closely.

Chris Willis:

So John and Bo, welcome to the podcast. And Bo, let me start with you, credit reporting is an area of specialty for you. And so, I wonder if you'd take our audience through the credit reporting issues and observations that were raised in this most recent Supervisory Highlights.

Bo Ranney:

Certainly. Thanks, Chris. This credit reporting topic continues to be a significant focus for CFPB exams and for their Supervisory Highlights publications. You all may know that our listeners probably know that consumer reporting has banned the focus of two special additions of Supervisory Highlights where the Bureau has articulated a wide range of code reporting issues they have identified at CRA's as well as at furnishers.

Bo Ranney:

And of course, the Bureau continues to identify findings here and there throughout other Supervisory Highlights. And we know that the Bureau is actively engaged in examinations of furnishers as we speak, so this is a topic where the Bureau continues to review closely and continues to have a number of findings. So here the Bureau has identified three categories of fair credit reporting act related violations to FCRA.

Bo Ranney:

That they've identified by the CFPB examiners over the course of the last four months of 2019. So these findings that we're

going to discuss today only cover exams that were concluded at the very end of last year. And those categories here are permissible purpose violations and improper data first delinquency used by some debt collection companies and an issue with where the Bureau determined companies had not conducted a reasonable investigation of dispute that it had received.

Bo Ranney:

So first off for permissible purpose violations, of course, the FCRA prohibits using, or even obtaining a consumer report unless it's for a purpose that is authorized by the FCRA, which is called the permissible purpose. And here the Bureau found that one or more lenders violated the FCRA by obtaining credit reports without a permissible purpose because the employees obtained to the credit reports without first establishing that the lender had a permissible purpose to obtain that.

Bo Ranney:

The Bureau did note that you don't need to receive explicit consumer consent in order to obtain a credit report so long as the lender has another permissible purpose. But then it calls out a specific lender that it has in mind, a mortgage lender that undertook certain actions in response to this finding.

Bo Ranney:

Where even though the mortgage lender may have had a cause to think that its employees had permissible purpose, they have agreed with Bureau findings and they have required their employees to receive explicit consumer consent before they pull a quitter report on a going-forward basis. The second category where the Bureau identified the FCRA problem is with the use of an improper date of first delinquency.

Bo Ranney:

Again, the FCRA requires furnishers to report that date of delinquency of an account to the consumer reporting agency is reporting information to within 90 days. And that the date first delinquency is supposed to be the month and year of the "commencement of the delinquency." The Bureau found here that there were some third party debt collection furnitures, and these furnishers the Bureau identified were furnishing information about cable, satellite and telecommunications accounts that they had violated this FCRA requirement.

Bo Ranney:

That's because some furnishers were incorrectly reporting the date of first delinquency as the date that the consumer service was disconnected, even though service was not disconnected until often several months after that first missed payment that commenced the delinquency. And the Bureau found that some other furnishers wanted more furnishers incorrectly provided the charge-off date as the date of first delinquency, which was often several months after that delinquency commenced.

Bo Ranney:

So in addition to violating the FCRA here, reporting an incorrect date, first delinquency that is several months or perhaps longer after the actual commencement of the delinquency. When that consumer first went delinquent, that's going to cause that negative furnished data to stay on a consumer's credit report much longer.

Bo Ranney:

Potentially much longer than it should have under the FCRA. So this is an area where the Bureau thinks there's a statutory violation and of course the potential for some real consumer harm down the road. Our third category of FCRA violations that have relates to issues where furnishers were not conducting a "reasonable investigation of disputes." John, what did the Bureau say about it one?

John Culhane :

Well, Bo, this seems to be sort of the quintessential violation that we find with investigations, the Bureau cited one or more furnishers for conducting inadequate investigations. And in particular, those furnishers weren't reviewing account information and documentation. They weren't looking at account history notes and they weren't looking at dispute related correspondence.

John Culhane :

It seems likely, although we're always reading the tea leaves with the Supervisory Highlights that what these furnishers were doing was simply looking at account records on their systems and basing their decisions solely on those account records without doing any real investigation. What's interesting about the finding here or the findings for one or more furnishers is that at least in one case, the root cause of this problem was a combination of inadequate staffing and high volume of disputes.

John Culhane :

Now what's noteworthy about that is that there was no fine, there does not appear to have been any further sanctions other than requirement that the violations be corrected. Although the Bureau does note that one or more of these companies ceased operations. But the root cause is important here because in the COVID pandemic as companies were wrestling with how to handle dispute investigations, when their employees might've had limited access to data or might not have even been available because of various restrictions, inadequate staffing and high daily high volumes of disputes seem to be endemic to the pandemic.

John Culhane :

And it's entirely likely that we'll see this in the next round or maybe the next two rounds of Supervisory Highlights. But again, it's noteworthy that the CFPB did not find the companies didn't really, I guess, overreact to these circumstances. And I hope that's a good sign for a lot of furnishers out there. Chris, should we move on to talking about deposits and EFTA and other issues, Regulation E and other issues?

Chris Willis:

Yes. I think the audience would love to hear about that, but I would just add that the CFPs reaction to the dispute issue that you just mentioned in Supervisor Highlights does appear to be consistent with the communication that the Bureau put out near the beginning of the pandemic relating to credit reporting disputes.

Chris Willis:

Basically saying, if furnishers have these problems we be understanding about it so to speak. And so it does look like an example of that actually going into practice. But what John, did the Bureau have to say about deposit accounts and Regulation E issues?

John Culhane :

Well, they identified four violations. One had to do with what they cited as a waiver of certain Regulation E rights. And I'll come back to that. And it used the use of an incorrect date for error resolution procedures, problems and deficiencies in the notice back to the consumer of the results of an investigation for error resolution purposes. And then there was a more of a true deposit account issue, the failure to honor advertised bonuses.

John Culhane :

So let me circle back and talk about the waiver of rights issue. I think we often see in form error resolution notices that clients send to consumers, a kind of a boilerplate provision asking the consumer to agree to submit affidavits if requested and file police reports if requested. And the Bureau objected to that, we don't know exactly what the terms were in the particular forms that were being used but the requiring that extensive a cooperation with investigations was deemed by the Bureau to be a waiver of error resolution rights.

John Culhane :

Because it required much more or arguably required much more extensive actions on the part of the consumer than are set forth in Regulation E and the electronic fund transfer act, which sets a pretty low standard for the consumer to meet to initiate

an error procedure and investigation. And we often see this because there's some suggestion in the Regulation Z commentary that it is in fact entirely appropriate to ask the consumer to provide affidavits or submit police reports.

John Culhane :

It's just that the creditor in a Regulation Z error investigation must conduct a reasonable investigation. Can request reasonable cooperation and if a consumer declines to provide any affidavits or to notify the police of any alleged wrongdoing, the credit just has to go on and conduct the investigation. And there's no comparable comment in Regulation E.

John Culhane :

But because the procedures are very similar, we often see Regulation Z procedures incorporated into Regulation E procedures and it looks like there's some concern about that on the part of the CFPB. Although it may just be that in the cases that the Bureau ran across, they felt that the company had sort of overstepped its boundaries and was requiring more or doing nothing if the complainant failed to file affidavits or failed to provide notices to law enforcement authorities.

John Culhane :

There's a similar citation that's kind of a waiver of rights or requiring more than can be required under Regulation E in connection with stop payment requests. And here it appeared that the institutions were requiring any customer that wanted to stop payment on an electronic funds transfer to agree to indemnify the bank.

John Culhane :

Again, that's something that we often see in these situations and the Bureau's position is that that's not something that can be required that is in effect a waiver of rights under Regulation E. I think those are both pretty significant findings with pretty significant consequences for our clients. There are also some other area violations that were cited. Bo, could you talk about those?

Bo Ranney:

Our second category relates to the incorrect date to determine timeliness of an error notice. I think John, you described this as a technical violation a bit ago here prior to us starting our recording here, after the electronic fund transfer act and Regulation E provide that notice of error must be received from the consumer no later than 60 days after the institution sends the periodic statement on which that error is first reported.

Bo Ranney:

But the Bureau found that one or more financial institutions were instead using 60 days from the date of the transaction, which could truncate, could shorten the timeframe within which the error notice would have been timely by, who knows, could be a couple of days, could be up to a month that the consumer is losing that window of time in which to submit their error notice.

Bo Ranney:

So because of that, probably financial institution was not investigating those error notices. In response to this finding again here, the Bureau did not report undertaking any additional remediation or other measures but those institutions had to revise their procedures to make sure they accurately reflect that what is timely under Regulation E.

Bo Ranney:

And the third category relates to failures to follow the error results notice requirements once reported back to the consumer. Following an investigation of an alleged error, the company is supposed to provide to consumers the results of the

investigation and explanation for determination if the company decides there was no error or a different error than the one alleged by the consumer occurred.

Bo Ranney:

And the company is supposed to provide notice that, but consumer can request the right to get the documents that the company relied on in conducting this investigation. And here, the Bureau said that one or more companies had dropped the ball on all three. That they had failed to provide any explanation for the investigation findings, results. That they had provided inaccurate or irrelevant responses after the company had determined that no error or a different error occurred, and they didn't tell consumers that they could request the documents on which the company had relied.

Bo Ranney:

I'd also as an aside here, note that the FDAC included similar findings and its first consumer compliance Supervisory Highlights publication last summer. So this is an error where folks subject to multiple regulators' supervision continued to drop the ball here. The Bureau did not include in its Supervisory Highlights any objection to the sufficiency of the investigation.

Bo Ranney:

It's perhaps then again, reading the tea leaves here, simply an issue with the company getting credit for the investigation it conducted and correctly and accurately describing what it did and its response to the consumer. And again, putting the consumer on notice that it could obtain those underlying documents. Of course, the devil's in the details on exactly how companies populate those forms and provide oversight to make sure that the information is reported consistently and correctly.

Bo Ranney:

But this is an area clearly where the Bureau, FDAC and others continue to have concerns and want to make sure companies are paying appropriate attention. And our final category of deposits related findings takes us out of the world of FDAC and Reg E into an issue the Bureau identified with Regulation DD compliance. Regulation DD the implementing regulation for the truth and savings act. And the Bureau identified a violation with one of the sections addressing advertising requirements and prohibitions.

Bo Ranney:

And here, the issue is that an ad shall not be misleading or inaccurate or misrepresent a depository institutions deposit contract. Here the Bureau identified that there were a number of one or more financial institutions that advertised bonuses for consumers who opened an account and met certain specified requirements but the Bureau examiners found that those institutions had failed to provide the promised bonuses.

Bo Ranney:

Even when consumers had met all of those specified requirements. And then because of that, the advertisement itself was determined to be misleading and inaccurate. Here, the Bureau called out that this is really a CMS issue that these companies did not have sufficient quality control and monitoring efforts to make sure that, they advertised bonus, the advertised benefits when folks met those requirements were implemented and that the consumers received the promised bonus.

Bo Ranney:

And so here the remediation again, the Bureau didn't specify that there was a backward-looking remediation. If I had to guess I would guarantee that the Bureau did make sure they honored those advertisements and provided those bonuses. But certainly, the Bureau also obligated those companies to undertake additional quality control and monitoring efforts to make sure that they follow through on their representations in their advertisements.

John Culhane :

Yeah. I would just add Bo, that as with the credit reporting investigations there's at least a suggestion that perhaps the deficiencies with quality control and monitoring may have been the result of staffing deficiencies as well as systematic deficiencies.

John Culhane :

And again, as we observed with the credit reporting investigations there may have been remediation but there was no fine or other penalty assessed. So that looks like a hopeful sign as well for our clients that have had issues with compliance as a result of staffing issues related to the pandemic.

Chris Willis:

Well, John and Bo, thank you very much for being on the podcast today and sharing your insights about these important issues. And thank you to our listeners for tuning in. Please, be sure to visit us at our website ballardspahr.com or you can subscribe to our show and Apple Podcasts, Google Play, Spotify or your favorite podcast platform.

Chris Willis:

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