Fair Credit Reporting Act and Financial Privacy Update—2017

*By Andrew M. Smith, Andrew Soukup, and Lucille C. Bartholomew**

Introduction

The previous two *Annual Surveys* reported that the Consumer Financial Protection Bureau ("CFPB") was bringing enforcement actions and issuing guidance under the Fair Credit Reporting Act ("FCRA")[1] with respect to data accuracy and the duties of companies that furnish data to consumer reporting agencies ("CRAs").[2] This past year, the CFPB and the plaintiffs' bar doubled down on data accuracy and data quality issues. Discussed below are important guidance issued by the CFPB regarding the duties of data furnishers and CRAs with respect to accuracy; multiple enforcement actions brought by the CFPB against some of the largest banks for alleged data furnishing failures, resulting in millions of dollars in fines; and private actions under the FCRA and the bankruptcy laws alleging failures to furnish accurate and complete data to CRAs, and alleging failures by CRAs to produce accurate consumer reports. We also discuss new cases interpreting the meaning of "willfulness" under the FCRA.

CFPB Supervisory Guidance

In March 2017, the CFPB released a Consumer Reporting Special Edition of its *Supervisory Highlights*.[3] The report describes issues encountered by the CFPB in connection with its FCRA examinations of data furnishers and CRAs, and offers

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1. Pub. L. No. 91-508, tit. VI, 84 Stat. 1114, 1127–36 (1970) (codified as amended at 15 U.S.C. §§ 1681–1681x (2012)).

2. *See* Andrew M. Smith & Lucille C. Bartholomew, *Fair Credit Reporting Act and Financial Privacy Update—2016*, 72 Bus. Law. 475, 475–78 (2017) (in the 2017 *Annual Survey*); Andrew M. Smith & Peter Gilbert, *Fair Credit Reporting Act and Financial Privacy Update—2015*, 71 Bus. Law. 661, 664–69 (2016) (in the 2016 *Annual Survey*).

3. Consumer Fin. Prot. Bureau, Supervisory Highlights Consumer Reporting Special Edition (Winter 2017), http://files.consumerfinance.gov/f/documents/201703_cfpb_Supervisory-Highlights-Consumer-Reporting-Special-Edition.pdf [hereinafter Supervisory Highlights].

important guidance on data quality to both sets of participants in the credit reporting market.

Supervisory Observations with Respect to Furnishers

The *Supervisory Highlights* discussed a number of issues involving the compliance management systems ("CMS") of data furnishers. For example, the CFPB found that certain furnishers had weak or nonexistent programs for data governance, furnishing and dispute handling, management and board of directors' oversight, and monitoring and corrective action.[4] The takeaway here is that it is not enough to simply report information that is technically accurate; data furnishers also are expected by the CFPB to have robust CMSs with respect to the data furnishing function, as they would with respect to other business operations.

The *Supervisory Highlights* also observed a variety of more specific shortcomings with respect to the data furnishing policies and procedures of certain data furnishers, including failures to specifically incorporate the guidelines in Appendix E of Regulation V into their policies and procedures;[5] to maintain reasonable written policies and procedures for preventing mixed file reporting; to investigate disputes from consumers; to oversee third-party service providers that furnish data on behalf of the furnisher; and to create and retain documentation for dispute investigations.[6] With respect to this final point, the CFPB stated its expectation that data furnishers should be able to reconstruct dispute investigations, including documents relied upon and substantiation of final conclusions, for the purpose of performing quality control analysis of investigations.[7]

The *Supervisory Highlights* also noted that one or more furnishers failed to maintain sufficient policies and procedures for furnishing information about consumer deposit account information.[8] As discussed below, this also was the subject of a CFPB enforcement action, which resulted in a multimillion dollar civil penalty.[9] Even though furnishers may have detailed policies and procedures in place for furnishing credit account information to the three large nationwide CRAs—Equifax, Experian, and Trans Union—they also must have in place written policies and procedures for furnishing deposit account data to specialized CRAs, such as Early Warning Services and Chex Systems.[10]

With respect to data accuracy, the *Supervisory Highlights* cited issues with furnishers reporting information to CRAs when they knew or had reasonable cause to believe that the information was inaccurate.[11] In particular, the CFPB found that furnishers had actual or reasonable knowledge of inaccuracies when their own records, which furnishers often refer to as their "systems of record," contra-

4. *Id.* at 12.
5. *Id.* at 14–17.
6. *Id.* at 13.
7. *Id.* at 15.
8. *Id.* at 13.
9. *See infra* notes 32–35 and accompanying text.
10. Supervisory Highlights, *supra* note 3, at 13.
11. *Id.* at 17–18.

dicted the information furnished to CRAs.[12] The CFPB also discussed supervisory observations regarding furnishers' failure to update and correct inaccurate information, particularly where updates to an account resulted in previously furnished information that no longer accurately reflects the furnisher's system of record. For example, the CFPB found that one or more furnishers failed to promptly update information for charged-off accounts where consumers made subsequent payments in accordance with payment plans, and about cured delinquencies where consumers had qualifying deferments.[13]

The *Supervisory Highlights* also identified issues with furnishers reporting the date of first delinquency ("DOFD").[14] Where the DOFD is absent on incoming loan servicing data transfers, furnishers should have a process to require a follow up with the transferor of the servicing to obtain and accurately report that information. And, in cases where a consumer has filed for bankruptcy, furnishers should not update the DOFD as the date of the bankruptcy filing.[15] To correct such issues, the CFPB required furnishers to reevaluate accounts with post-delinquency statuses and to correct and update the DOFD, if appropriate.[16]

With respect to the DOFD, the Credit Reporting Resource Guide ("CRRG"), which is the manual for the industry-standard Metro 2 data furnishing format, specifically instructs data furnishers to include the date of bankruptcy petition in the DOFD field, where the account is current.[17] Although somewhat confusing, there appears to be no inconsistency between the *Supervisory Highlights* and the CRRG guidance. The *Supervisory Highlights* state that the DOFD field should not be updated, i.e., for an account already in a delinquent status, to include the date of the bankruptcy petition,[18] but are silent with respect to accounts that are in a current status but included in bankruptcy. The CRRG states that the DOFD for an account included in bankruptcy should be populated with the DOFD immediately preceding a derogatory account status, e.g., thirty days past due or charged off, or, if current, the date of bankruptcy petition.

The *Supervisory Highlights* discussed supervisory observations about furnishers' dispute-handling practices. For example, the CFPB found that certain furnishers were not providing notices to consumers when they determined that a

12. *Id.* at 18.

13. *Id.*

14. *Id.* The "date of first delinquency" provisions of the FCRA are important because derogatory information may remain in a consumer's credit report for only seven years from the date of the first delinquency immediately preceding the derogatory event. 15 U.S.C. § 1681c(c) (2012). Companies that furnish information to CRAs are specifically required to provide this date of first delinquency. *Id.* § 1681s-2(a)(5).

15. Supervisory Highlights, *supra* note 3, at 18.

16. *Id.*

17. Consumer Data Indust. Ass'n, Credit Reporting Resource Guide 4–17 (2017) (providing that if an account included in bankruptcy is delinquent, furnishers should report the date of first delinquency in the DOFD field, but if the account is current, furnishers should "report the date of the bankruptcy/personal receivership petition or notification," "[e]ven though the account is not delinquent").

18. Supervisory Highlights, *supra* note 3, at 18.

dispute was frivolous or irrelevant,[19] and that one or more furnishers failed to send adequate notices to consumers summarizing the results of disputes.[20] The report also discussed issues related to furnishers' indirect investigation requirements, including that one or more furnishers failed to report results to CRAs or complete the required investigation within the timeframes required by the FCRA,[21] or that, to meet the FCRA's timeframes, certain furnishers would verify information to CRAs when they had not conducted a reasonable investigation.[22]

In concluding its discussion of issues related to furnishers, the *Supervisory Highlights* indicated that the CFPB would "continue to conduct reviews at a wide range of furnishers . . . and expects furnishers to evaluate carefully their entire operations as they relate to their furnishing practices."[23]

Supervisory Observations with Respect to CRAs

In its *Supervisory Highlights*, the CFPB identified issues regarding the accuracy of data maintained by CRAs. The CFPB summarized a number of supervisory observations with respect to the data quality practices of CRAs, including that CRAs had decentralized data governance functions with undefined responsibilities, lacked quality control procedures for the accuracy of consumer reports, exhibited insufficient oversight of furnishers providing data, and inconsistently provided data quality feedback to furnishers.[24] As a result of these deficiencies, the CFPB directed CRAs to enhance data governance programs; to implement and enhance quality control programs to assess the accuracy of consumer reports and patterns and trends in mixed file data; and to vet, monitor, and provide data quality reports to furnishers.[25] Going forward, data furnishers may expect scrutiny not just from regulators, but also from the CRAs with which they do business.

The *Supervisory Highlights* also reported that a reseller of consumer report information used a system with programming errors that did not assure maximum possible accuracy when the reseller merged consumer report data bought from CRAs.[26] To address this issue, the CFPB required the reseller to enhance its procedures, resolve the data merge errors, and conduct a comprehensive review to assess the programming errors' impact on consumers.[27]

The *Supervisory Highlights* also discussed issues involving CRAs' dispute handling and resolution procedures. In some instances, the CFPB found that CRAs failed to review and consider certain documentation and relied solely on the fur-

19. *Id.* at 19–20.
20. *Id.* at 20.
21. *Id.* at 20–21.
22. *Id.* at 21.
23. *Id.* at 22.
24. *Id.* at 4.
25. *Id.* at 5–8.
26. *Id.* at 8.
27. *Id.*

nisher to investigate a dispute.[28] As a corrective action, the CFPB required the CRAs to enhance their policies and procedures to ensure that such documentation was reviewed and considered going forward.[29] The CFPB also found that one or more CRAs sent dispute notices to consumers after a reasonable investigation that did not clearly articulate the results of the investigation.[30] These CRAs were required to include more precise information about the result of the investigation in these notices, including whether the CRA made any changes to the consumer report as a result of the investigation.[31]

Enforcement Actions Concerning Data Accuracy and Quality

The CFPB has continued to enforce the obligations of data furnishers, settling five enforcement actions alleging violations of the FCRA. Most recently, in August 2017, the CFPB entered into a consent order with JPMorgan Chase Bank, N.A. ("JPMorgan").[32] The CFPB alleged that JPMorgan violated section 1022.42(a) of Regulation V by failing to have reasonable written policies and procedures in place regarding the accuracy of the information JPMorgan furnished to specialty CRAs about consumers' deposit account behavior.[33] The CFPB also alleged that, in some instances, JPMorgan violated section 623(a) of the FCRA by failing to provide consumers with the results of its investigation when the consumers disputed the accuracy of furnished information directly to JPMorgan.[34] As part of the settlement, JPMorgan was required to pay a $4.6 million civil money penalty.[35]

In January 2017, the CFPB alleged that CitiFinancial Servicing ("Citi") failed to conduct reasonable investigations of consumer's disputes and failed to complete such investigations within thirty days of receiving the dispute.[36] In addition, according to the CFPB, Citi inaccurately reported accounts as "charged off" with a balance due when the accounts were actually settled in full.[37] In some cases, Citi allegedly received notice from consumers that their accounts had been settled rather than charged off, and Citi's system of record reflected the correct status

28. *Id.* at 10.
29. *Id.* at 11.
30. *Id.*
31. *Id.*
32. Consent Order, *In re* JPMorgan Chase Bank, N.A., No. 2017-CFPB-0015 (Aug. 2, 2017), http://files.consumerfinance.gov/f/documents/201708_cfpb_JPMorgan-Chase_consent-order.pdf.
33. *Id.* at 6.
34. *Id.* at 7–8.
35. *Id.* at 13. According to the CFPB, JPMorgan also violated section 615(a) by failing to include in denial notices the names and contact information of the specialty CRAs that supplied the information resulting in the denial of consumers' checking account applications. *Id.* at 8.
36. Consent Order, *In re* CitiFinancial Servicing, LLC, No. 2017-CFPB-0004 (Jan. 23, 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201701_cfpb_CitiFinancial-consent-order.pdf [hereinafter CitiFinancial Consent Order]. The CFPB also alleged that Citi violated the Real Estate Settlement Procedures Act ("RESPA") and the Consumer Financial Protection Act's prohibition against deceptive acts or practices by failing to inform consumers about foreclosure relief options, misleading consumers about the impact of deferring the payment due date on the interest that accrued on their mortgages, and charging certain consumers for credit insurance that should have been cancelled due to missed payments, among other things. *Id.* at 1–2.
37. *Id.* at 2; *see also* 15 U.S.C. § 1681s-2(a)(2) (2012).

of these accounts, but Citi nonetheless allegedly continued to inaccurately report the accounts as charged off and did not correct or update the information it previously furnished to CRAs.[38] The CFPB also alleged that Citi violated the Real Estate Settlement Procedures Act ("RESPA") by furnishing adverse information to CRAs regarding payments subject to a notice of error.[39] RESPA and Regulation X prohibit loan servicers from furnishing adverse information to CRAs regarding any payment that is the subject of a Notice of Error within sixty days after receipt of the Notice of Error.[40] As part of the settlement, which also included allegations under the Consumer Financial Protection Act ("CFPA"), the CFPB required Citi to refund approximately $4.4 million to consumers and to pay a civil money penalty of $4.4 million.[41]

As discussed elsewhere in this *Annual Survey*,[42] the CFPB alleged that online lender Flurish, Inc., d/b/a LendUp ("LendUp"), violated the CFPA's prohibition against deceptive acts or practices when it failed to furnish information about consumers' payment history after advertising to consumers that it would help them build their credit by furnishing information regularly to CRAs.[43] The CFPB also alleged that LendUp failed to maintain any written policies and procedures regarding the accuracy and integrity of the information it furnished to CRAs.[44] To settle these allegations and other claims, the CFPB ordered LendUp to pay approximately $1.83 million in consumer refunds and a $1.8 million civil money penalty.[45]

In August 2016, the CFPB alleged that Wells Fargo Bank, N.A. ("Wells Fargo") violated section 623(a)(2) of the FCRA by failing to promptly notify CRAs that it had furnished information that was not complete or accurate and by failing to provide CRAs with additional information necessary to make such information complete and accurate.[46] Specifically, the CFPB alleged that Wells Fargo furnished inaccurate information to CRAs about consumers when it failed to timely aggregate partial payments and overpayments and reported that consumers were

38. CitiFinancial Consent Order, *supra* note 36, at 13.

39. *Id.* at 14.

40. *See* 12 C.F.R. § 1024.35(i)(1) (2017).

41. CitiFinancial Consent Order, *supra* note 36, at 19, 22.

42. *See* Justin B. Hosie, K. Dailey Wilson & Erica A.N. Kramer, *Stranger Things: Small Dollar Lending Updates and the Arrival of a Final Rule*, 73 BUS. LAW. 525 (2018) (in this *Annual Survey*).

43. Consent Order at 4, 5, 8, *In re* Flurish, Inc., No. 2016-CFPB-0023 (Sept. 27, 2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/092016_cfpb_LendUpConsentOrder.pdf. The CFPB also alleged that LendUp violated the Truth in Lending Act and the CFPA's prohibition against unfair and deceptive acts or practices by providing consumers with inaccurate information about the costs of loans, misleading consumers about the benefits associated with its lending products, and reversing discounts without consumers' knowledge, among other things. *Id.* at 1.

44. *Id.* at 10.

45. *Id.* at 14, 16.

46. Consent Order at 11, *In re* Wells Fargo Bank, N.A., No. 2016-CFPB-0013 (Aug. 22, 2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/2016-CFPB-0013Wells_Fargo_Bank_N.A.–_Consent_Order.pdf. The CFPB also alleged that Wells Fargo violated the CFPA's prohibition against unfair and deceptive acts and practices by charging illegal late fees, misrepresenting the value of making partial payments, and processing payments in a way that maximized fees for consumers, among other things. *Id.* at 1.

delinquent on their private student loans serviced by the bank.[47] The CFPB also found that Wells Fargo failed to correct and provide additional information to CRAs after consumers submitted a payment and it updated their accounts in its system of record.[48]

In addition to these violations, Wells Fargo allegedly failed to "establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers that it furnishes to a [CRA]" in violation of section 1022.52(a) of Regulation V.[49] Specifically, the CFPB found that Wells Fargo did not have reasonable policies and procedures in place to ensure that the bank updated previously furnished information about partial payments and overpayments.[50] As a result of these allegations, and other allegations under the CFPA, the CFPB ordered Wells Fargo to pay a $3.6 million civil money penalty.[51]

Litigation Developments

The FCRA and credit reporting continued to be an active source of litigation for financial institutions and other companies during the past year. Courts continued to apply the U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins*,[52] which addressed standing for a claimed FCRA violation where only statutory damages are alleged, and a topic which is discussed elsewhere in this *Annual Survey*.[53] But there also have been other important litigation developments involving credit reporting, especially with respect to the accuracy of information in consumer reports.

In what is believed to be the largest jury verdict in the FCRA's history, a California jury awarded more than $60 million in statutory and punitive damages against TransUnion LLC, with $984 in statutory damages and $6,353 in punitive damages being awarded to a class of approximately 8,000 individuals who allegedly were erroneously linked to similarly named persons in a federal government database about individuals subject to U.S. government sanctions programs.[54] TransUnion had been accused of providing reports to consumers that failed to include their information in the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") database, which identifies terrorists, drug traffickers, and others subject to U.S. government sanctions programs, although it provided such information to third parties, thereby depriving consumers of the

47. *Id.* at 14–15.
48. *Id.*
49. *Id.* at 15–16.
50. *Id.*
51. *Id.* at 25.
52. 136 S. Ct. 1640 (2016).
53. *See* Anna-Katrina S. Christakis, Jeffrey D. Pilgrim & Jennifer L. Majewski, *Post*-Spokeo: *The Impact of Article III Standing on Consumer Finance Litigation*, 73 Bus. Law. 565 (2018) (in this *Annual Survey*); *see also* Matthew O. Stromquist, Anna-Katrina S. Christakis & Jeffrey D. Pilgrim, *The High Court Speaks on Standing, Mootness, Arbitration, and Representative Evidence*, 72 Bus. Law. 567, 567–69 (2017) (in the 2017 *Annual Survey*).
54. *See* Ramirez v. TransUnion LLC, No. 3:12-cv-00632 (N.D. Cal. June 20, 2017) (judgment).

ability to dispute inaccurate OFAC alerts.[55] The jury found that TransUnion willfully failed to employ procedures intended to ensure maximum accuracy for its results, disclose this OFAC information in the disclosures it sent to class members, and notify class members of their FCRA rights.[56]

Courts have also provided guidance on how CRAs and furnishers should report information about delinquent accounts that are subject to bankruptcy proceedings. Courts have overwhelmingly concluded that the filing of a Chapter 7 or Chapter 13 bankruptcy petition, or even the confirmation of a Chapter 13 bankruptcy plan, does not force CRAs and furnishers to change how they report information about a delinquent account.[57] Rather, until a debt has been discharged in bankruptcy, CRAs and furnishers may continue to report derogatory information about an account, including that an account has an outstanding balance, a past-due balance, that payments were missed, or that the account has been charged off or is in collection.[58]

In a similar vein, courts generally continue to reject the contention that a mere departure from the standard Metro 2 reporting format, standing alone, is sufficient to claim that inaccurate or misleading information has been furnished about an account. Where courts have been most open to allowing plaintiffs to state claims based upon a deviation from the Metro 2 reporting format, it is when CRAs and furnishers fail to note that an account is subject to a pending bankruptcy proceeding.[59] Other courts have rejected even this argument, observing that because bankruptcy information is publicly available, potential creditors could not be misled by the failure to include a line-item notation on a trade line that an account is subject to pending bankruptcy proceedings.[60] And courts

55. Complaint at 4–5, Ramirez v. TransUnion LLC, No. 3:12-cv-00632 (N.D. Cal. Feb. 9, 2012).

56. *See* Verdict Form, Punitive Damages, Ramirez v. TransUnion LLC, No. 3:12-cv-00632 (June 20, 2017).

57. *See, e.g.*, Lugo v. Experian Info. Sols., Inc., No. 5:16-cv-04647, 2017 WL 2214641, at *5–6 (N.D. Cal. May 19, 2017); Mamisay v. Experian Info. Sols., No. 16:cv-05684, 2017 WL 1065170, at *3–7 (N.D. Cal. Mar. 21, 2017); Burrows v. Experian Info. Sols., No. 16:cv-06356, 2017 WL 1046973, at *5–9 (N.D. Cal. Mar. 20, 2017); Jaras v. Experian Info. Sols., Inc., No. 16-cv-03336, 2016 WL 7337540, at *2–4 (N.D. Cal. Dec. 19, 2016), *app. docketed*, No. 17-15201 (9th Cir. Feb. 2, 2017). *But see* Aulbach v. Experian Info. Sols., Inc., No. 16-cv-06331, 2017 WL 1807612, at *3–5 (N.D. Cal. May 4, 2017) (reaching contrary conclusion in the context of a Chapter 13 bankruptcy proceeding based on belief that Chapter 13 plan confirmation changes the legal status of a debt).

58. *See, e.g.*, *In re* Experian Info. Sols. Credit Reporting Litig., No. 16-cv-05676, 2017 WL 1319843, at *1 (N.D. Cal. Mar. 28, 2017), *app. docketed*, No. 17-15987 (9th Cir. 2017); *Mamisay*, 2017 WL 1065170, at *6–7; *Burrows*, 2017 WL 1046973, at *9; Doster v. Experian Info. Sols., Inc., 16-cv-04629, 2017 WL 264401, at *1, *4–6 (N.D. Cal. Jan. 20, 2017); *Jaras*, 2016 WL 7337540, at *1, *4.

59. *See* Cristobal v. Equifax, Inc., No. 16-cv-06329, 2017 WL 1489274, at *4–5 (N.D. Cal. Apr. 26, 2017); Nissou-Rabban v. Capital One Bank (USA), N.A., No. 15cv16575, 2016 WL 4508241, at *5 (S.D. Cal. June 6, 2016).

60. *See, e.g.*, Torion v. JPMorgan Chase Bank, No. 17-cv-00422, 2017 WL 2986250, at *4–6 (N.D. Cal. July 13, 2017); *In re* Experian Info. Sols. Credit Reporting Litig., 247 F. Supp. 3d 1111 (N.D. Cal. 2017); Mestayer v. Experian Info. Sols., Inc., No. 15-cv-03645, 2016 WL 7188015, at *3 (N.D. Cal. Dec. 12, 2016).

continue to broadly reject the proposition that a departure from the Metro 2 reporting format can give rise to a willful FCRA violation.[61]

Some individuals have attempted to use the Bankruptcy Code to force CRAs and furnishers to eliminate otherwise historically accurate information about accounts subject to bankruptcy proceedings, advancing the theory that reporting such information constitutes debt collection activity that violates the automatic stay imposed by a bankruptcy court.[62] This theory seeks to circumvent the FCRA's statutory restriction on private actions against data furnishers because there is no private right of action against a data furnisher under the FCRA, except for failure to conduct an adequate investigation of a dispute by a consumer that is forwarded to the furnisher by a CRA.[63] The Ninth Circuit's Bankruptcy Appellate Panel rejected this theory in *In re Keller*,[64] holding that when a creditor continues to report that a borrower is overdue or delinquent on payments following the filing of a bankruptcy and the confirmation of a Chapter 13 plan, that reporting does not constitute a per se violation of the automatic stay or the confirmation order.[65]

Evolving Standards of Willfulness

Private plaintiffs can recover statutory damages of $100 to $1,000 for each "willful" violation of the FCRA.[66] The Supreme Court has held that, to be willful, the violation must be knowing or reckless, and that "[w]here . . . the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator."[67]

Federal appellate courts have continued to apply the Supreme Court's willfulness standard strictly. For example, in *Smith v. LexisNexis Screening Solutions*,[68] the Sixth Circuit found that a CRA negligently violated section 607(b) of the FCRA, requiring the establishment of reasonable procedures to ensure maximum possible accuracy of consumer reports, when it failed to require a middle name before running a credit report.[69] Although the court upheld a $75,000 award to compensate the plaintiff for lost wages, emotional distress, and reputational harm,[70] it found that there had been no willful FCRA violation because "a single inaccuracy, without more, does not constitute a willful violation of the FCRA."[71]

61. *See, e.g.*, *Cristobal*, 2017 WL 1489274, at *6 ("There is no guidance from the courts of appeals or the FTC indicating that noncompliance with the Metro 2 format is *per se* unlawful."); Webb v. Experian Info. Servs., Inc., No. 15 C 10355, 2017 WL 1022012, at *5 (N.D. Ill. Mar. 16, 2017); Jackson v. Experian Info. Sols., Inc., 236 F. Supp. 3d 1058, 1065–66 (N.D. Ill. 2017).
62. *See, e.g.*, *In re* Keller, 568 B.R. 118 (9th Cir. B.A.P. 2017).
63. *See* 15 U.S.C. § 1681s-2(c)(1) (2012).
64. 568 B.R. 118 (9th Cir. B.A.P. 2017).
65. *Id.* at 122–29.
66. 15 U.S.C. § 1681n(a) (2012).
67. Safeco Ins. Co. v. Burr, 551 U.S. 47, 70 n.20 (2007).
68. 837 F.3d 604 (6th Cir. 2016).
69. *Id.* at 610.
70. *Id.* at 611–12.
71. *Id.* at 611.

In another case alleging inaccurate consumer reports, the Eleventh Circuit found in *Pedro v. Equifax, Inc.*[72] that it was objectively reasonable for CRA Trans-Union to interpret the FCRA as requiring only that information reported be "technically accurate," in light of the statutory text and other courts' adoption of that standard, even though the court appears to endorse a different standard for maximum possible accuracy in dicta.[73] The Eleventh Circuit further confirmed the appropriateness of resolving willfulness at the motion to dismiss stage, holding that "[d]istrict [c]ourts may, and often do, determine on the pleadings that a plaintiff failed to plead willfulness when the interpretation of the relevant statute by the [CRA] was not objectively unreasonable."[74]

In a case of first impression at the appellate level, however, the Ninth Circuit held in *Syed v. M-I, LLC*[75] that an FCRA defendant may be held liable for willfully violating the FCRA even if no court of appeals or agency has spoken on the issue. FCRA section 604(b) requires employers to provide prospective employees with "a clear and conspicuous disclosure . . . in writing to the consumer . . . , in a document that consists *solely* of the disclosure, that a consumer report may be obtained for employment purposes."[76] In *Syed*, the defendant employer provided this disclosure to a prospective employee in a document that also contained a broad liability waiver releasing the prospective employer from any claims arising from the use of any information on his consumer report.[77] The Ninth Circuit held that the inclusion of this liability waiver in the same document that also contained the section 604(b)(2) disclosure violated the FCRA's requirement that the disclosure appear "in a document that consists solely of the disclosure."[78]

The Ninth Circuit did not stop there. It went on to hold that the prospective employer's violation of section 604(b)(2) was willful as a matter of law.[79] The Ninth Circuit reached this conclusion even though no court of appeals had interpreted section 604(b)(2) and district court decisions were split on the issue. Instead, because the *Syed* court believed that the prospective employer's interpretation of the statute was objectively unreasonable,[80] it held that the defendant was not entitled to offer evidence that it subjectively believed its interpretation was correct to rebut accusations of willfulness.[81] Rather, according to the Ninth Circuit, "where a party's action violates an unambiguous statutory requirement, that fact alone may be sufficient to conclude that its violation is reckless, and therefore willful," under the U.S. Supreme Court's decision in *Safeco Ins. Co. v.*

72. 868 F.3d 1275 (11th Cir. 2017).
73. *Id.* at 1281 ("Although the better reading of the Act requires that credit reports be both accurate and not misleading, we cannot say that reading the Act to require only technical accuracy was objectively unreasonable.").
74. *Id.* at 1282.
75. Syed v. M-I, LLC, 853 F.3d 492 (9th Cir.), *cert. denied*, No. 16-1524 (U.S. Nov. 13, 2017).
76. 15 U.S.C. § 1681b(b)(2)(A)(i) (2012) (emphasis added).
77. *Syed*, 853 F.3d at 497–98.
78. *Id.* at 500–03.
79. *Id.* at 503–06.
80. *Id.* at 503–04.
81. *Id.* at 505.

Burr.[82] The Ninth Circuit's ruling thus has the potential to create an especially strict rule for entities subject to the FCRA: if a court concludes that a company's interpretation of its FCRA obligations is objectively unreasonable, the FCRA defendant may be held liable for willfully violating the FCRA even if no court of appeals or agency has spoken on the issue.

Conclusion

The CFPB and the plaintiffs' bar likely will have a sustained focus on data quality in the year ahead. Based on the developments of the prior two years and the relatively extensive guidance provided by the CFPB, data furnishers and CRAs should continue to pay attention to: maintaining and updating written policies and procedures regarding data accuracy, including with respect to information furnished to specialty CRAs; investigating disputes of furnished information by consumers and keeping records of those investigations; and establishing robust CMSs with respect to the data furnishing function, including oversight by board of directors, internal audit, consumer response, and vendor management programs. Particular attention should also be paid to reporting accounts included in bankruptcy and to ensuring that furnished data and any updates are not inconsistent with the furnisher's system of record, especially in connection with payment or settlement of previously charged-off accounts.

82. *Id.* at 505 n.7 (citing Safeco Ins. Co. v. Burr, 551 U.S. 47, 52 (2007)).