Enforcing the CARES Act Credit Reporting Protections
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The economic harm caused by the COVID-19 pandemic will soon translate into pervasive credit reporting harm, as millions of consumers become unable to pay their credit obligations, and creditors, debt collectors, and others furnish negative information about them to the nationwide consumer reporting agencies (CRAs). This article explains how consumers can protect their credit reports by enforcing the very modest protections offered by the CARES Act.

Application of the CARES Act Credit Reporting Provision


This new FCRA subparagraph provides protections only if a creditor approves a consumer for an “accommodation.” An accommodation is an agreement for a forbearance, a payment deferral, a partial payment agreement, a loan modification, 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.” 15 U.S.C. § 1681s-2(a)(1)(F)(i)(I). The covered period extends to 120 days after the termination of the national emergency declared by the President over COVID-19. 15 U.S.C. § 1681s-2(a)(1)(F)(i)(II).

Significantly, any accommodation qualifies. It need not be one required under other CARES Act provisions. An accommodation should include one required by state legislation or a state emergency order. An accommodation also includes an agreement provided by a creditor voluntarily. An accommodation can relate to a mortgage loan, credit card account, a car loan, or any other agreement altering payment obligations.

On the other hand, the CARES Act offers no protections for the millions of Americans who become delinquent on credit obligations and do not obtain an accommodation from their creditor. Government-mandated accommodations are generally limited to certain home mortgage and student loans and rental agreements, thus leaving accommodations for credit card and auto loans to the discretion of the lender. Even with mortgages forbearances, consumers typically must apply for them, yet consumers are having difficulty reaching their creditors or servicers that are overwhelmed with massive numbers of calls.

Nor do the protections provide practical relief to debt collection accounts, where a loan has already been turned over to a debt collection agency and thus considered inherently negative. For further discussion of the limits of the CARES Act credit reporting provision, see NCLC’s Policy Brief: Protecting Credit Reports During the Covid-19 Crisis [2] (April 2020).

New Credit Reporting Rights Under the CARES Act

If a consumer is able to obtain a covered accommodation, the CARES Act offers the following protections:

- If the consumer was current on an obligation at the time of an accommodation approval, the account must be reported to CRAs as current if the consumer is complying with the accommodation agreement. 15 U.S.C. § 1681s-2(a)(1)(F)(ii)(I).
- If the consumer was already delinquent when the consumer received the accommodation, but complies with the accommodation agreement, the creditor or other furnisher must report the same delinquency status during the accommodation period. 15 U.S.C. § 1681s-2(a)(1)(F)(ii)(II)(aa).
- If a delinquent consumer manages to catch up during the accommodation period, the creditor or other furnisher must then report the consumer as current. 15 U.S.C. § 1681s-2(a)(1)(F)(ii)(II)(bb).

CARES Act credit reporting protections do not apply to accounts that have been charged off. 15 U.S.C. § 1681s-2(a)(1)(F)(iii). An account is charged off when it is moved from profit to loss, occurring at 120 days past due for closed-end loans and 180 days past due for credit cards. See NCLC Fair Credit Reporting § 5.2.3.4.2 [3].

These basic CARES Act rights translate into the following technical implementation, as guided by the standardized Metro 2 format developed by the Consumer Data Industry Association. This Metro 2 format is explained at NCLC’s Fair Credit Reporting § 6.3.2 [4].

When a creditor reports accounts as “current,” the Metro 2 reporting format includes both a payment history field and an account status field. If the CARES Act requires the account to be reported as current, one would assume that both fields should be reported as current, i.e., the payment history field should be reported as not being past due while the account status field
should be reported as “current.” See NCLC’s Fair Credit Reporting § 6.3.3.4 [5].

In addition, the Metro 2 format considers any payment that is less than 30 days late to be “current.” The same should be true for purposes of the CARES Act credit reporting provision. See NCLC’s Fair Credit Reporting § 6.3.3.7 [6].

For delinquent accounts, the CARES Act credit reporting provision requires that the furnisher “maintain the delinquent status.” This should be the same delinquency status that was reported immediately before the accommodation, e.g., if an account was 30 days delinquent when a borrower is approved for a forbearance, the account should continue to be reported as 30 days delinquent.

**Even the Credit Reporting Industry Expects Problems with Implementation of These New Rights**

One can expect a significant number of errors and creditor noncompliance with these new credit reporting rights, given the large volume of accommodations that creditors are processing. In addition, creditors may be onboarding large numbers of new customer service staff who may be inexperienced in dealing with credit reporting issues. Even the nationwide CRAs expect problems, as an Equifax representative openly admitted [7] “It will take a moment to figure out how to execute against what’s been stipulated [by the CARES Act], so something’s bound to slip through the cracks.”

**Consumer Enforcement of the CARES Act Credit Reporting Provision**

It is now free to check frequently a consumer’s credit report for violations of the CARES Act credit reporting provision. The major three credit reporting agencies, Equifax, TransUnion, and Experian, are offering free weekly credit reports [8] through April 2021.

Once a violation is spotted, private enforcement is a two-step process. The CARES Act credit reporting provision is codified in the FCRA at 15 U.S.C. § 1681s-2(a). Consumers cannot privately enforce that FCRA provision because 15 U.S.C. § 1681s-2(c) excludes § 1681s-2(a) from the FCRA’s private liability provisions. See NCLC’s Fair Credit Reporting § 6.1.2 [9].

Nevertheless, violations of the CARES Act protections will be privately enforceable under the FCRA once a consumer lodges a dispute with a CRA, thus triggering a furnisher’s reinvestigation duties under 15 U.S.C. § 1681s-2(b). Section 1681s-2(b) as opposed to 1681s-2(a) is privately enforceable. See NCLC’s Fair Credit Reporting § 6.10 [9].

The CARES Act provision is considered in pari materia with the standard for accuracy under the reinvestigation requirements of CRA-referred disputes under section 1681s-2(b). Therefore, the CARES Act provision informs those reinvestigation duties.

Indeed, several courts note the interplay between furnisher duties found in subsections 1681s-2(a) and 1681s-2(b). See NCLC’s Fair Credit Reporting § 6.10.5 [10]. Most notably is the Fourth Circuit in Saunders v. Branch Banking & Trust Co. of Virginia [11], 526 F.3d 142, 150 (4th Cir. 2008):

> The first subsection, § 1681s-2(a), provides that furnishers have a general duty to provide accurate and complete information; the next subsection, § 1681s-2(b), imposes an obligation to review the previously disclosed information and report whether it was “incomplete or inaccurate” upon receipt of a notice of dispute from a CRA. The second subsection thus requires furnishers to review their prior report for accuracy and completeness; it does not set forth specific requirements as to what information must be reported, because these requirements have already been set forth in the first subsection.

As stated by one court summarizing the Saunders jurisprudence, “If a furnisher has a duty to report information under the subsection (a) standard, that information must also be covered by the subsection (b) duty to investigate and correct ‘incomplete or inaccurate’ information.” Shames-Yeakel v. Citizens Fin. Bank [12], 677 F. Supp. 2d 994, 1005 (N.D. Ill. 2009).

**Special Enforcement Rights for California Consumers**

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California residents have the option to enforce the CARES Act credit reporting provisions before raising a dispute. Unlike other states (with the exception of Massachusetts), the FCRA does not preempt the California credit reporting statute’s furnisher accuracy requirement. See NCLC’s Fair Credit Reporting § 10.7.3.2.2 [13]. The California statute does not require a consumer to dispute a report before suing a furnisher for inaccuracy.

A number of California decisions hold that courts should look to the federal FCRA when interpreting California’s furnisher accuracy requirements. See, e.g., Carvalho v. Equifax Info. Servs., L.L.C. [14], 629 F.3d 876, 889 (9th Cir. 2010) (because the California FCRA “is substantially based on the Federal Fair Credit Reporting Act, judicial interpretation of the federal provisions is persuasive authority and entitled to substantial weight when interpreting the California provisions”).

For more information

Description of the Metro 2 format: See NCLC’s Fair Credit Reporting § 6.3.2 [4].

Litigation against furnishers in reinvestigation cases: NCLC’s Fair Credit Reporting § 6.10 [15].


Author Name: Chi Chi Wu
About Author: Chi Chi Wu has been a staff attorney at NCLC for over a decade. Chi Chi focuses on consumer credit issues at NCLC, including legislative, administrative, and other advocacy. Chi Chi’s specialties include fair credit reporting, credit cards, refund anticipation loans, and medical debt. Before joining NCLC, Chi Chi worked in the Consumer Protection Division at the Massachusetts Attorney General’s office and the Asian Outreach Unit of Greater Boston Legal Services. Chi Chi is a graduate of Harvard Law School and The Johns Hopkins University.

Chi Chi is co-author of the legal manuals Fair Credit Reporting [16] and Collection Actions [17], and a contributing author to Consumer Credit Regulation [18] and Truth in Lending [19].

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