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Maintaining the Reseller Defense After the FACT Act

For the first time with the passage of the 2003 Fair and Accurate Credit Transactions Act (FACT Act), the Fair Credit Reporting Act (FCRA) defines a reseller as a “consumer reporting agency” (CRA). This denotes a sea change in the law as interpreted by the courts. Prior to this definition, cases addressing the issue generally concluded that although a reseller might undertake activities that transformed it into a formal CRA, it was not necessarily one per se. Under the new definition, resellers appear to be a distinct subset of CRAs. This distinction becomes more clear when we understand what resellers are and what they do, i.e., they neither maintain nor evaluate the information in a consumer report and, accordingly, have fewer legal obligations than CRAs with respect to maintaining the privacy and accuracy of such reports. They are simply a conduit of information from the actual CRA to an end user. Companies operating as resellers should take steps to maintain the status because resellers not only have fewer compliance obligations, but they also can avoid liability for inaccuracies in consumer reports. This article explains how companies can maintain the reseller defense in light of the Act as amended.

CRAs vs. Resellers Under the FCRA

The FCRA is designed to safeguard the privacy of consumer information, while insuring it is accurately reported to users with a legitimate need. These competing interests place administrative burdens on entities that regularly procure, resell or use consumer reports, and failure to adhere to the statute's requirements can lead to legal liability.

What is a CRA?

The overarching CRA is any person or entity which, for a fee, regularly assembles and/or evaluates consumer information for the purpose of furnishing consumer reports to third parties through interstate commerce.

What are a CRA's responsibilities under the FCRA?

A CRA must identify the end user of a consumer report and obtain certification that the information being sought is for a permissible and no other purpose. A CRA also must make reasonable efforts to verify this identification and certification. Beyond this, CRAs must make sure that no impermissible information is included in a consumer report (such as credit information that is more than seven years old or otherwise outside the limitations periods set forth in the FCRA). Importantly, CRAs must take reasonable steps to assure the maximum possible accuracy of the information contained in a consumer report. CRAs also must provide both the entities from whom the CRA receives information (if the entity provides information in the ordinary course of business) and end users with notices of their responsibilities under the Act. Failure to do so can lead to civil liability.

CRAs also are required to “clearly and accurately” disclose certain information to consumers upon request. If a consumer disputes information contained in a consumer report, the Act imposes rigorous and time-sensitive obligations to reinvestigate the disputed information, inform any providers of information about the dispute, and make deletions or corrections to the report if necessary.

What is a reseller?

Resellers of information obtain consumer reports from other sources and pass the information on to end users (or other resellers). Under the Act as amended, resellers appear to be a distinct subset of CRAs, subject to fewer and less onerous compliance requirements. Thus, resellers may *assemble* and merge information from the databases of one or more CRA, but they may not maintain their own databases of consumer information from which new consumer reports may be produced. Omitted from the new definition of resellers is the traditional CRA activity of *evaluating* consumer information for inclusion in a consumer report.

What must a reseller know from the purchaser?

No matter whether a reseller sells a consumer report to an end user or another reseller, it is required to make sure that such purchaser: (1) identifies the end user of the resold report; (2) certifies each purpose for which the report will be used; and (3) certifies that the report will be used for no other purpose. Additionally, the reseller must make reasonable efforts to verify these identifications and certifications.

What must a reseller disclose to the CRA?

A reseller that procures a consumer report from a CRA for the purpose of reselling the report (or any information in the report) must disclose to the CRA: (1) the identity of the end user of the report; and (2) the permissible purpose(s) for which the report is being furnished to the end user. To this end, resellers must establish and comply with reasonable procedures to ensure that a report is resold only for a permissible purpose.

The Distinction Between Resellers and CRAs After the FACT Act

Prior to the FACT Act, courts generally agreed that a reseller was not responsible for verification and disclosure requirements applicable to a resold consumer report, and that a reseller would not be liable for transmitting a report with inaccurate information. The FACT Act blurs but nevertheless leaves intact the distinction between CRAs and resellers.

Why resellers do not have all the obligations of a CRA

As described above, resellers are mere conduits of information from CRAs. The Act as amended takes into consideration this limited role. In section 607, the FCRA maintains separate subsections to explain the duties of CRAs and resellers. Congress thus did not intend resellers to be synonymous with CRAs. Rather, Congress retained subsection 607(e), which contains distinct and lesser responsibilities for resellers.

The FCRA now also carves out or separately defines other reseller obligations as compared to those of traditional CRAs. New section 605B requires CRAs to block the reporting of any information in a consumer file resulting from identity theft (subject to certain preconditions). This section specifically exempts CRAs that are resellers from many of the obligations related to blocking a file, setting forth in a separate subsection the lesser requirements applicable to resellers. Further, in the amendment to section 611, which details procedures CRAs must follow when the accuracy of information in a report is disputed by the consumer, resellers are again exempted from the general reinvestigation requirements. In this regard, a reseller only is responsible for identifying and correcting any inaccuracies that result from an act or omission of the reseller itself. If a reseller receives

notice of a dispute and determines that it is not responsible for any inaccuracy, it is obliged to inform all CRAs from which it received relevant information, thus passing along the dispute to the CRA.

What is the significance of a reseller that “assembles” information for a consumer report?

Case law and FTC opinion letters issued before the reseller definition was added to the FCRA differentiate between the act of a CRA in assembling or evaluating information to be contained in a consumer report, and a reseller’s mere receipt and transmission of that information from one entity to another. However, with the new definition, both traditional CRAs and resellers may “assemble” information; only CRAs may evaluate it.

What new duties may a reseller have?

The amendment to the FCRA does not contain a reseller carve-out in section 609, which addresses disclosures CRAs must make to consumers upon request (subject to certain limitations, such as receipt of proper identification). This may mean that resellers will be required to disclose information in a consumer’s file, the sources of such information, the identity of persons who procured the consumer report, and other such information, as well as provide consumers with a summary of their rights. The applicability of this section to resellers is somewhat suspect, however, because resellers typically do not have possession of or control over much of this information.

As the amendment to the FCRA demonstrates, it is still advantageous to be a reseller and avoid traditional CRA status because resellers continue to have fewer obligations than CRAs and, presumably, face less liability for inaccuracies in consumer reports.

Maintaining the Reseller Defense After the Amendments to the FCRA

Assuming that resellers are a distinct subset of CRAs subject to lesser compliance requirements, deciding what a reseller can and cannot do can be tricky. Resellers should try to undertake only those activities that fall squarely within the definition of reseller. However, resellers must recognize the reality of their business that not every transaction will be “clean” enough to avoid evaluation. The following is some guidance on the possible risks to reseller status associated with various activities.

Can a reseller provide access to a CRA’s database without risking its status?

Most likely, yes. In the typical situation, the reseller acts merely as a gatekeeper for a database of information maintained by a CRA. For a fee, an end user or another reseller can access the CRA’s information through the reseller. The reseller may not, however, evaluate the information.

Can a reseller select portions of a single consumer report to resell to a third party without risking its status?

A reseller may risk being viewed as a CRA if it evaluates information before deciding what parts to resell. The FCRA contemplates that a reseller can sell either an entire report or only some of the information in a report. If an end user directs a reseller to transmit only certain parts of a consumer report, the reseller can argue that it did not evaluate the report prior to resale. However, the greater the reseller's discretion in choosing what information will be included (for example, by choosing to include only information indicating a poor credit risk), the greater the risk it will be considered a CRA.

Can a reseller compile information from several different consumer reports to resell without risking its status?

A reseller may risk being considered a CRA if it evaluates information in order to decide what to resell. However, the new definition of reseller specifically provides that resellers may assemble and/or merge information. A reseller that merges information from several different consumer reports can argue that merely cutting and pasting information as directed by the end user or pursuant to a set process does not involve discretion sufficient to convert the reseller to a CRA.

Conclusion

In daily business operations, handlers of background information often operate as CRAs and resellers. The advantage to being a reseller is decreased administrative and other requirements relating to the accuracy of information. This makes sense because resellers are not the true "source" of the information. For these reasons and to perfect an effective defense in litigation, companies acting as resellers should take steps to cement that relationship with the end user and the source of the information. Thus, contracts and documentation with third parties should reflect the nature of the relationship, and steps should be taken to ensure that resellers are not evaluating information.

ATLANTA

One Peachtree Pointe
1545 Peachtree Street, N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON

Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO

55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON

700 Louisiana Street, Suite 3700
Houston, Texas 77002-2731
713-225-2300
713-225-2340 fax

LOS ANGELES

One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK

1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO

400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO

560 Mission Street, Suite 3100
San Francisco, California 94111-5858
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.

815 Connecticut Avenue, N.W, Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS

Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2)647.60.25
(32)(2)640.70.71 fax

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