A Notice Can Protect You from Credit Reporting Liability; Lesson Learned From CFPB Consent Order

By Robert M. Horwitz

It is no secret that credit reporting and furnishing practices remain a high priority of regulators. The Consumer Financial Protection Bureau ("CFPB") issued its disclosure portion of the Debt Collection Rule last week. It includes a prohibition against furnishing an account to the credit bureaus without first speaking with, or sending a written or electronic notice to, the consumer about the account. The rule is designed to prevent what regulators refer to as "parking" the debt on the credit report, which they believe too often results in a consumer learning of the debt at an inopportune time (*i.e.,* at a closing) and feeling pressured to pay the debt even if she has a dispute.

This week the CFPB entered into a Consent Order with Santander Consumer USA Inc. concerning the furnishing of inaccurate information to the credit bureaus and fined it $4.75 million. *See* Consent Order *here*. The basic facts are that Santander furnished inaccurate data, including the date on which the account first became delinquent (the "date of first delinquency"), to the credit bureaus. For background purposes, FCRA requires credit bureaus to remove negative information about a debt after the information is seven years old. 15 U.S.C. § 1681(a)(5). The date by which the information must be removed is determined by the date of first delinquency. FCRA requires furnishers of "accounts in collection" to include a date of first delinquency in the files sent to the credit bureaus so the latter can timely remove negative information. The CFPB alleges that Santander knew from a credit bureau that it sent the wrong date of first delinquency and it otherwise had "reasonable cause" to believe the information was inaccurate.

What's amazing about the Consent Order, however, is that Santander could have avoided liability under the FCRA for furnishing inaccurate information by providing a simple and concise notice to its customers. A furnisher is not liable to regulators under 15 U.S.C. §1681s-2a(1)(A) of the FCRA for supplying inaccurate information if it "clearly and conspicuously" specifies to consumers an address to where consumers could notify the company that information the company

furnished was inaccurate. *See* 15 U.S.C. §1681s-2a(1)(C). This is precisely why you see these types of notices in the terms and conditions or other correspondence you receive from your financial institutions/lenders. The CFPB actually alleges in the Consent Decree that Santander did *not* provide the notice and, therefore, can be held liable under FCRA for furnishing inaccurate information to the credit bureaus. *See* Consent Decree, ¶ 21 ("Prior to June 2017, [Santander] did not consistently, for all its retail installment contracts and lease portfolios, clearly and conspicuously specify to consumers an address where consumers could notify the company that information the company furnished was inaccurate.")

The FCRA is not for everyone. It is a comprehensive and, at times, complicated statute. Making sure you have appropriate counsel to protect and insulate your company from liability has never been more important given the increased scrutiny in this area and the interaction between the FCRA and the FDCPA.

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