

Consumer Financial Protection Bureau and Background Screeners

Question: If you are a consumer reporting agency should the Consumer Financial Protection Bureau (“CFPB”) be on your radar screen?

Answer: Yes.

Why?

The most basic reason is because the Fair Credit Reporting Act (“FCRA”) was “transferred” to the CFPB from the Federal Trade Commission, and furthermore, because the CFPB has rulemaking and enforcement powers over consumer reporting agencies (“CRAs”). Unlike certain other industries, the CFPB does not have supervisory powers over CRAs. This is important because if certain consumer groups have their way, they would force the CFPB to have supervisory powers over CRAs. Why is this of concern? Primarily because the CFPB is tasked with ensuring that consumers have greater transparency and protections when it comes to financial products and services and background screening doesn’t fit that mold since consumer reports used for employment and tenant screening aren’t a financial product or service. In fact, Congress agreed and provided employment and tenant screening companies with an exception under the definition of “financial products or services” when it comes to the CFPB’s supervisory powers.

What is the CFPB Doing?

The CFPB is required to implement a risk-based program to **supervise** certain non-depository or non-bank covered persons for compliance with Federal consumer financial laws. Section 1024 of the Wall Street Reform and Consumer Protection Act (P.L. 111-203)(“Dodd Frank Act”) provides that the CFPB may supervise covered persons in the residential mortgage, private education lending, and payday lending markets. For other markets, the supervision program generally will apply only to a “larger participant” of these markets. The CFPB must define such “larger participants” by rule. The CFPB is required to issue an initial rule to define covered persons that are “larger participants” of other markets not later than July 21, 2012. The “larger participant” rule will not impose new substantive consumer protection requirements on any non-depository entity, but rather will provide to the CFPB the authority to supervise larger participants in certain markets—including by requiring reports and conducting examinations—to ensure, among other things, that they are complying with existing Federal consumer financial law.

Recently, through the Federal Register, there was a [notice](#) and comment period regarding development of a rule to define covered persons that will be subject to the CFPB’s supervision program as a “larger participant” of a market for consumer financial products or services. Markets identified in the Federal Register notice for possible inclusion in an initial rule are: debt collection; **consumer reporting**; consumer credit and related activities; money transmitting, check cashing and related activities; prepaid cards; and debt relief services.

Why should you Care?

The CFPB has rulemaking, enforcement and supervisory powers. Presently, CRAs are covered by the CFPB’s rulemaking and enforcement powers. However, the National Association of Professional Background Screeners (“NAPBS”) fought for an exemption from the CFPB’s **supervisory** powers because background screening is not, and cannot be defined as a “consumer financial product or service”, which is at the core of what CFPB seeks to regulate. Therefore, CRAs were granted an exemption from the CFPB’s supervisory powers, which are defined at Section 1024 of the Dodd-Frank Act. A “financial product or service” is defined in Section 1002(15) of the Dodd-Frank Act and the

list includes activities such as extending credit and servicing loans, providing payments or other financial data processing products, providing financial advisory services and so on. For CRAs, the key language is Section 1002(15)(A)(ix), which states that a financial product or service includes:

(ix) collecting, analyzing, maintaining, or providing consumer report information or other account information, including information relating to the credit history of consumers, used or expected to be used in connection with any decision regarding the offering or provision of a consumer financial product or services, **except to the extent that—**

(I) A person---

(aa) collects, analyzes, or maintains information that relates solely to the transactions between a consumer and such person;

(bb) provides the information described in item (aa) to an affiliate of such person; or

(cc) provides information that is used or expected to be used solely in any decision regarding the offering or provision of a product or service that is not a consumer financial product or service, **including a decision for employment, government licensing, or a residential lease or tenancy** involving a consumer; and

(II) The information described in sub clause (I)(aa) is not used by such person or affiliate in connection with any decision regarding the offering or provision of a consumer financial product or service to the consumer other than credit described in section 1027(a)(2)(A).

This language clearly exempts CRAs from the CFPB's supervisory powers and that was the intent. I know because I was there when the Act was being debated on Capitol Hill and I worked with House Financial Services Committee staff to include this exemption on behalf of NAPBS members. So what's the problem you might be asking yourself?

What if CFPB Where to Supervise CRAs?

The problem is that there are forces at work to curb back this exemption. If CRAs were to fall under the CFPB's supervisory powers it would mean that CFPB examiners would/could conduct on-site examinations to ensure compliance with Federal consumer financial protection laws and regulations – including laws prohibiting unfair, deceptive, abusive, or discriminatory acts or practices – and that companies are operating their compliance management programs responsibly. The CFPB has provided [guidance](#) with respect to how it will conduct supervision of banks, which could easily be translated to non-bank entities such as CRAs. According to the CFPB, “CFPB supervision will be an on-going process of pre-examination scoping and review of information, data analysis, on-site examinations, and regular communication with regulated entities, prudential regulators, and as well as follow-up monitoring. For most depository institutions supervised by the CFPB, periodic examinations will be conducted. For the largest and most complex banks in the country, the agency will implement a year-round supervision program that will be customized to reflect the consumer protection and fair lending risk profile of the organization.” Furthermore, according to the CFPB, “During an examination, the CFPB will assess each institution's internal ability to detect, prevent, and remedy violations that may harm consumers by reviewing the institution's internal procedures and conducting interviews with personnel. Examiners will look at the products and services the institution offers, with a focus on risk

to consumers. The institution's compliance with requirements during the entire life cycle of the product or service will be reviewed, including how a product is developed, marketed, sold and managed. Fair lending reviews will be conducted to detect and address potential discriminatory practices, and, more generally, the institution's policies and practices will be evaluated to ensure compliance with consumer financial protection laws and regulations."

Congress did not intend for CRAs to fall under the CFPB's supervisory powers because employment and tenant screening are not financial products or services and the law should remain as is.

What Does This Matter to CRAs?

Returning to the above mentioned CFPB notice and request for comments. Several groups, led by the National Employment Law Project (NELP) and Community Legal Services of Philadelphia (CLS), provided [letters](#) to CFPB essentially trashing the background screening industry and asking that the CFPB include in its initial rule "the data and consulting industry that sells employment background checks among its products". NELP and CLS are aware of the above mentioned exemption, however, they want CFPB to disregard that exemption for those companies that may not only provide employment or tenant screening services, but other services or products as well. They want companies that may in fact offer "financial products or services", in addition to employment and tenant screening services, to be fully covered by the CFPB's supervisory powers. There would be no distinction between business units and any unit could consume the whole company.

Before you think I'm being harsh by using the term "trashed", you be the judge by considering the below direct quotes from their letter, which statements are not supported by facts.

- "We urge the CFPB to focus on this industry because of widespread non-compliance with the Fair Credit Reporting Act ("FCRA") in preparing and handling employment background checks and the devastating impact of these violations on the 65 million people in this country who have criminal records."
- "Under-regulated access to criminal history information has emerged as a fundamental threat to millions of U.S. workers screened every year for employment, as well as one of the most important civil rights issues of our time."
- "As employers have increasingly turned to private background check companies who profits depend, in part, on quickly churning out vast quantities of data, it has become increasingly apparent that CFPB supervision is needed to ensure that commercial background screening firms comply with FCRA."
- "It's members' widespread FCRA non-compliance in the criminal background reports that they generate requires the CFPB's early and extensive attention to them."

Others who wrote similar [letters](#) to the CFPB following the NELP/CLS template include The Lawyers' Committee for Civil Rights of the San Francisco Bay Area, the Ohio Poverty Law Center, NC Justice Center, Columbia Legal Services, Public Justice Center, Community Service Society, The Legal Aid Society of Cleveland, Legal Services for Prisoners with Children, Legal Services of New Jersey and the Empire Justice Center.

In a series of roundtable discussions this summer, which included representatives from a variety of groups and industries, the issue of including CRAs under the CFPB's supervisory powers was raised as was the push to have the CFPB further regulate CRAs. What persists throughout the discussion both at

the Equal Employment Opportunity Commission (EEOC) with respect to criminal history records and credit reports and now at the CFPB, is a basic misunderstanding of the industry. CRAs are highly regulated, at the federal level by both the Federal Trade Commission and the CFPB. Furthermore, there is no discussion about the FCRA, the rights it provides and what the processes are under the law with respect to background screening. Finally, there is no consideration given to the value of background checks to not only employers and landlords, but also to the employees, children, customers and others who benefit from background checks being conducted.

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