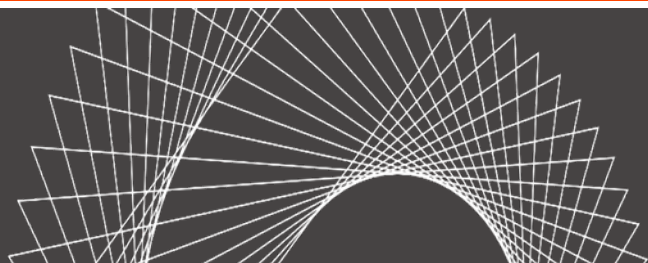


Mitigating FCRA Risks During the Pandemic and Beyond



Akin Gump
STRAUSS HAUER & FELD LLP

Association of Corporate Counsel – Wednesday, December 2, 2020

Hyongsoon Kim, Partner, Akin Gump

Natasha Kohne, Partner, Akin Gump

Michael Stortz, Partner, Akin Gump

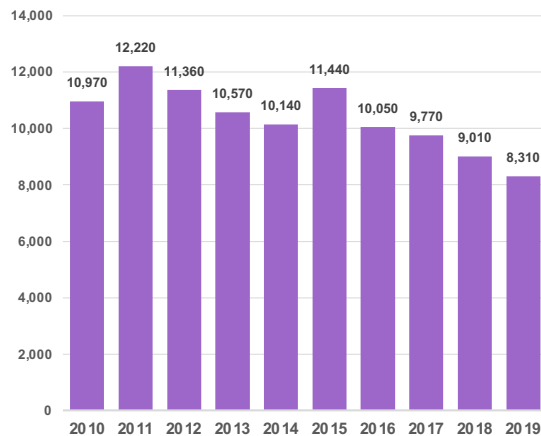
Overview of FCRA



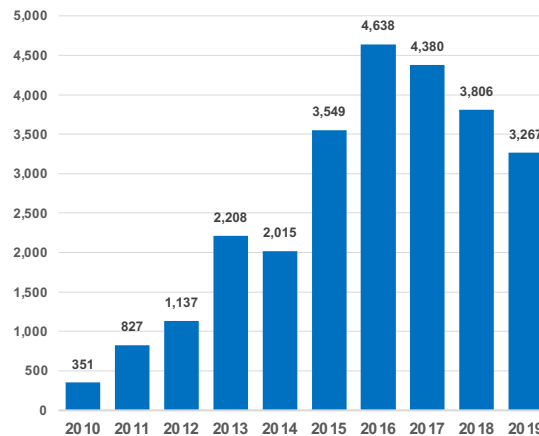
FCRA Lawsuits Increase over Past Decade

- Pace of FCRA Lawsuits Increases
 - Increased filings from 2010-2019
- After an initial slowdown during the early stages of the pandemic, cases have continued to increase through 2020.

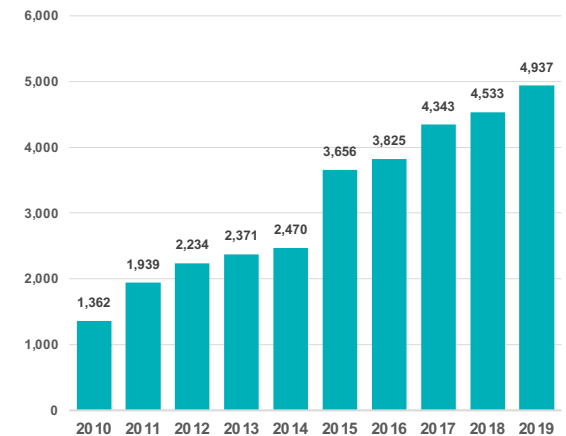
FDCPA 2010-2019



TCPA 2010-2019



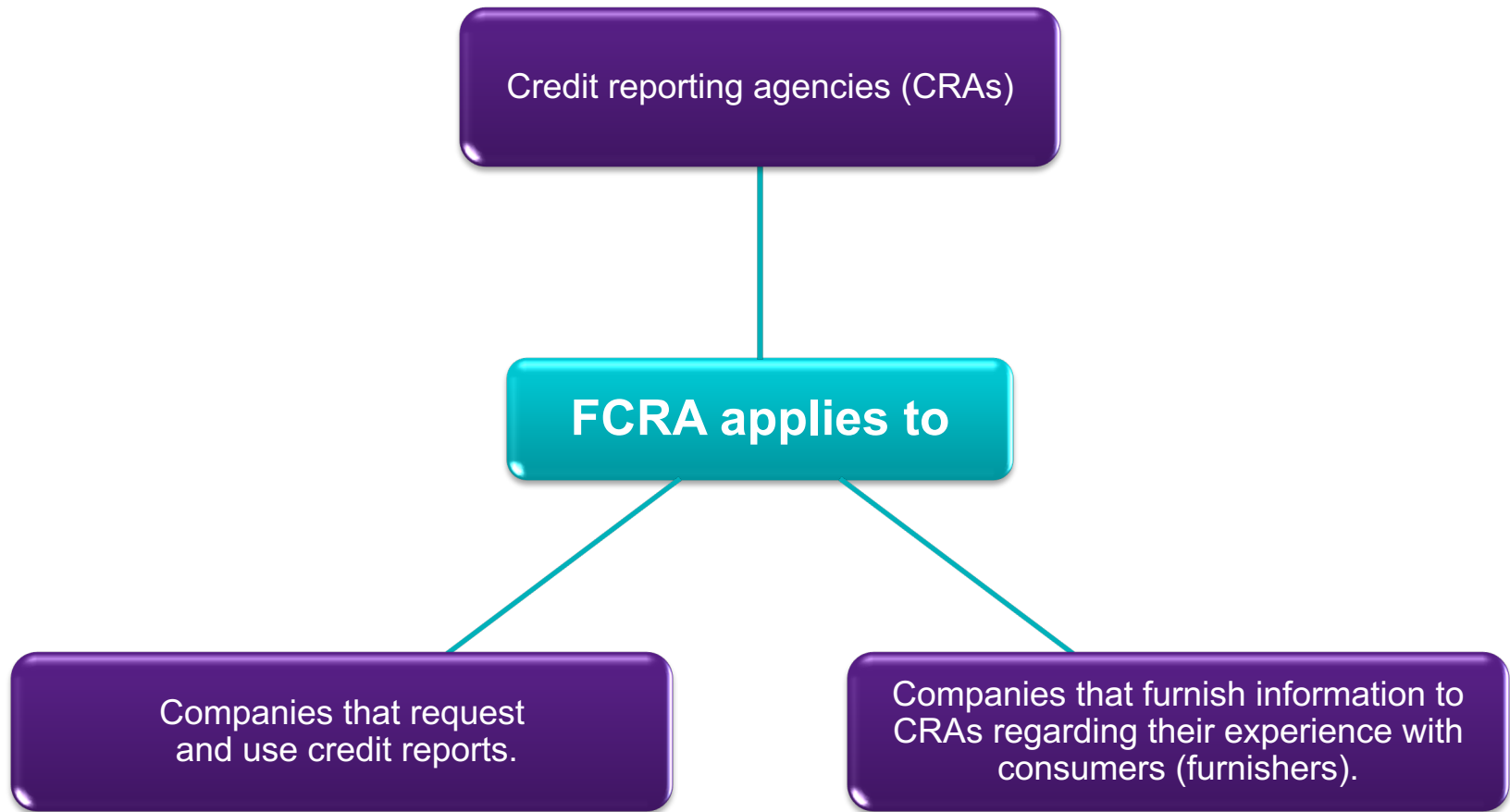
FCRA 2010-2019



FCRA Lawsuits After Onset of Pandemic

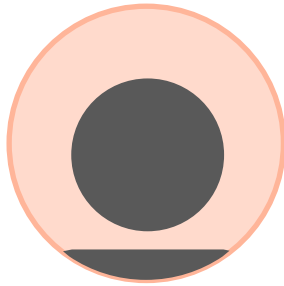
- Increased filings prior to March 2020.
- Initial slowdown during early stages of pandemic.
- More than 4,000 FCRA lawsuits filed to date in 2020.
- FCRA consumer complaints to CFPB also have increased in 2020 (including complaints mentioning COVID-19).

Who Does FCRA Impact?

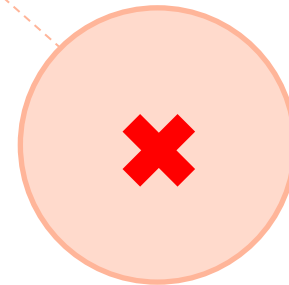
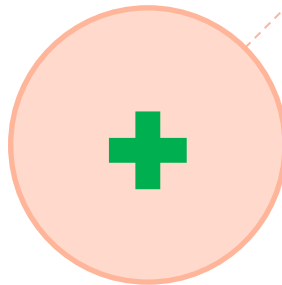
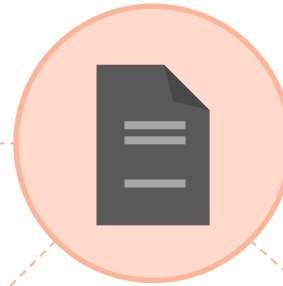


Employer Background Checks

**Are you receiving info
from a CRA?**



**If so, are you receiving
a consumer report?**



If yes, are you providing
FCRA-compliant disclosures
and obtaining consent?

If no, then potentially liable
for actual damages, unless
violation is willful, then
statutory penalties.

What is a Consumer Report Under FCRA?

- Consumer reports – i.e., communication that bears on consumer's creditworthiness, standing, credit capacity, character, reputation, personal characteristics or mode of living;
- And used in whole or in part to establish consumer's eligibility for:
 - Credit or insurance for personal, family or household purposes;
 - Employment purposes; or
 - Any other purpose authorized by FCRA. (15 USC § 1681(a)(d)(1))
- Per legislative history, FCRA “does not apply to reports used for business, commercial or professional purposes.”

FCRA's Expansive Remedies

Willful failure to comply:

- Actual damages
- Statutory damages from \$100 to \$1,000 per violation
- Punitive damages
- Attorney's fees and costs

Negligent violations:

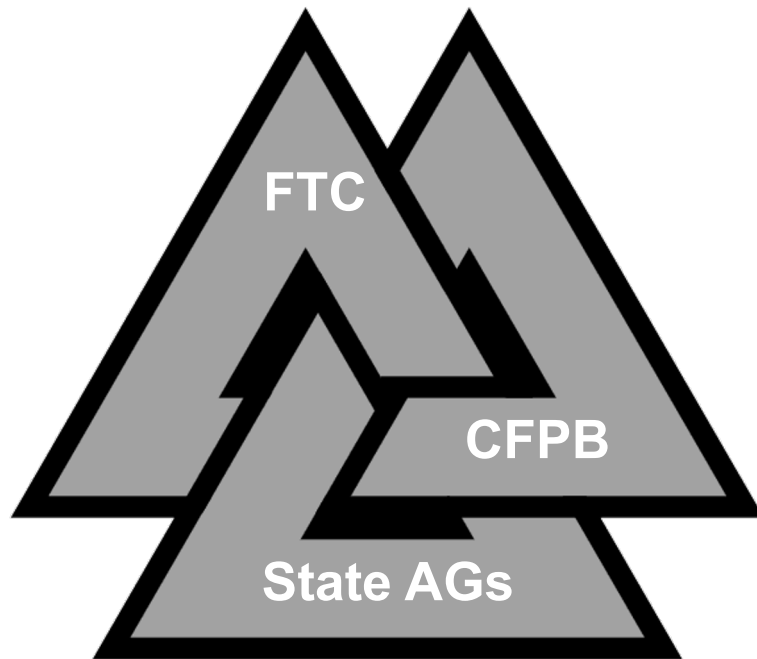
- Actual damages
- Attorney's fees and costs

Actual damages may include emotional distress in certain circumstances.

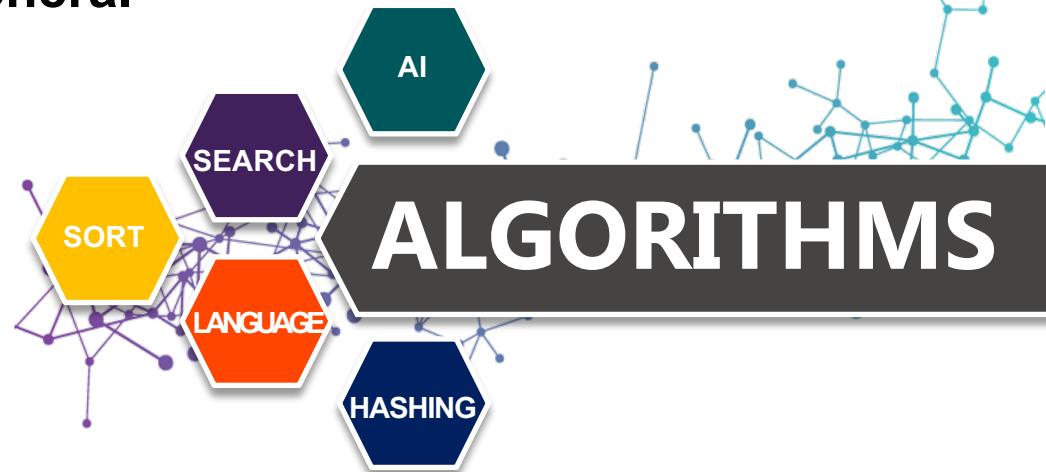


Regulatory Activity

- **FTC, CFPB, State Attorneys General**



- **AI and Algorithms**



- **Identity Theft**



U.S. VS EUROPE



Employer Background Checks



Sample Background Check Form – Anything Wrong?

FAIR CREDIT REPORTING ACT CONSUMER DISCLOSURE AND AUTHORIZATION

Facts You Need to Know:

In connection with your relationship with _____ “Company” the Company may obtain a consumer report on you, as defined in the Federal Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* It may be an “investigative consumer report” that includes information as to your character, general reputation, personal characteristics, and mode of living, whichever are applicable. If the Company obtains an investigative consumer report, you have the right to request disclosure of the nature and scope of the report, which involves personal interviews with sources such as your neighbors, friends, or associates.

The Company may not obtain any consumer report on you for employment purposes/medical staff privileges without your written consent. Also, the Company may not obtain medical information about you without your express consent to the release of medical information. Consent to the release of medical information, is *not* covered by the authorization contained in this document.

State-specific consumer choices:

Please see the next page for additional state-specific information.

- California – If you are a California resident or applying in the State of California, in addition to this disclosure/authorization, please review and complete the “Disclosure and Acknowledgement Concerning Consumer Credit Report or Investigative Consumer Report Obtained for Employment Purposes Pursuant to California Law.”
- Minnesota – If you are a Minnesota resident or applying at a location within the State of Minnesota, you have a right to obtain a copy of the consumer report by checking this box.
☐
- Oklahoma – If you are an Oklahoma resident or applying at a location within the State of Oklahoma, you have a right to obtain a copy of the consumer report by checking this box. ☐

Consent and General Authorization to Obtain Consumer Report

I hereby authorize the Company, now or at any time while I am in a relationship with the Company, to obtain a consumer report, or an investigative consumer report, on me. This authorization does not authorize the release of medical information.

Sample Background Check Form – Anything Wrong?

Background Check Authorization

You are hereby advised that, for purposes of employment, [REDACTED] may obtain a report concerning your criminal history. This may be considered a "consumer report", as defined by the Fair Credit Reporting Act (FCRA).

Please select the "I Consent" button indicating that you have read the Statement of Consent, and that you understand its contents. If you select the "I Do Not Consent" button, [REDACTED] will not further consider you for employment.

Upon request, the Customer Service counter will provide a paper copy of this Background Check Authorization, at no charge.

Statement of Consent

I hereby authorize [REDACTED] to order criminal background reports for purposes of initial and continued employment. I understand that the information may be obtained from courts of law, law enforcement agencies, other agencies or any other public record. I authorize all persons who have information relevant to my criminal background (if any) to disclose such to [REDACTED] I release [REDACTED], its employees, its authorized agents and representatives from any liability in connection with any decisions made concerning my employment based on information reported.

☐ Please check here to receive a copy of the Background Report. (CA, OK, and MN residents only.)

☒ I Consent

☐ I Do Not Consent

Summary of Employer Disclosure Requirements

- “Clear and conspicuous” disclosure
- “In a document that consists solely of that disclosure”
- “That a consumer report may be obtained for employment purposes”
- Scenarios:
 - Combine federal disclosure in same document as disclosures under state law? *Gilberg v. California Check Cashing Stores, LLC*, 913 F.3d 116.
 - Include liability waiver in same document as disclosure? *Syed v. M-I, LLC*, 853 F.3d 492.
 - Include consent form in same document as disclosure?
 - Provide additional documents in the same packet as background check disclosure?
 - Online disclosure form – how long can it be? Multipage click-through?

Ninth Circuit Eases FCRA Requirements (Slightly)

- *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082
 - Can include **certain limited** information in disclosure form without violating “standalone” form requirement.
 - Minimal description of consumer report, source of report, and statement that report is being obtained for employment purpose.
 - But information that may “pull the applicant’s attention away from” the rights provided under the FCRA, **even if provided in good faith by the employer**, violates the FCRA’s standalone disclosure requirement.
- *Luna v. Hansen & Adkins Transport, Inc.*, 956 F.3d 1151
 - If background check disclosure itself is in a standalone form, disclosure can be presented with and at the same time as other employment documents.

Practical Tips and Special Issues to Consider

Go overboard in separating out disclosures.



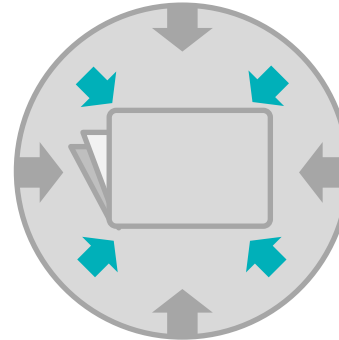
Electronic disclosures – be particularly careful.



State laws like CCRAA/ICRAA, NY laws (can be more expansive in certain respects).



Involvement in third party's employment decisions (for example funds and portfolio companies).



FCRA for Consumer-Facing Businesses



Users of Credit Reports:

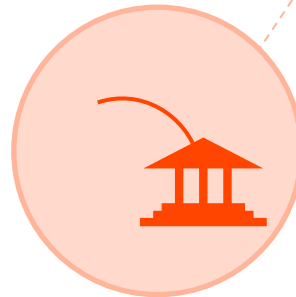
**Do you have written
authorization of customer?**



**Do you have legitimate
business need for the check?**



**These
include:**



In connection with a
business transaction
initiated by consumer.



To review an account to
determine whether the
consumer meets account
terms.

Use Case: Identity Theft

- No written authorization.
- Legitimate business need includes:
 - Verifying the identity of consumer and assessing eligibility for service (*Dish Network*).
 - Even where pulling the credit report fails to prevent use of the stolen ID to open an account.
 - Initial credit pulls vs. subsequent credit pulls.
 - Account review may support subsequent credit pulls.
 - Users must follow specific policies in instances of fraud alerts or security freezes due to ID theft.

Duties in Using Credit Reports

- Certifications to CRA re: intended use of consumer report (15 USC § 1681e).
 - “Blanket” certifications upheld.
- Notify consumers when adverse actions are taken based on credit report (15 USC § 1681m(a)).
- Upon request, disclose information obtained from other third parties when that information is basis for adverse action (15 USC § 1681m (b))



Furnishers' Duties as to Consumer Information


Furnishers of information to CRAs must provide accurate and complete information.



Before filing suit against furnisher, consumer must formally dispute the information with CRA.



CRA must provide prompt notice to furnishers, along with the basis for consumer's dispute and supporting information (within five business days).



Furnishers then must investigate consumer disputes as the accuracy of furnished information and complete investigation within 30 days.



If reported information is incorrect, furnishers must promptly correct information as reported to CRAs.

CARES Act – Impact on FCRA

Overview of Section 4021 of the CARES Act

- **Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)** (Pub. L. No. 116-136); Enacted: March 27, 2020.
- Purpose: to ease the financial burdens of individuals and small businesses resulting from the pandemic.
- Covered period applies retroactively on January 31, 2020.
- End date: COVID-19 related national emergency termination date is not currently known.
- Section 4021 of the CARES Act temporarily amends Section 623 of the FCRA (15 U.S.C. 1681s-2(a)(1)).
- If an institution makes an accommodation for one or more payments on a consumer credit obligation or account that is subject to deferrals or forbearance agreements because of the COVID-19 pandemic, the institution must report such obligation or account as “current” during the relief period.

Example of FCRA Litigation Based on CARES Act

- On July 16, 2020, Plaintiffs sued in a putative class action alleging that Defendants failed to adopt reasonable procedures to ensure the accuracy of consumer credit reports.
- Section 3513(b) of the CARES Act automatically suspends all payment obligations on federal student loans held by the U.S. Dept. of Education from March 13, 2020 through September 30, 2020 (extended to December 31, 2020).
- Section 3513(c) halted all accrual of interest during the same period.
- As a result, student loan servicers are required to report the credit obligation or account as “current.”

Example of FCRA Litigation Based on CARES Act

- Plaintiff alleged that Defendants “improperly reported thousands of federally owned student loans as being in forbearance or accruing interest,” which resulted in borrowers suffering a decrease in their credit scores.
- Based on these allegations, Plaintiff asserted a single cause of action under 15 U.S.C. § 1681e(b) against the same Defendants for failure to follow reasonable procedures to assure maximum possible accuracy of the records Defendants reported.
- On October 2, 2020, Plaintiff filed an amended complaint against the same Defendants alleging the same cause of action.
- On November 13, 2020, the three Defendants each filed a motion to dismiss the first amended complaint.

CFPB Statement on Enforcement and State Attorneys General Response

- CFPB announced relaxed enforcement against CRAs and furnishes regarding FCRA's dispute investigation requirements.
- 23 State AGs urged CFPB to withdraw statement.
- Argued CFPB's stance will hurt consumers.
- Reiterated compliance with FCRA obligations.
- State AGs will continue to perform oversight.



Foreground: California Attorney General Xavier Becerra
Background: California Governor Gavin Newsom

Best Practice Tips

- 1** Be vigilant about the accuracy of the credit information that is being reported when providing accommodations.
- 2** Ensure reasonable policies and procedures are in place to comply with the amended rules, including policies and procedures to investigate and review the accuracy of consumer disputes.
- 3** Train employees on accurate reporting of COVID-19 accommodations.
- 4** Update any processes that automatically report an account's default status to be in compliance with Section 4021.
- 5** Continue monitoring regulatory guidance.
- 6** Perform checks and updates periodically, as accommodation requests made prior to changes in the automated processes may not be captured.
- 7** Closely monitor the volume of credit disputes to see if they can be traced to errors in credit reporting that are in violation of the temporary amendment.

Litigation Defense Strategies



Defenses to Litigation

- Arbitration and class waiver provision.
 - *Waffle House*
- Standing of plaintiff (if information received was accurate, not circulated to third parties and employee suffered no adverse action as result) – *Ramirez/Jaras*.
- Challenge willfulness (to eliminate statutory penalties).
 - Defendant's interpretation of statute must be objectively unreasonable (*Safeco*).
 - Encouragement from 9th Circuit panel for district courts to determine whether and in what circumstances a violation might arise (*Marino*).
 - Need to keep up on current events and legal opinions (*Ramirez*).

Defenses to Class Actions

- Standing of class members.
 - Class members must have Art. III standing at final judgment to recover damages (*Ramirez*)
 - Individualized determinations
- Class definition.
- Host of individual issues, including:
 - Sources of information in credit report;
 - Impact of incomplete or inaccurate information;
 - Amount of actual **or** statutory damages.
- Class device not superior.
- Due process limits on punitives, statutory penalties (*Ramirez*).

Questions
