

Employment and the Credit Reporting Laws: Negotiating the Shoals of Consumer Protection, Business Need, Data Privacy, and Public Policy

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Overview of Laws That Permit or Restrict Employer Use of Consumer Credit Reports and Related Empirical Research

The federal government¹ and 13 states with substantially consistent credit reporting laws² have codified the right of private and public employers to access and consider a consumer's credit history in the employment process. At the same time, these laws protect employees and job applicants from employer access to or use of such information in the absence of notice, disclosure and, pursuant to federal law, consumer consent.

Eighteen state and local governments since 2007 have enacted laws that diverge from the federal Fair Credit Reporting Act (FCRA).³ Legislators in those jurisdictions essentially have concluded the federal balance between business need and consumer protection tips too heavily in the direction of employers.⁴ Some post-2007 legislation comes close to implementing outright bans on employer use of consumer credit reports.⁵

Advocates of FCRA-divergent legislation contend employer use of consumer credit histories has a disproportionate, negative impact on the unemployed, those with low incomes, communities of color, the disabled, and women.⁶ When a state or local government adopts an FCRA-divergent law, it rejects at least in part a Congressional premise that has been in place for 50 years. The premise is that consumer credit reports play a permissible role in an employer's quest to learn facts needed to make a sound employment decision.⁷

Precisely where state and local governments should draw the line between consumer protection and employer access to consumer credit information is a matter of legitimate debate. Accordingly, this article, in a credit reporting and employment context, explores the balance between business need and consumer protection as well as important related issues of data privacy, the doctrine of preemption, and matters of public policy.

The use of consumer credit checks in the employment process increasingly has become a hot-button issue, polarizing federal, state, and city legislatures along a largely "red/blue" divide.⁸ On January 29, 2020, the House of Representatives, in a 221-189 vote, passed H.R. 3614 essentially along party lines.⁹ The House bill would have Congress amend the FCRA to ban most employer use of consumer credit reports.¹⁰

Congressional House Report 116-305 presents the majority and minority positions regarding the House-proposed FCRA amendment, and cites several studies.¹¹ One or more of those studies conclude (i) there is no correlation between employer credit report use and job performance and (ii) credit reports do not help identify employees or job applicants who are likely to commit fraud.¹² However, the cited studies do not address the impact restricted credit report use may have on employment opportunity.

The New York State credit reporting law, as in effect on May 11, 2021, may serve as a proxy for 12 other state laws that for employment purposes are substantially consistent with or not materially inconsistent with the FCRA.¹³ However, the New York State Assembly and Senate in 2019 proposed legislation to amend the New York Fair Credit Reporting Act (NY FCRA)¹⁴ in a way that would greatly diminish employer access to and use of consumer credit checks in New York State.¹⁵

New York City in 2015 enacted a highly FCRA-divergent credit check law.¹⁶ To guide interpretation of the city law, the New York City Human Rights Commission issued a Legal Enforcement Guidance¹⁷ in which, among other things, the Commission asserts that consumer credit reports are generally flawed.¹⁸

Those who advocate amending the FCRA or FCRA-consistent state laws to ban or restrict employer use of consumer credit reports do not report focusing on empirical studies that have considered whether FCRA-divergent state laws impact employment opportunity for the credit-disadvantaged. Empirical findings give reason to question whether increasing restrictions on employer credit report use advances employment opportunity for all major cohorts of consumers who experience impaired credit.

Recent data-based studies observe that when states enact laws in an employment context that materially diverge from the FCRA, such laws may correlate either negatively or positively with employment opportunity for significant cohorts of consumers whose members experience impaired credit.¹⁹ Authors of three such studies identify negative or relatively negative correlations that extend to (among others) African-Americans who have poor credit.²⁰ One or more of these studies find that restrictive state credit reporting laws also correlate negatively with credit availability for certain cohorts of credit-disadvantaged consumers.²¹



Authors of a fourth study find FCRA-divergent laws correlate positively with opportunity for unemployed consumers who recently have experienced financial hardship.²² However, the authors of this fourth study advise that their data sample is not large enough to conduct meaningful sub-group analysis by race.²³

Information providers that qualify as consumer reporting agencies issue more than three billion reports annually and more than 36 billion annual updates to consumer files.²⁴ The FCRA and NY FCRA require such agencies to make reasonable efforts to assure accuracy and confidentiality of consumer credit information.²⁵ Disclosure of consumer public record information can have a particularly significant impact on a consumer's ability to obtain employment. For this reason, the FCRA requires reporting agencies to observe "strict procedures" when they include public record information in a consumer credit report.²⁶

Three United States reporting agencies are nationwide in scope.²⁷ Each has experienced enormous problems maintaining accurate consumer data in confidence. Under pressure from state attorneys general and consumer class litigation, the major bureaus have sought to improve their practices.²⁸ Yet, even as they engage in such efforts, cyberattacks have compromised the confidential-

ity of massive amounts of data in their files.²⁹ The United States,³⁰ New York State,³¹ and California³² (among other jurisdictions) during 2018 and 2019 adopted laws to enhance privacy protections for personal consumer information.³³ California as of 2021 has expanded those protections.³⁴

FCRA-inconsistent state and local laws include provisions that in several instances conflict materially with the FCRA. A subsequent article will consider the doctrine of preemption as well as exemptions that FCRA-divergent jurisdictions offer. That article also will consider whether preemption doctrine offers a meaningful resource should a court seek to resolve conflicts between the FCRA and inconsistent provisions of state or local law.³⁵

In a third article we will consider the New York City Credit Check Law in a case study context.³⁶ That article also will review in-depth four empirical studies³⁷ in which teams of research economists have analyzed large data sets to determine whether correlations may be found between FCRA-divergent state laws and employment opportunity for the credit-impaired.

As our economy moves along a difficult path to recovery in this Age of Coronavirus, disproportionately large numbers of credit-impaired individuals may continue to be unemployed for considerable periods of time.

It is to be expected consumer advocates and businesses will continue to express conflicting views regarding employer use of credit reports. Before legislators support or reject FCRA-divergent laws or amendments, they should consider the data-based studies cited above.³⁸ Such a review should assist in determining whether additional FCRA-inconsistent legislation would be productive or counterproductive for significant cohorts of consumers who experience poor credit.

The Federal and New York State Fair Credit Reporting Acts: History and Basic Propositions

History

We begin by examining the history of FCRA and New York State credit reporting provisions that generally apply when persons seek a consumer credit report.³⁹ We then consider provisions offering additional consumer protection in an employment context as well as reporting agency standards of care, enforcement when such laws are breached, and data security.

More than 50 years have passed since the federal government enacted the FCRA on October 26, 1970. The United States House of Representatives issued a House Conference Report addressing Title VI of the Consumer Credit Protection Act. Title VI “dealt with consumer credit reporting,”⁴⁰ and became the Fair Credit Reporting Act.⁴¹

The 1970 House Conference Report identified as a Congressional purpose of Title VI the need to balance (i) the individual right to confidentiality of credit data, (ii) the reporting agency duty to accurately compile, maintain, and protect such information, and (iii) the right of employers to use consumer credit reports when seeking to make sound employment decisions.⁴² Subject to detailed statutory protocols intended to protect consumers, Congress concluded consumer credit information may be pertinent when an employer seeks to make employment decisions.⁴³ Accordingly, the FCRA permits businesses to draw upon consumer credit reports in the employment process.⁴⁴

Core concepts

Consumer report as defined in the FCRA encompasses:

any written, oral, or other communication of any information bearing on a consumer’s creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is issued or expedited to be used or collected in whole or part . . . as a factor in establishing the consumer’s eligibility for . . . (A) credit . . . [or] (B) employment purposes. . . .⁴⁵

The FCRA definition of consumer reporting agency covers:

any *person*⁴⁶ which, for monetary fees dues or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purposes of furnishing consumer reports . . . to third parties.⁴⁷ (Emphasis added).

•Conditions regarding requests for and use of consumer reports

Employers, reporting agencies, and others must meet a series of FCRA conditions when asking for or providing a consumer credit report.⁴⁸ CRAs and report recipients also must satisfy applicable state⁴⁹ and local law.⁵⁰

•Reporting agency procedures and obligations

The FCRA requires consumer reporting agencies (CRAs) to adopt reasonable procedures:

for *meeting the needs of commerce* for consumer credit, personnel, insurance, and other information *in a manner* which is *fair and equitable to the consumer*, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter. [Emphasis added.]⁵¹

New York State has similar requirements.⁵²

Legislative and administrative efforts to protect the privacy of consumer credit data ramped up in 2017 following a major cyberattack on one of the three nationwide credit reporting bureaus.⁵³ Congress, New York State, and other jurisdictions subsequently have required CRAs to step up their game to protect the confidentiality of consumer credit data.⁵⁴

•Similarities and differences in federal and state credit reporting laws

The New York FCRA, as of December 31, 2020, is largely consistent with the federal statute and may serve as a proxy for similar laws in twelve other states.⁵⁵ New York law, however, differs from the FCRA in a number of respects. This article considers relatively material federal/New York State distinctions in the text and less material differences as well as most definitions in footnotes.

When Information Providers Are Likely To Be Deemed Consumer Reporting Agencies Under the FCRA

The Fair Credit Reporting Act definition of “consumer reporting agency” focuses on persons that regu-

larly engage in “assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. . . .”⁵⁶ The Second Circuit Court of Appeals in *Kidd v. Thomson Reuters*⁵⁷ considered when courts should deem information providers to be consumer reporting agencies.⁵⁸

Reuters maintains a research platform known as Consolidated Lead Evaluation and Reporting (CLEAR). The platform inaccurately informed a potential employer that plaintiff had been convicted of theft. The employer dropped Kidd as a candidate for employment, and Kidd filed suit in the Southern District of New York.⁵⁹

The FCRA identifies consumer report content as “[information] used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for . . . employment purposes.”⁶⁰ Kidd contended Reuters met the consumer reporting agency definition in the FCRA and provided inaccurate information to plaintiff’s prospective employer.⁶¹ Denying it should be deemed a consumer reporting agency, Reuters stressed that its Terms of Use make the CLEAR platform available only to “help combat fraud and assist in criminal investigations . . . , [and] . . . prohibits its subscribers from utilizing the platform for any purpose covered by the FCRA.”⁶²

The district court granted summary judgment in Reuters’ favor.⁶³ The Second Circuit on appeal held that before deciding an information platform should be considered a consumer reporting agency,⁶⁴ a court should find the information provider (i) intends to furnish consumer reports to third parties and (ii) has a specific, subjective intent to act in a CRA capacity.⁶⁵ The Second Circuit concluded Reuters demonstrated an intent to limit use of its platform by taking “numerous and effective measures to prevent CLEAR content from being utilized as a ‘consumer report.’”⁶⁶

On different facts, a Ninth Circuit panel reached a similar conclusion in *Zabriskie v. Fannie Mae*.⁶⁷ The *Zabriskie* court as a threshold matter had to decide whether mortgage lender Fannie Mae met the FCRA definition of consumer reporting agency and could be sued as a CRA for alleged FCRA violations. The court noted that FCRA consumer-oriented objectives “support a liberal construction”⁶⁸ since Congress intended the statute to broadly “protect consumers from the transmission of inaccurate information about them” and “to establish credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner.” Nonetheless, the Ninth Circuit observed it would be a mistake to assume whatever might appear to further the primary objective of a statute must be the law. “Rather . . . the court must presume more modestly instead that the legislature says what it means and means what it says.”⁶⁹ The court in *Zabriskie* held Fannie Mae was not a consumer reporting agency within the meaning

of 15 U.S.C.S. § 1681a(f) because, even though it may assemble or evaluate consumer information, it does not furnish consumer reports to third parties; rather, its purpose is to facilitate transactions between a lender and Fannie Mae. Since Fannie Mae’s intentions do not align with those of reporting agencies (from which the FCRA intends to protect consumers), the *Zabriskie* court found Fannie Mae is not subject to FCRA regulation⁷⁰ as a consumer reporting agency.

Information furnishers preferring not to attain FCRA reporting agency status in the Second and Ninth Circuits may wish to consider as a model the disclosure statement Thomson Reuters uses for its online information platforms.⁷¹

What Consumer Reports May and May Not Include in an Employment Context

•FCRA reporting limits

Congress has determined that employers do not require various types of information to fill positions for which an employee’s salary reasonably may be expected to be less than \$75,000.⁷² In that context, the FCRA precludes reporting agencies from providing information regarding:

- (i) bankruptcies more than ten years old;
- (ii) “[c]ivil suits, civil judgments, and records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period”;
- (iii) paid tax liens that precede the issuance of a consumer report by more than seven years from the date of payment;
- (iv) accounts placed for collection antedating a report by more than seven years; and
- (v) “any other adverse item of information” that temporally precedes the report by more than seven years (other than criminal convictions the report may include).⁷³

New York FCRA reporting limits

The New York Fair Credit Reporting Act limits the types of information a reporting agency may supply when responding to an employer request for a consumer report. For example, New York precludes CRAs from disclosing several types of information when an employer seeks to fill a position reasonably expected to pay an annual salary of less than \$25,000.⁷⁴ Regardless of projected salary, New York does not permit reporting agencies to maintain certain kinds of information in a consumer’s file.⁷⁵ Nor does the New York credit reporting law permit CRAs to collect, obtain, evaluate, or report information

regarding polygraph tests or other examinations used to detect deception.⁷⁶

Subject to narrow exceptions and stringent conditions, and without regard to projected income, the federal and New York State credit reporting laws do not allow CRAs to report consumer medical data other than contact information.⁷⁷

- **State and local governmental limits on criminal history requests**

Numerous jurisdictions, separate and apart from their credit reporting laws, materially limit but do not fully preclude private employers from obtaining and using information relating to a consumer's criminal history. Those jurisdictions do not permit employers to use a check box to determine whether a job applicant has a criminal record.⁷⁸ However, "ban the box" cities and states do allow employers to consider an applicant's criminal history *after* an offer of employment has been extended.⁷⁹ More recently, additional jurisdictions have enacted similar laws precluding employers from asking job applicants for such information until an employer has offered a position to the applicant.⁸⁰

- **Access to consumer criminal histories by members of self-regulatory organizations**

Laws governing self-regulatory organizations (SROs) and rules such organizations promulgate may require or permit private employers to obtain a candidate's criminal history.⁸¹ The 1934 Securities Exchange Act designates the Financial Industry Regulatory Authority (FINRA) as an SRO the members of which are eligible to obtain a credit report relating to certain job applicants and transfer personnel.⁸² Although FINRA makes credit report use permissive rather than mandatory, should a FINRA member fail to properly investigate a prospective or transferee registered representative, the member could be subject to a penalty.⁸³ For this reason, FCRA-divergent laws that otherwise preclude employer use of consumer credit reports should not restrict FINRA member access to credit histories of registered representative applicants and transferees.⁸⁴ Yet, at least one FCRA-divergent jurisdiction, New York City, specifically interprets its credit check law to preclude FINRA members from claiming an SRO exemption to obtain a consumer credit report.⁸⁵

Reporting Agency, Information Furnisher, and Employer Disclosure and Investigative Responsibilities: An Overview

The FCRA imposes several obligations on consumer reporting agencies. Basic responsibilities cover consumer reports the agencies develop (regardless of purpose). Additional duties apply when a person requests a consumer report for employment purposes (e.g., mandating employers certify to a report-issuing CRA that they have given prior notice to and received consent from the

consumer for the report to issue). The FCRA also imposes duties on non-CRA information providers.⁸⁶

Disclosure and Investigative Duties

Consumers may instruct reporting agencies to make their credit history available to a report recipient. In doing so, the CRA must make certain disclosures.⁸⁷ Unless a consumer specifies an alternative means of communication to which the reporting agency has access,⁸⁸ the CRA must make all disclosures in writing.⁸⁹

The largely hidden consumer right to limit reporting agency disclosure of a consumer's full Social Security number

The FCRA permits consumers to require reporting agencies to eliminate the first five digits of their social security numbers.⁹⁰ For privacy purposes, this right is quite significant. Yet the FCRA does not mandate that reporting agencies advise consumers of this right.

It is puzzling why the FCRA does not require CRAs or report users to prominently feature this privacy protection in a disclosure document. The right of a consumer to request that a CRA truncate the consumer's Social Security number does not appear in the Summary of Rights⁹¹ the FCRA requires employers to provide job applicants and employees.⁹² The federal statute in essence leaves to consumers the obligation to study a complex law⁹³ and, hopefully, learn the statute permits them to request that CRAs not disclose their full social security number.

FCRA disclosure that consumer reporting agencies must provide:

- **Basic disclosure**

Once a consumer has supplied proper identification,⁹⁴ a CRA "clearly and accurately" must provide several categories of information to the consumer.⁹⁵ Such disclosure includes: (i) information sources in most instances,⁹⁶ (ii) the identity of persons including each end-user⁹⁷ who has obtained a consumer's credit report for a non-employment purpose during the prior one-year period,⁹⁸ and, if the consumer has requested only a credit file and not a credit score, (iii) "a statement advising that the consumer may request and obtain a credit score."⁹⁹

- **Basic credit score disclosure**

The FCRA provides a precise definition of credit score.¹⁰⁰ In responding to a consumer inquiry, CRAs must supply several categories of data relating to a consumer's credit scores.¹⁰¹ Such disclosure includes: (1) the consumer's current credit score as calculated by the reporting agency for a purpose relating to an extension of consumer credit; (2) the range of possible scores under the model used; (3) key factors adversely affecting such scores;¹⁰² (4) advice that the scoring model identified in the report may differ from the model a lender may use; (5) the date on which the CRA created the credit score; and (6) the iden-

tivity of the information furnisher who provided the score or file upon which the credit score was created.¹⁰³ CRAs are also required to “indicate the information and credit scoring model may be different” from the score and scoring model a lender may use.¹⁰⁴

Several websites offer guidance showing how consumer reporting agencies may make disclosure that satisfies FCRA obligations.¹⁰⁵

The requirement that reporting agencies investigate information a consumer challenges

Consumers may contest information appearing in a CRA report.¹⁰⁶ In response, the CRA must investigate the accuracy and completeness of challenged information and perform several tasks. *First*, within five business days of receiving notice of a consumer dispute, the reporting agency must disclose the source of information the consumer has placed in dispute.¹⁰⁷ *Second*, within 30 days of receiving such a notice, the CRA must conduct a reasonable investigation, free of charge, to determine whether the contested information is accurate and complete. *Third*, the CRA must record as disputed any information the consumer continues to challenge.¹⁰⁸

Following reinvestigation, a CRA may conclude challenged information is inaccurate, incomplete, or unverifiable. The CRA must make all corrections necessary to remove incorrect data from its internal records and notify its information furnishers of any modifications or deletions.¹⁰⁹

Non-CRA information furnishers

• Persons who qualify as information furnishers

The FCRA does not tell us what persons qualify as non-CRA information furnishers. However, the statute requires information furnishers to perform certain duties.¹¹⁰ Case law identifies such furnishers as persons who transmit “information concerning a particular debt owed by a particular consumer to reporting agencies such as Equifax, Experian, MCCA, and Trans Union.”¹¹¹ In *Gorman v. Wolpoff & Abramson, LLP*, a Ninth Circuit panel observed the most common information furnishers are “credit card issuers, auto dealers, department and grocery stores, lenders, utilities, insurers, collection agencies, and government agencies.”¹¹²

• FCRA duties imposed on information furnishers

The FCRA assigns two sets of duties to non-CRA information furnishers. The first is to “provide accurate information” to reporting agencies. After a furnisher receives notice that a consumer has disputed the completeness or accuracy of information provided to an agency, the second duty requires the furnisher to conduct an investigation, report the results to the CRA, and take corrective steps if the information is inaccurate, incomplete, or impossible to verify.¹¹³

When a consumer requests a copy of his or her credit report (and, in most circumstances, the CRA’s information sources), the consumer has a right to notify the information sources of alleged inaccuracies in the report.¹¹⁴ Should the furnisher have “reasonable cause” to believe information is inaccurate or incomplete, it no longer may supply the disputed data to others.¹¹⁵

• Consumer claims against information furnishers

The FCRA in the first instance limits those who are eligible to file claims against non-CRA information furnishers¹¹⁶ and assigns enforcement duties to certain federal agencies and state officials.¹¹⁷ Should a furnisher fail to verify or correct inaccurate information, or fail to note an ongoing dispute yet have reasonable cause to question the information, the appeals courts for the First¹¹⁸ and Fourth¹¹⁹ Circuits have held consumers then may file an action against the furnisher.

CRAs, non-CRA information furnishers as well as report recipients should retain all records regarding information a consumer places in dispute.

Basic Reporting Agency Duties Under New York Law

Reporting agencies must comply not only with the FCRA but also with applicable state law. The New York FCRA as of May 11, 2021 can serve as a stand-in for 12 other FCRA-similar state laws.

Confirming consumer identity before disclosing information

New York joins the federal government in requiring reporting agencies to confirm a consumer’s identity before making disclosure in response to a consumer information request.¹²⁰ The CRA must reveal its information sources (except investigative sources in limited circumstances) as well as disclosure of any persons to whom the agency during specified time periods furnished a consumer report for employment purposes New York limits this disclosure requirement to six months preceding the date of a consumer request¹²¹ except when a report recipient has sought information for employment purposes (in which case the disclosure period is two years).¹²²

Credit score disclosure

Unlike the federal statute, the New York FCRA, does not exclude credit scores from information CRAs must provide to consumers in the first instance.¹²³ Accordingly, CRAs may find it prudent to disclose credit scores to New York consumers at the outset.

The CRA duty to investigate information a consumer challenges

New York consumers have a right to dispute the accuracy of a CRA report.¹²⁴ The state requires report-

ing agencies to investigate and, if appropriate, to correct information a consumer challenges.¹²⁵

Additional Responsibilities in an Employment Context

When a person seeks a consumer report for employment purposes, the FCRA and New York FCRA impose additional duties while at the same time creating certain employment rights.

Supplemental FCRA disclosure when an agency responds to an employer request for a consumer report

The FCRA permits CRAs to prepare a consumer report for anyone intending to use such information in matters relating to employment.¹²⁶ A report-issuing CRA must provide job applicants and employees with a Summary of Rights in the form prescribed by the Consumer Financial Protection Bureau (CFPB).¹²⁷ As under New York State credit reporting law,¹²⁸ when a consumer requests a copy of his or her report, the FCRA¹²⁹ requires the reporting agency to disclose each person to whom the CRA during the preceding two years delivered the consumer's credit information for employment purposes.¹³⁰

Federal and state law differ as to the age of data CRAs must provide when responding to a consumer request. Reporting agencies therefore should disclose information maintained over the longer of any federal or state disclosure period.

Federal and New York State employer duties regarding disclosure notices and consumer consent

Employers must give clear and conspicuous written notice and secure consent before obtaining a consumer's credit report.¹³¹ They also must certify to the CRA that they have provided all required disclosure to the consumer.¹³² New York State requires report recipients to provide consumers with written notice when a report relates to "credit, employment, insurance, or rental or lease of residences. . . ."¹³³ When seeking a report relating to a non-New Yorker, the New York FCRA imposes similar duties on a New York employer.¹³⁴ Unlike the federal rule, New York does not require CRAs to request consent before an employer may obtain a basic consumer credit report for employment purposes.

FCRA limits on content of an employer notice and consumer consent request

In the same document in which employers provide notice, an employer may ask an applicant or employee to consent to a request for a consumer credit report.¹³⁵ The Federal Trade Commission staff, in an informal advice, stated employers may not include extraneous or contradictory information when they send such a request to a consumer. The FTC staff advises employers not to

use consent forms to request that consumers waive their FCRA rights.¹³⁶

In *Syed v. MI, LLC*, an employer consent form included a waiver of rights. The Ninth Circuit Court of Appeals held the request willfully violated the FCRA.¹³⁷ Although a notice and consent request must appear in a free-standing document, the employer need not make the request at a time separate from delivery of other employment documents.¹³⁸

The employer right to obtain future reports based on an initial consumer consent

When employers provide notice and seek consumer consent, the FTC staff advises that the employer may obtain permission at the same time to secure follow-up reports encompassing updates, renewals, and extensions.¹³⁹ With follow-up authorization in hand, employers need not provide further notice to obtain subsequent reports. In essence, the original authorization becomes "evergreen" and covers all future requests. Unlike the federal credit reporting law, the New York FCRA makes express the employer's right (other than for investigative reports) to secure ongoing consumer consent.¹⁴⁰ New York also limits the nature of adverse information a CRA may include in a subsequent investigative report.¹⁴¹ We address investigative reports in a later section.

Using electronic signatures to obtain consumer consent

Employers increasingly conduct hiring processes online. Those doing so often ask for an electronic signature to secure consent. Employers and others must satisfy federal and state laws governing electronic signature use.¹⁴² At least one United States district court has held employers may rely on electronic signatures to obtain consumer consent.¹⁴³ Variations in state and local law affect how an employer may request credit information based on an electronic signature.¹⁴⁴ These variations could affect development and use of online forms by multi-state employers.

Investigative Reports

The FCRA defines investigative report¹⁴⁵ separately from the more basic form of consumer report and imposes specific obligations when a person requests investigative information.¹⁴⁶

FCRA disclosure required to obtain an investigative report

Those who ask a CRA to prepare an investigative consumer report must confirm¹⁴⁷ to the reporting agency that they have disclosed each item discussed in the following section.

Providing certification to the CRA that consumer disclosure has been made

Each person seeking an investigative report must certify to the reporting agency that it has notified the consumer of the requesting party's intent to ask for a report. The party making the request must also certify it has provided and will provide all other required FCRA disclosure,¹⁴⁸ including an explanation that the investigative report may include information regarding "character, general reputation, personal characteristics, and mode of living, whichever are applicable."¹⁴⁹ Persons seeking an investigative report must (i) deliver to the consumer a statement describing the substance of the CFPB Summary of Rights¹⁵⁰ and (ii) advise that the consumer may obtain a complete copy of the Summary from the reporting agency.¹⁵¹ Persons that ask a CRA to prepare an investigative report also must inform consumers of their right to learn the nature and scope of the investigation.¹⁵²

Timing and certification of FCRA and New York FCRA disclosure

Within three days of requesting an investigative report, an employer must make all required consumer disclosures.¹⁵³ The three-day timeline suggests employers may request a report in advance of making disclosure. In no event may a reporting agency act on a request until the employer certifies it has made all FCRA-mandated disclosure. Should the employer fail to provide certification, the CRA may not deliver the report.¹⁵⁴ Before the requesting party may receive an investigative report, New York law requires such person to advise the consumer the CRA will make the report available upon request.¹⁵⁵

Additional required New York disclosure before a person may obtain and use an investigative report in an employment context

Reporting agencies must notify New York consumers that persons seeking an investigative report must make the report available to the consumer.¹⁵⁶ When a New York employer seeks an investigative report¹⁵⁷ it also must deliver to the applicant a copy of New York Correction Law article 23-A.¹⁵⁸ Article 23-A precludes employers from denying or terminating employment based on an applicant's prior criminal conviction unless (i) there is a direct relationship between the conviction and specific employment sought or (ii) employment would involve an unreasonable risk to the property, safety, or welfare of another.¹⁵⁹

Consumer consent

• The FCRA consent requirement

The FCRA requires consumers to consent when a person seeks an investigative report in an employment context.¹⁶⁰

• New York notice and consent requirements

New York requires report recipients to obtain advance consent before receiving an investigative report.¹⁶¹ New York notice requirements otherwise are substantially similar to those the FCRA imposes when an employer asks a CRA to prepare such a report.¹⁶²

• New York consequences when a consumer withholds consent

Although New York requires advance consent¹⁶³ should the consumer withhold consent, the state permits the employer to "decline to grant . . . employment on the ground that the applicant refused to execute an authorization."¹⁶⁴ The New York City Credit Check Law,¹⁶⁵ in most instances, precludes employers from obtaining any consumer credit report. Thus, the city law conflicts with the right of employers under the New York FCRA to deny employment should a consumer decline to consent to an investigative report request. The contrary New York City Credit Check Law thus could be challenged under the New York common law doctrine of preemption.¹⁶⁶

Non-disclosure of investigative sources

When reporting agencies obtain consumer credit data solely to prepare an investigative report, and use the information for no other purpose, the FCRA does not require them to disclose their information sources.¹⁶⁷ New York similarly does not require a CRA to disclose investigative sources.¹⁶⁸

Adverse Employment Action: Disclosure and Timing

A business may make employment decisions "based in whole or in part on . . . report[ed information] . . ." that could adversely affect consumer employment opportunities. Should an employer wish to take adverse action after obtaining a credit report, it must provide advance disclosure of such intent to the consumer.¹⁶⁹ Although New York FCRA basic requirements regarding employer disclosure are similar to those in the FCRA,¹⁷⁰ New York does not require employers to provide adverse action notice. Several categories of consumer report recipients in New York, other than employers, must provide after-the-fact notice of adverse action.¹⁷¹

The FCRA identifies a process employers must follow after they receive a consumer credit report and before taking adverse action.¹⁷² The statute does not designate a time period during which employers must defer taking such action. The FTC staff suggests a five-business-day deferral "appears reasonable."¹⁷³

Definition of adverse employment action

The FCRA defines adverse employment action as: "a denial of employment or any other decision for employ-

ment purposes that adversely affects any current or prospective employee.¹⁷⁴

Basic adverse action disclosure

Before taking adverse action in whole or in part based on a CRA report, the recipient must provide the consumer with:

- (i) a copy of the report;¹⁷⁵
- (ii) a written summary of consumer rights as enumerated by the CFPB;¹⁷⁶ and
- (iii) a statement advising that the CRA makes no decisions and therefore is unable to offer a reason why a report recipient may choose to take adverse action.¹⁷⁷

The summary of rights confirms that a candidate or employee may dispute incorrect information.¹⁷⁸

Credit score disclosure in an adverse action context

When an employer takes adverse action based on a CRA report, the employer must disclose any numerical credit score used in reaching the adverse employment decision.¹⁷⁹

A notice disclosing credit score information to a candidate or employee must include

- (i) the range of scores in the credit reporting model used
- (ii) up to four factors (with a possible fifth) that adversely affect the credit score
- (iii) the name and address of the CRA providing the report (together with additional contact information), and
- (iv) the date of credit score creation.¹⁸⁰

Before employers may take adverse action, they must disclose any credit report they have obtained.¹⁸¹ The FCRA does not distinguish between employer disclosure of credit scores and disclosure of other credit information. However, the FCRA does require employers to make full credit score disclosure before taking adverse action.¹⁸²

Adverse action notice in New York

Unlike the FCRA, the New York credit reporting law does not require employers to provide prior (or subsequent) adverse action notice to the consumer. However, New York requires report recipients to provide such notice after taking action that denies or raises the cost of residential leases, personal credit, or insurance.¹⁸³

No obligation to provide a reason for adverse action

Except in a single instance, neither the FCRA nor the New York FCRA¹⁸⁴ requires consumer report recipients to furnish a reason for taking adverse action.¹⁸⁵ The FCRA

does require recipients to disclose the “nature of the information upon which [adverse] action is based.”¹⁸⁶

Business Need and Consumer Protection

Congress and the New York State Legislature each has addressed the duty of CRAs, employers, and others to protect consumer rights. The manner in which each has done so reflects a legislative balance as of May 11, 2021 in weighing business need and consumer protection.¹⁸⁷

CRA and Information Furnisher Standards of Care and Liability

The FCRA insulates reporting agencies in most instances from liability when they act with reasonable care and apply reasonable procedures when reporting consumer credit information.¹⁸⁸ When an agency reports consumer public record information for employment purposes, Congress requires the CRA to adhere to a strict procedure standard.¹⁸⁹ Non-CRA information furnishers in all instances are required to meet a reasonable care standard.¹⁹⁰

The basic reasonable procedure, reasonable care, and reasonable effort standard to verify information

Consumer reporting agencies must make a “reasonable effort” to verify a report recipient’s identity and obtain certification regarding the intended use of the report.¹⁹¹ The FCRA protects agencies that implement “reasonable procedures” and act with “reasonable care” to assure “maximum possible accuracy” when preparing and updating consumer credit reports (whether in an employment context or otherwise).¹⁹² See *Erikson v. First Advantage Background Servs. Corp.* (11th Cir.);¹⁹³ see also *Podell v. Citicorp Diners Club* (2d Cir.).¹⁹⁴ New York applies a reasonable procedure standard in all circumstances to determine whether a reporting agency has acted responsibly in preparing or updating a consumer report.¹⁹⁵

In seeking to balance CRA liability exposure with the costs of implementing reasonable procedures, the Tenth Circuit (*Wright v. Experian Info. Sols., Inc.*) has joined the Seventh (*Henson v. CSC Credit Servs.*) in holding: “[CRAs] are not required to do further research when the cost of verifying source accuracy outweighs possible harm that inaccurately reported information may cause to the consumer.”¹⁹⁶

One district court in the Second Circuit has suggested that operation costs and reporting agency profitability could be pertinent in determining whether CRAs have followed reasonable procedures.¹⁹⁷ Other courts do not appear to have gone quite this far.

The “strict procedures” standard when a CRA reports public record information

To assure public record information is complete and up-to-date as reported, the FCRA requires reporting agen-

cies to follow “strict procedures.”¹⁹⁸ In contrast, when a non-CRA furnishes public record information, the FCRA holds the furnisher to a reasonable procedure standard.¹⁹⁹

FCRA Guidance and Enforcement

From 1970 to 2011, the FTC carried the exclusive portfolio to guide businesses and consumers in matters relating to the Fair Credit Reporting Act. Pursuant to Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress created the Consumer Financial Protection Bureau as an independent agency within the Board of Governors of the Federal Reserve System. Effective July 21, 2011, Congress assigned to the CFPB responsibility to interpret the FCRA²⁰⁰ as well as authority to issue regulations.²⁰¹

The FTC has continuing authority to pursue civil penalties against FCRA violators unless (pursuant to a subsequent FCRA provision or Title B of the Consumer Financial Protection Act) enforcement authority is specifically committed to another government agency or to the states.²⁰² The FCRA references Consumer Financial Protection Bureau enforcement under Title E of the Consumer Financial Protection Act.²⁰³ Otherwise, the statute does not allocate enforcement responsibility between the CFPB and the FTC.²⁰⁴ Congress for this reason has required the FTC and CFPB to enter into an interoffice memorandum of understanding to coordinate enforcement activity.²⁰⁵

Pre-2011 FCRA enforcement

Congress originally assigned FCRA enforcement exclusively to the FTC,²⁰⁶ and instructed the Commission to apply Federal Trade Commission Act standards in doing so.²⁰⁷ When the FTC deems an FCRA breach to be an unfair or deceptive act or practice in commerce within the meaning of Section 5(a) of the FTC Act,²⁰⁸ the Fair Credit Reporting Act authorizes the FTC to pursue sanctions, whether or not the alleged violator has engaged in commerce or meets any other FTC jurisdictional test.²⁰⁹

An FCRA respondent may settle a claim and waive its right to contest charges in an FTC administrative process.²¹⁰ However, when respondent disputes a charge, it may file a complaint with an FTC administrative law judge who will address the matter in a “formal adjudicatory proceeding.”²¹¹ The ALJ may ask the Commission to file the ALJ’s decision in federal district court with a request that the Commission seek an order adopting the ALJ’s recommendations.²¹² Upon a district court doing so, the FTC may enforce the order.²¹³

FCRA enforcement and supervision since 2011

Pursuant to the Consumer Financial Protection Act (CFPA),²¹⁴ Congress in 2011 directed the then-newly formed Consumer Financial Protection Bureau (CFPB) to share principal enforcement jurisdiction with the FTC.²¹⁵ Congress also instructed the FTC and CFPB to share supervision of reporting agencies and other information

furnishers.²¹⁶ Since the creation of the Consumer Financial Protection Bureau,²¹⁷ the FTC,²¹⁸ the CFPB,²¹⁹ and representatives²²⁰ of the states each have been authorized to police FCRA compliance and pursue penalties when the Fair Credit Reporting Act is breached.

FTC rules guide the Commission in its FCRA supervision and enforcement efforts.²²¹ However, the FCRA limits penalties the FTC may pursue when a person violates the statute.²²² The Consumer Financial Protection Act, in contrast, has authorized the CFPB since 2011 to set its own rules regarding FCRA supervision and enforcement,²²³ and to identify penalties it may pursue.²²⁴

FTC and CFPB shared jurisdiction

The FCRA identifies the general parameters of FTC and CFPB enforcement jurisdiction.²²⁵ As part of the 2011 Consumer Financial Protection Act, Congress assigned shared responsibility to the CFPB and FTC to determine whether reporting agencies are using unfair or deceptive practices to diminish rights the FCRA vests in consumers.²²⁶

The CFPB/FTC inter-agency memorandum of understanding

Congress instructed the CFPB and FTC (a/k/a the “Bureau” and the “Commission”) to enter into an agreement coordinating FCRA supervisory and enforcement jurisdiction.²²⁷ This agreement has taken the form of a memorandum of understanding (MOU) in which the agencies outline how they will share supervision and enforce the statute.²²⁸

The CFPB and FTC division of supervisory and enforcement responsibilities

The Comptroller General in a 2019 GAO report observed the FTC typically supervises smaller CRAs and the CFPB the larger ones.²²⁹ The FTC focuses its enforcement efforts on specialty CRAs such as those that conduct background screenings.²³⁰

Policing the credit reporting process is a high FTC enforcement priority. Between 2010 and 2018, the FTC pursued 30 enforcement actions.²³¹ During that same period, the FTC initiated 160 investigations.²³² Almost half the investigations considered whether an information provider engaged in conduct sufficient to lead the Commission to place a consumer reporting agency designation on the information provider.²³³ The Second Circuit decision in *Kidd*²³⁴ and the Ninth Circuit decision in *Zabriskie*²³⁵ could influence when or whether the FTC will award a CRA designation to an information provider.

Pursuant to rules promulgated under the CFPA,²³⁶ the CFPB enforces the FCRA²³⁷ through an administrative adjudicatory process.²³⁸ Administrative law judges conduct hearings and issue decisions that may include recommendations to the CFPB Director.²³⁹ Alternatively, the CFPB may file suit in federal district court²⁴⁰ and pursue fines

“limited to (i) \$10,000 in individual actions and (ii) the lesser of \$500,000 or 1 percent of the creditor’s net worth in class actions . . . equitable and declaratory relief, costs and reasonable attorney’s fees.”²⁴¹

Both the CFPB and persons subject to its administrative processes may seek “equitable and declaratory relief” in federal court.²⁴²

When an employer or other consumer report recipient knowingly commits a wrong that is part of “a pattern or practice of [FCRA] violations,”²⁴³ the FTC may seek a statutory penalty of up to \$3,756 for each willful breach.²⁴⁴

• The constitutional challenge to the structure of the CFPB

On June 29, 2020, the United States Supreme Court in *CFPB v. Seila Law*²⁴⁵ declared the CFPB structure unconstitutional to the extent it prevents the President from removing a principal officer of an executive agency at will. The Supreme Court severed the balance of the Consumer Financial Protection Act from the scope of its ruling and CFPB authority otherwise continues unabated.²⁴⁶

• State enforcement of the FCRA

Each of the 50 states may appoint a chief law enforcement officer or other agent to enforce FCRA compliance.²⁴⁷ Should a state representative conclude a regulated person has breached the FCRA, the statute offers a “piggyback” opportunity for state representatives to enforce the federal credit reporting law on behalf of state residents so long as the representative provides advance notice to the FTC and CFPB together with a copy of the state complaint.²⁴⁸

If a state-designated representative invokes the FCRA, the state may pursue statutory damages in federal district court.²⁴⁹ A requirement to provide advance notice to the supervising agencies offers the FTC and CFPB an opportunity to exercise considerable control over court actions that state agents may commence. The Bureau and Commission may “intervene” and “be heard on all matters arising [from a state proceeding].”²⁵⁰ When a state representative commences suit, the FTC and the CFPB may remove the action to a federal district court venued in another jurisdiction.²⁵¹

The FCRA caps at \$1,000 per willful or negligent breach the statutory damages a state representative may pursue.²⁵² State representatives also may seek injunctive relief and actual damages when noncompliance is willful (15 U.S.C. § 1681n) or negligent (15 U.S.C. § 1681o),²⁵³ together with costs and reasonable attorneys’ fees.²⁵⁴ This grant of authority supplements such other remedies as states may provide to assist their representatives in addressing perceived FCRA violations.²⁵⁵

• NY FCRA enforcement guidance

The New York State Department of Financial Services offers regulatory guidance to employers and to the credit reporting industry.²⁵⁶ The New York State Attorney General, as the state’s chief law enforcement officer, enforces the NY FCRA.²⁵⁷

• Statutory penalties in FCRA-divergent jurisdictions and related preemption risk

FCRA penalties are smaller, by several orders of magnitude, than the maximum penalties New York City authorizes its Human Rights Commission to pursue should it believe an employer has violated the SCDEA.²⁵⁸ Were an employer to challenge this penalty structure, a court could compare top SCDEA penalties with (i) the maximum recoverable pursuant to the FCRA and (ii) nonexistent New York FCRA penalties. If the maximum penalty in an FCRA-divergent jurisdiction is oversized, penalty risk could deter employers from pursuing an exemption. A court for this reason could conclude the penalty structure violates or otherwise interferes with a material purpose or intent of the FCRA or an FCRA-consistent state law. Penalties such as those New York City makes available²⁵⁹ could be ripe for a preemption challenge under the FCRA²⁶⁰ and, with respect to the New York FCRA, under New York State common law preemption doctrine.²⁶¹

Standing to Sue and Private Rights of Action

In regard to a willful²⁶² or negligent²⁶³ reporting agency or employer failure to comply with an FCRA duty, consumers may file a civil action.²⁶⁴ The Eleventh Circuit in *Pedro v. Equifax*²⁶⁵ held that to demonstrate willful CRA failure to comply with a reporting agency’s duty to reasonably assure “maximum possible accuracy” in reporting credit information (*see* 15 U.S.C. 1681e[b]), a plaintiff must show the agency either knowingly or recklessly violated the statute.²⁶⁶ “Recklessness” generally requires “action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known.”²⁶⁷ The New York State credit reporting law provides a consumer right of action in similar circumstances.²⁶⁸

In *Robins v. Spokeo* (“*Spokeo I*”), the United States Supreme Court considered who has standing to sue based on a claimed violation of the FCRA.²⁶⁹ In a 6–2 decision, the Court observed: “injury-in-fact . . . requires a plaintiff to allege injury that is both ‘concrete and particularized’ [citation omitted].” The Supreme Court held the Ninth Circuit overlooked the “concreteness” factor, and remanded for the Circuit Court to consider whether the alleged violation entailed a degree of “risk” sufficient to satisfy the concreteness test.²⁷⁰

The Seventh and Ninth Circuits have taken the lead after *Spokeo I* in explaining when an FCRA injury is sufficient to confer Article III standing to sue an employer. In *Dutta v. State Farm Mut. Auto. Ins. Co.*, the Ninth Circuit held a bare procedural violation does not confer stand-

ing.²⁷¹ The Seventh Circuit in *Robertson v. Allied Solutions, LLC* observed defendant denied information to plaintiff that “could have helped her craft a response to defendant concerns.” The *Robertson* court held plaintiff’s injury was sufficiently concrete to satisfy the *Spokeo* standing test.²⁷²

Defendant in *Robertson* did not make a credit report available to the consumer until defendant already had made an adverse decision. The Seventh Circuit concluded defendant’s delay prevented plaintiff from contesting inaccurately reported information. Unlike *Dutta*, plaintiff in *Robertson* demonstrated a clear nexus between (i) incorrect information, (ii) action by defendant that precluded plaintiff from exercising her statutory right to contest and correct disputed information and, ultimately, (iii) adverse employment action. Also unlike *Dutta*, the *Robertson* defendant failed to articulate a reason that would render remote the argument that defendant in fact did not rely on incorrectly reported information. The court in *Robertson* further observed that the Supreme Court in *Spokeo* considered the relationship between a CRA and a consumer, and not one between an employer and a consumer where statutory duties differ in important respects.²⁷³ The *Robertson* court accordingly held plaintiff had standing to sue. In a recent article appearing in the *ABA Business Lawyer* publication, the authors review several additional decisions that emanate out of the Seventh and Ninth Circuits but address FCRA standing in a post-*Spokeo* context.²⁷⁴

FCRA Claims Against Reporting Agencies and Employers

Courts of Appeal in at least six federal circuits have considered what a consumer must do to demonstrate reporting inaccuracies are sufficient to support a claim of CRA or employer negligence.

Linking CRA or employer action to consumer harm

In the Third and Eleventh Circuits

The Third Circuit in *Cortez v. Trans Union, LLC* proposed considering four elements in determining whether a CRA through negligence failed to meet FCRA accuracy standards.²⁷⁵ In *Long v. Se. Pa. Transp. Authority*, when plaintiffs became aware of their rights, they timely filed claims. The Circuit Court found no injury-in-fact notwithstanding the failure of defendant to provide a summary of plaintiffs’ FCRA rights.²⁷⁶ In *Felts v. Wells Fargo Bank*, the Eleventh Circuit concluded the record lacked facts sufficient to show allegedly missing information “would have changed [plaintiff’s] overall credit picture.”²⁷⁷

In the Fourth and Eighth Circuits

To determine whether a consumer has stated a claim against a CRA, courts in the Fourth²⁷⁸ and Eighth Circuits²⁷⁹ have addressed the issue in the context of standing and injury-in-fact.

In the Ninth Circuit

A Ninth Circuit panel in *Shaw v. Experian Information Solutions, Inc.* affirmed the Circuit standard requiring complainant to demonstrate a CRA report is “‘misleading in such a way and to such an extent that it [could] be expected to adversely affect credit decisions.’ [internal citations omitted].”²⁸⁰

In *Dutta v. State Farm Mut. Auto. Ins. Co.*, a different Ninth Circuit panel observed defendant employer failed to provide notice and an opportunity for the applicant to address alleged inaccuracies in a credit report.²⁸¹ Nonetheless, the court in *Dutta* held the applicant failed to show injury flowing from inaccuracies regarding several dates and events noted in the report. Based on an internal State Farm policy requiring sales personnel to have a clean credit record to perform their duties, the panel concluded defendant demonstrated it would have denied employment in any event.²⁸²

Plaintiff in *Dutta* argued he suffered adverse action because the CRA’s report included inaccuracies upon which State Farm *could have* relied in denying employment. Although defendant breached its statutory duty to provide advance adverse action notice and an opportunity for plaintiff to correct misinformation,²⁸³ the Court concluded State Farm did not in fact rely upon any inaccurately reported information. Accordingly, the Court held defendant’s denial of employment did not give *Dutta* standing to sue.²⁸⁴

• The practical impact of *Dutta* on financial product employers in the Ninth Circuit

Financial product employers in the Ninth Circuit after *Dutta* may attempt to require sales position candidates to demonstrate they have a clean credit record before extending an employment offer. FCRA-divergent jurisdictions within the Ninth Circuit in response could take a page from “ban-the-box” legislation²⁸⁵ and enact laws precluding employers from demanding a clean credit demonstration until an employer has extended a job offer. Were a state or local government to enact such legislation, a candidate could argue that before an employer may obtain a consumer credit report, the employer should be required to show clean credit is an essential component of the position.²⁸⁶

Venue and Limitation Periods

Without regard to amount in controversy, an aggrieved consumer may file an FCRA claim in a United States District Court²⁸⁷ or any other court of competent jurisdiction.²⁸⁸ Consumers must do so within the sooner of two years of discovering a violation and five years of the date on which a violation occurs.²⁸⁹

New York permits employers and others, within two years of a claimed New York FCRA violation, to file a civil action in “any court of competent jurisdiction.”²⁹⁰ New

York consumers may also bring suit within two years of discovering a material, willful misrepresentation of New York FCRA-mandated disclosure.²⁹¹

Class Actions

Damages attributable to CRA or employer action often are nominal and rarely motivate individual consumers to seek redress. To enhance employer exposure, a consumer on behalf of a class may plead defendant breached an FCRA obligation.²⁹² Litigation in the wake of a major 2017 Equifax data breach²⁹³ suggests security breaches will be an ongoing focus of FCRA class actions.²⁹⁴

Statutory Breaches and Their Consequences

The United States Supreme Court in *Safeco v. Burr*²⁹⁵ considered what constitutes a willful FCRA breach.²⁹⁶ Citing *Safeco*, the Ninth Circuit in *Syed v. MI, LLC*²⁹⁷ held a willful FCRA breach includes actions taken in reckless disregard of a statutory duty as well as actions known to violate the statute.²⁹⁸ In the face of a negligent or willful breach, the FCRA permits consumers to pursue actual damages and “reasonable” attorneys’ fees.²⁹⁹

The Ninth Circuit observed the FCRA permits an “actual damages” recovery for emotional distress and humiliation.³⁰⁰ In the case of willful breach, a consumer may also pursue punitive damages.³⁰¹

New York consumers who have standing may sue a CRA or report recipient for willful or negligent non-compliance with the New York FCRA³⁰² and seek actual damages, together with costs and reasonable attorneys’ fees.³⁰³ If noncompliance is willful, the consumer also may pursue punitive damages.³⁰⁴

The Need for Nationwide Reporting Agencies To Assure Accuracy of Consumer Information and To Enhance Security of Consumer Data

The federal and New York State credit reporting laws direct reporting agencies to maintain accurate consumer information in confidence.³⁰⁵ The nationwide CRAs have exhibited a poor track record in this regard. The press has widely reported security breaches and incursions into the files of the nationwide credit bureaus. Such breaches have had a dramatic public impact and have led to legislative and administrative reforms. The three national bureaus reached a settlement in 2015 with the attorneys general of 31 states. The settlement required the bureaus to improve how they achieve information accuracy and maintain data security.³⁰⁶

• The 2015 attorneys general settlement requiring nationwide CRAs to correct several categories of data errors

A multi-state 2015 attorneys general settlement required TransUnion, Equifax, and Experian to ad-

dress data errors regarding civil judgments and tax liens reflected in their consumer credit reports.³⁰⁷ Growing out of a lengthy investigation, the settlement permitted the bureaus to phase in required changes.³⁰⁸

As part of a joint National Consumer Assistance Plan, the three nationwide bureaus have implemented changes in the way they collect and retain consumer records.³⁰⁹ Equifax, Experian, and TransUnion³¹⁰ update a consumer’s public record information at least once every 90 days.³¹¹ Effective July 1, 2017, the three nationwide agencies adopted strict rules governing collection and retention of such records.³¹² These rules supplement an existing statutory duty requiring nationwide agencies (and other CRAs) to follow “strict procedures” when supplying public record information, and to assure information is accurate and up-to-date.³¹³ One commentator estimated that when the nationwide bureaus remove from their records all civil judgments and tax liens not conforming to the settlement, affected consumers (around 7% of 220 million reporting individuals in the United States) would likely see their credit scores increase by approximately 20 points.³¹⁴ Since September 2017, the nationwide agencies have also purged certain medical debt collection accounts from their files.³¹⁵

As part of a separate agreement with the Attorney General of New York,³¹⁶ the three nationwide agencies now require information furnishers to undertake action to combat a flaw in the consumer reporting process known as “false flagging.”³¹⁷ False flagging, or false matches, present recurring problems for reporting agencies.³¹⁸ Court records showing a judgment against “Joe Smith,” for example, easily could wind up on the wrong Joe Smith’s credit report.³¹⁹ Similar errors led a California jury in *Ramirez v. TransUnion LLC*, to award \$60 million to a consumer group that proved TransUnion “falsely flagged some of [the consumers] as terrorists and drug traffickers because [TransUnion] had mistaken them for others with similar names.”³²⁰

A Ninth Circuit panel in *Ramirez* in a 2-1 decision upheld the jury verdict and concluded that all F.R. Civ. P. Rule 23 class members must have Article III standing at final judgment to recover monetary damages.³²¹ The court determined that all such class members had class standing in fact.³²² The United States Supreme Court on December 16, 2020 granted a petition for certiorari to determine whether Rule 23 permits a damages class action when most class members have not suffered actual injury.³²³ The Court heard oral argument on March 30, 2021.³²⁴

To address false flagging, the major bureaus now strictly enforce rules regarding collection and maintenance of public records. The three principal bureaus have agreed their reports will include the full name, address, birthdate, and Social Security number of any consumer who is the subject of public record information.³²⁵ As noted above, consumers have a right to direct CRAs not



to disclose the first five digits of their Social Security numbers (or similar identification codes).³²⁶ An anomaly arises because the Summary of Rights form does not advise employees and applicants of their statutory right to demand that the first five digits of their social security numbers not appear in CRA reports.³²⁷

• Breaches of consumer data security

Federal and state laws and regulations require CRAs to safeguard the privacy of credit data and other confidential information relating to employees and other consumers.³²⁸ Nonetheless, the nationwide bureaus have experienced extraordinary security breaches³²⁹ and such incursions have led to problems of national if not international dimension.

The 2017 Equifax security breach

A major 2017 cyberattack on the Equifax credit reporting bureau resulted in the theft of immense amounts of confidential consumer data. Hackers accessed sensitive and potentially compromising information, including Social Security numbers and drivers' license information initially thought to belong to 143 million American consumers.³³⁰ A *New York Times* article described the attack as "one of the largest risks to personally sensitive information in recent years" and "the third major cybersecurity threat for the agency since 2015."³³¹ In a March 1, 2018 website post, Equifax revealed the 2017 theft also captured names and partial driver's license information of an additional 2.4 million consumers.³³²

Cybersecurity breaches that the nationwide bureaus have experienced, and material inaccuracies in databases they maintain, illustrate there is vast room to improve

how the bureaus assure only accurate information appears in a consumer's file, how they protect consumer data from improper access, and how they provide notice when confidential data has been compromised.

SEC and U.S. Attorney action against the former Equifax Chief Information Officer

The Securities and Exchange Commission on March 14, 2018 filed a civil complaint against the former Chief Information Officer of the Equifax Consumer Reporting Division for the United States.³³³ The SEC complaint charged the officer with selling company stock after learning of the data breach, but before Equifax issued a public report. The director of the SEC Atlanta office stated, "Corporate insiders who learn inside information, including information about material cyber intrusions, cannot betray shareholders for their own financial benefit."³³⁴

The United States attorney's office in Atlanta that same day announced it was filing parallel criminal charges against the company officer.³³⁵ The officer subsequently pled guilty, was sentenced to a prison term, and required to make restitution.³³⁶

Government investigations into and class action lawsuits against Equifax

The federal government and numerous states conducted a joint investigation following the 2017 Equifax debacle. In response to these efforts and class litigation, Equifax reached a global settlement in July 2019.³³⁷ Pursuant to the settlement, Equifax agreed to pay at least "\$380.5 million earmarked for class benefits fees, expenses, and service awards, as well as notice and administrative costs."³³⁸ Equifax also pledged to fund (i) up to

an additional \$125 million “if needed,” to satisfy claims for out-of-pocket losses consumers sustained in defending against “identity theft,” and (ii) \$1 billion “over five years upgrading the Company’s data security and related technology.”³³⁹ There is no reported overall cap on the settlement.³⁴⁰

The initial New York State response to the Equifax data breach

The New York State Attorney General in 2017 called for Equifax to produce a summary of Equifax’s plan to make the roughly 8.4 million New Yorkers “whole in the wake of the breach,” as well as a list of federal law enforcement agencies engaged in investigating the breach.³⁴¹

In 2018, the New York Secretary of State directed Equifax to provide “New York-specific data about consumers whose credit-card information or personally identifying information was exposed, and the number of children under the age of 16 who were affected by the breach.”³⁴²

In doing so, the Secretary of State requested “a detailed description of Equifax’s core consumers or commercial credit reporting databases and how they differ from the databases that were exposed in the July 29, 2017 breach.”³⁴³

In a May 7, 2020 email received from the Office of the New York Secretary of State, the Secretary confirmed Equifax responded to the Secretary’s inquiry. However, the Secretary’s Office advises New York settled and resolved its concerns, closed its investigation, and is keeping the Equifax response confidential.³⁴⁴

The ongoing New York State response to breaches of CRA data security

New York in 2018 and 2019 enacted a series of administrative and legislative measures requiring reporting agencies to enhance how they protect consumer data confidentiality.

• The response of the New York State Department of Financial Services

The New York Department of Financial Services (DFS) in June 2018 adopted a Consumer Credit Reporting Agencies Rule (“DFS Rule”) establishing registration, oversight, and substantive requirements applicable to any consumer credit reporting agency that “has assembled, evaluated, or maintained” reports on 1,000 or more New York consumers in the preceding year (each an Active CCRA).³⁴⁵

The DFS Rule addresses shortcomings in the way Active CCRAs safeguard and maintain consumer credit data confidentiality and explains how the DFS Superintendent will investigate consumer complaints alleging an Active CCRA has produced an inaccurate report.³⁴⁶

As a condition of becoming and remaining DFS-registered, Active CCRAs must complete an annual registration form.³⁴⁷ Absent registration, they may not prepare credit reports relating to a New York consumer.³⁴⁸ No person in New York may acquire a credit report from an unregistered Active CCRA. Nor may any person, absent registration, furnish information regarding a New York resident to a consumer reporting agency.³⁴⁹ Registered Active CCRAs may not engage in practices such as defrauding or misleading consumers, engaging in unfair, deceptive, or predatory acts, or failing to comply with federal law provisions requiring accurate reporting of consumer information.³⁵⁰

The DFS Superintendent may examine registered Active CCRAs “as often as the Superintendent may deem necessary.”³⁵¹ CCRAs in turn must report to the Superintendent, in quarterly or other statements, and provide such information as the Superintendent may request. The DFS Rule also requires CCRAs to document programs developed to comply with the NY FCRA.³⁵²

DFS-registered Active CCRAs must design a cybersecurity program intended to “protect the confidentiality, integrity and availability” of consumer databases.³⁵³ Subject to Superintendent review, the DFS Rule also mandates that each CCRA create and administer a cybersecurity program based on an individualized risk assessment “designed to protect the confidentiality, integrity and availability” of CCRA internal data.³⁵⁴

• The New York State legislative response

New York in July 2019 enacted a law requiring persons to provide enhanced consumer data security.³⁵⁵ The Stop Hacks and Improve Electronic Data Security Act (SHIELD) imposes breach notification and security duties on consumer reporting agencies, employers, and any other “person or business” that sends or receives consumer data.³⁵⁶ When a CRA experiences a data breach, the NYS Identity Theft Prevention and Mitigating Services Act requires the CRA to provide identity theft prevention, mitigation services, and free credit freezes to all affected consumers.³⁵⁷

• Addressing data security on a national and global level

FCRA security freezes and fraud alerts

On May 24, 2018, the president signed into law the Economic Growth, Regulatory Relief and Consumer Protection Act (EGA; also known as the “Economic Growth Act”).³⁵⁸ The EGA, among other things, provides a degree of cybersecurity relief that could benefit consumers. At Section 301(a), the EGA amends the Fair Credit Reporting Act to require that, upon receiving a consumer request, the nationwide agencies place a free security freeze on the consumer’s credit history and personal information.³⁵⁹

When a financing source considers loaning money to a consumer, it typically will obtain a report on the borrower's credit. Before lenders may obtain such a report, CRAs may be required to put a security freeze into place³⁶⁰ precluding issuance of further reports regarding the prospective borrower.³⁶¹ A consumer may require a credit freeze at any time, even if not related to a report request (whether the request is made by a lender or otherwise).³⁶² A security freeze should preclude others from accessing a consumer's credit information. A freeze also should prevent persons other than an intended lender from opening a line of credit in a consumer's name.

Should a reporting agency fail to implement a security freeze when asked to do so, the agency may be subject to penalties for willful or negligent noncompliance with the FCRA.³⁶³ The EGA also increases from 90 days to one year the period during which, upon request, a consumer's credit file must display a fraud alert.³⁶⁴

The 2019 Comptroller General Report

Pursuant to the Economic Growth Act, the federal government directed the Comptroller General to review legal and regulatory structures surrounding the activity of consumer reporting agencies, and to analyze gaps in those structures.³⁶⁵ The EGA also directed the Comptroller General to comment on rulemaking as well as reporting agency enforcement and supervision under the "the Fair Credit Reporting Act, the Gramm-Leach-Bliley Act, and any other relevant statutes."³⁶⁶

The EGA expressly directs the Comptroller General to address (i) dispute processes relating to consumer reports, (ii) data furnisher responsibility to provide accurate information, (iii) data security relating to CRAs, (iv) those who may access and use consumer credit data, and (v) ownership and control of such data.³⁶⁷ The EGA also directed the Comptroller General to recommend how to improve the consumer reporting system.³⁶⁸

On July 16, 2019, on behalf of the General Accounting Office, the Comptroller General submitted a final report to Congress ("GAO Report").³⁶⁹ The GAO noted CFPB's failure to communicate Bureau expectations to reporting agencies it supervised, even though the CFPB brought enforcement actions against those very same agencies.³⁷⁰

The Comptroller General report also reviewed the regulatory framework surrounding reporting agency operations, and recommended the CFPB communicate Bureau expectations regarding how CRAs should implement "FCRA reasonable procedures" to assure "maximum possible accuracy of consumer report information" as well as how agencies should conduct "reasonable" investigations of consumer disputes.³⁷¹

Consumer data security breaches: a global response

When state actors place their resources behind cyberattacks, it is not astonishing that employees and others

will suffer from data breaches. If economic cyberwarfare presents an existential 21st-century threat, then cybersecurity presents the existential problem.

The nationwide bureaus on multiple occasions have failed to carry out in full their statutory mandate to maintain in confidence the data of employees and other consumers. Such failures highlight a need for stronger reporting agency oversight. Amendments and rules the federal government as well as New York State, California, and other jurisdictions added in 2018 and 2019 reflect meaningful steps. However, unless the nationwide bureaus in particular materially enhance how they protect consumer data confidentiality, the United States may take a cue from a regulation the European Union adopted in 2016.³⁷²

The General Data Protection Regulation (GDPR) permits each E.U. member country to impose separate fines should it identify a proven data security breach.³⁷³ More specifically, regulators "in each European Union country" may issue fines of up to 4 percent of a company's global revenue for a breach" (emphasis added).³⁷⁴

During the summer of 2018, poor security at British Airways (BA) permitted hackers to divert 500,000 customers who visited the BA website and send those customers to:

a fraudulent site, where names, addresses, login information, payment card details, travel bookings and other data were taken, according to the Information Commissioner's Office, the British agency in charge of reviewing breaches.³⁷⁵

The Office of the Information Commissioner in the UK (ICO), on July 8, 2019, recited an intent to order British Airways to pay a fine of nearly \$230 million (183m)—a sum equal to 1.5 percent of the airline's annual global revenue.³⁷⁶ United States regulators, in absolute terms, have imposed even larger fines. However, if calculated on an annual revenue basis, fines that may be imposed pursuant to the FCRA do not in percentage terms necessarily approach fines E.U. countries have a right to pursue under the GDPR.³⁷⁷

CFPB rules permit the bureau, in a class action context, to pursue a fine based upon a percentage of a violator's net worth (capped at a maximum of \$500,000).³⁷⁸ It remains to be seen whether Congress will develop a E.U.-style law or permit a rule allowing FCRA regulators to seek an uncapped fine based on a percentage of a violator's annual global revenues.

Conclusion and Look to the Future

• Preemption risk

Various state and local laws supplement FCRA regulation of employer credit report use. Provided those laws

do not unduly expand or contradict the federal statute, they may be deemed FCRA-consistent. Other laws diverging from the FCRA, or an FCRA-consistent state law, may deprive employers of a material right. Such inconsistencies carry a risk that a court could conclude the federal statute (or an FCRA-consistent state law) preempts divergent provisions of state or local law to the extent the inconsistencies violate provisions of a senior law.³⁷⁹ Illustrating this risk, the New York City Credit Check Law contradicts the right of an employer in New York State not to hire an applicant who refuses to authorize an investigative consumer report.³⁸⁰

In a following article, we will review federal and New York State preemption doctrine and analyze FCRA-inconsistent laws restricting employer use of consumer credit reports. Several FCRA-divergent jurisdictions make penalties available when an employer violates their laws. Should a state or local government authorize an oversized penalty,³⁸¹ the penalty risk—without more—could deter employers from pursuing a statutory exemption and trigger a finding of material inconsistency with the senior law.³⁸² The extent to which FCRA-divergent state and local laws do or do not make exemptions available may contribute to a determination whether those laws effectively skirt preemption risk.

• Empirical studies examining whether FCRA-inconsistent state laws correlate with employment opportunity

In a later article we will offer a case study based on the highly FCRA-divergent New York City Credit Check Law. That article also will review in depth the four empirical studies identified above.³⁸³ Teams of research economists in those studies tested assumptions driving a state and municipal trend to ban or materially restrict employer credit report use. Three of the research teams, analyzing large panels of employment-related data, arrived at unexpected findings.³⁸⁴ Among other noteworthy conclusions, several of the studies find that credit-impaired African Americans (who are protected against discrimination under federal, state, and local anti-discrimination laws) experience a diminished or relatively reduced share of employment opportunity in comparison to whites when a state enacts a law materially inconsistent with the FCRA.³⁸⁵

The authors of a fourth study³⁸⁶ considered the impact credit reporting bans may have on members of an unemployed cohort of consumers who recently experienced difficulty meeting their expenses.³⁸⁷ The authors of the study found laws that ban employer credit report use to evaluate an individual's suitability for employment correlate with a significant increase in job opportunities for such consumers.³⁸⁸ However, the fourth research team noted its data sample is not large enough to conduct meaningful sub-group analysis by race.

Federal, state, and local legislators should review the four empirical studies and their findings before deciding whether to enact FCRA-inconsistent laws or expand existing laws that restrict employer credit report use.

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Endnotes

1. See Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681 *et seq.*
2. Thirteen states currently have credit reporting laws substantially consistent with, or not materially inconsistent with, the FCRA: **Arizona**, Ariz. Rev. Stat. § 44-1691 (1970); **Kansas**, Kan. Stat. Ann. § 50-701 (1973); **Louisiana**, La. Rev. Stat. Ann. § 9:3571 (1970); **Maine**, Me. Rev. Stat. tit. 10, § 1306 *et seq.* (2013); **Massachusetts**, Mass. Ann. Laws ch. 93, § 54A (1995); **Minnesota**, Minn. Stat. Ann. § 332.52 (2001); **Montana**, Mont. Code Ann. § 30-14-1728 (2007); **New Hampshire**, N.H. Rev. Stat. Ann. § 359-B:1 (1971); **New Jersey**, N.J. Stat. § 56:11 29 (1997); **New Mexico**, N.M. Stat. Ann. § 56-3A-1 (2007); **New York**, N.Y. Gen. Bus. Law § 380-a (1977); **Oklahoma**, 24 O.K. Stat. § 24-148 (2000); and **Rhode Island**, R.I. Gen. Laws Section § 6-48-1 (2006).
3. Eighteen jurisdictions have enacted laws restricting employer use of consumer credit reports. Those jurisdictions, in sequence of enactment, are: **Washington**, Wash. Rev. Code Ann. § 19.182 *et seq.* (2007); **Hawaii**, Haw. Rev. Stat. §§ 378 *et seq.* (2009); **Oregon**, Or. Rev. Stat. Ann. § 659A.320 (2010); **Madison, Wisconsin**, Madison Gen. Ord. 39.03 (2010); **California**, Cal. Lab. Code § 1024.5 (2011); **Connecticut**, Conn. Gen. Stat. Ann. § 31-51tt (2011); **Illinois**, 820 Ill. Comp. Stat. Ann. 70 *et seq.* (2011); **Chicago, Illinois**, Chicago, Ill. Municipal Code, § 2-160-053 (2012); **Maryland**, Md. Lab. & Empl. § 3711 (2012); **Vermont**, Vt. Stat. Ann. 21 § 495i (2012); **Colorado**, Colo. Rev. Stat. § 8-2-126 (2013); **Nevada**, Nev. Rev. Stat. § 613.520 *et seq.* (2013); **Delaware**, 19 Del. C. § 711(g) (2014); **Cook County, Illinois**, Cook County, Ill. Code of Ordinances § 42-35 (2015); **New York City, New York**, N.Y.C. Admin. Code §§ 8-102(29), 8-107(9) (d), (24) (2015); **New Orleans, Louisiana**, New Orleans, La. Code of Ordinances §§ 70-504 *et seq.* (2016; amended 2021); **Philadelphia, Pennsylvania**, Philadelphia, Pa. Code 9-1130 (2016; amended 2021); and **District of Columbia**, Fair Credit in Employment Amendment Act of 2016, D.C. Act 21-673 (2017).
4. See, e.g., Nev. Rev. Stat. § 613.570(1) (subject to exceptions, employers in Nevada generally may not condition employment on the contents of a credit report or other credit information).
5. See, e.g., N.Y.C. Admin. Code §§ 8-102(29). See notes 45-47, 56, and associated text for definition of "consumer report," "consumer reporting agency" and, in New York, "consumer credit reporting agency."

6. See, e.g., *Report of the Governmental Affairs Division*, New York City Council, Committee on Civil Rights, Int. No. 261 A (April 14, 2015) (“NYC Council Committee Report”) at 5-6.
7. See notes 40-44 for the Congressional purpose of the FCRA, and n.52 for the purpose of the NY FCRA; but see New York City Human Rights Commission Legal Enforcement Guidance (“NYC Guidance”; available at <https://www1.nyc.gov/assets/cchr/downloads/pdf/CreditHistory-InterpretiveGuide-LegalGuidance.pdf>) stating consumer credit reports are inherently flawed and businesses typically do not need credit information regarding current or prospective employees. NYC Guidance, pp. 1-2 (2015).
8. See H. Rept. 116-305 at 1.
9. See 116 H.R. 3614 (2020).
10. *Id.*
11. See, e.g., H. Rept. 116-305 at 2-3 (majority); 3-5 (minority); see also Sponsor Memo to New York Senate Bill S2884E, Cal. No. 116, citing a Federal Trade Commission Interim Report to Congress on Credit Report Accuracy, December 2012, at i.
12. See *infra* H.R. 116-305 at 2; see also Sponsor Memo to New York Senate Bill S2884E, Cal. No. 116 at 1.
13. See n. 2, *supra*.
14. New York General Business Law (NY GBL) at §§ 380 *et seq.* codifies the NY FCRA. Other than the NY FCRA, and the extent to which the NY FCRA may serve as a proxy, FCRA-consistent state laws are beyond the scope of this article.
15. See, e.g., NY Senate Bill S2884E, dated January 30, 2019, sponsored by State Senator James Sanders, Jr., and currently on the floor calendar. The Senate gave the bill a Third Reading on March 11, 2020. The next step—a vote by the full Senate—has not been scheduled as of March 14, 2021. A separate New York State Assembly bill would “prohibit[] the disclosure or use of consumer credit history in hiring, employment and licensing determinations.” That bill passed the Assembly as of July 20, 2020 and was delivered to the Senate. See 2019 NY Assembly Bill A2611E.

Were the New York Legislature to pass one of the amendments and were the Governor to sign the bill, New York would join 18 FCRA-divergent jurisdictions (see n.3, *supra*) and New York State would become perhaps the most restrictive of these jurisdictions.
16. See N.Y.C. Admin. Code §§ 8-102(29).
17. See NYC Guidance; see also Notice of Adoption of Amended HRC Rules, which may be obtained at: <http://www1.nyc.gov/assets/cchr/downloads/pdf/Final%20Rules%20Implementing%20the%20Stop%20Credit%20Discrimination%20in%20Employment%20Act%20.pdf>.
18. *Id.*
19. See:
 - (i) Kristle Cortés, Andrew Glover, and Murat Tasci, *The Unintended Consequences of Employer Credit Check Bans for Labor Markets*, Federal Reserve Bank of Kansas City RWP 20-04 (July 2020). Available at https://www.kansascityfed.org/~/_media/files/publicat/reswkpap/pdf/rwp20-04.pdf;
 - (ii) Joshua Ballance, Robert Clifford, and Daniel Shoag, “No more credit score” – *Employer credit check bans and signal substitution*, *Labour Economics*, Elsevier, vol. 63 (April 2020). The authors report the article also is available at <http://www.bostonfed.org/economic/wp/index.htm>; and
 - (iii) Alexander W. Bartik and Scott T. Nelson, *Deleting a Signal: Evidence from Pre-Employment Credit Checks* (December 2019). Available at https://bf.uchicago.edu/wp-content/uploads/BFI_WP_2019137.pdf.
20. *Id.*
21. *Id.*
22. See Leora Friedberg, Richard M. Hynes, and Nathaniel Pattison, *Who Benefits from Bans on Employer Credit Checks?* (July 2019; hereinafter, “*Who Benefits?*”) https://pattison-nate.github.io/files/CreditReportBans_07262019.pdf.
23. *Id.* at 5.
24. See U.S. Gov’t Accountability Office, GAO-19-459, *Consumer Reporting Agencies: CFPB Should Define Its Supervisory Expectations* 14 (July 16, 2019) [hereinafter, “*GAO Report*”].
25. See 15 U.S.C. § 1681e(a)-(b) (reciting CRA confidentiality and accuracy requirements); see also NY GBL 380-k and 380-b.
26. See 15 U.S.C. § 1681k(a)(2) and discussion *infra* at n. 198 and associated article text; see also NY GBL § 380g.
27. The FCRA defines “nationwide consumer reporting agency” at 15 U.S.C. § 1681a(p). The nationwide bureaus are Equifax, Experian and TransUnion. See Consumer Financial Protection Bureau, List of Consumer Reporting Companies (2019), available at https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-companies-list.pdf. See *infra* at n. 47 and associated article text for the FCRA definition of consumer reporting agency.
28. See, e.g., *infra*, 332-52 and associated text.
29. See, e.g., *infra*, 323-31 and associated text.
30. Former President Trump on May 24, 2018 signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGA). The EGA includes provisions intended to improve consumer access to credit. Pub. L. No. 115-174, 132 Stat. 1296 (2018), <https://www.congress.gov/115/bills/s2155/BILLS-115s2155enr.pdf>.
31. See *infra* 340-52.
32. California Consumer Privacy Act of 2018 (CCPA) (CA A.B. 375) (2018 Cal. Legis. Serv. Ch. 55 [A.B. 375] [West]), as amended by CA S.B. 1121 (2018 Cal. Legis. Serv. Ch. 735 [S.B. 1121] [West]) (Sept. 23, 2018).
33. See, e.g., Andrew Soukup, David A. Stein, and Lucille C. Bartholomew, *Fair Credit Reporting Act and Financial Privacy Update—2018*, 74 *Bus. Law.* 495 (2019).
34. See Privacy Rights Act of 2020 (CPRA), (CA A.B. 383) §§ 999.300 *et seq.*
35. The FCRA specifically preempts certain subjects (see 15 U.S.C. § 1681t[b]-[d]) and offers express but limited statutory preemption in a savings clause. See 15 U.S.C. § 1681t(a). New York State applies a common law doctrine of preemption. Although not arising in an FCRA or NY FCRA context, cases addressing federal and New York State preemption apply a materiality standard to determine whether inconsistencies could or should lead to preemption. See, e.g., *Hillsborough County, Florida v. Auto. Med. Labs.*, 471 U.S. 707, 714-15 (1985); see also *Garcia v. N.Y.C. Dep’t of Health & Mental Hygiene*, 31 N.Y.3d 601, 618, 81 N.Y.S.3d 827, 840 (2018); *Wholesale Laundry Board of Trade, Inc., et al. v. City of New York*, 17 A.D. 2d 327, 329, 234 N.Y.S.2d 862, 864-65 (1st Dep’t 1962), *aff’d*, 12 N.Y.2d 998 (1963). An article to follow will address potential preemption risk in FCRA-divergent state and local laws.
36. NYC offers particularly constrained private-sector exemptions. See N.Y.C. Admin. Code §§ 8-102(29), 8-107(9)(d), (24). Several FCRA-inconsistent state laws provide comparatively generous exemptions (or are fairly mild in overall restrictions). See, e.g., 820 Ill. Comp. Stat. Ann. 70 *et seq.* (2011).
37. See 19 and 22, *supra*.
38. *Id.*
39. The FCRA permits employers to obtain and use consumer credit reports after providing proper notice and securing consumer authorization. See 15 U.S.C. §1681b(b)(2)(a); see also 15 U.S.C. § 1681b(a)(3)(B).

New York State requires persons to (i) inform consumers they may seek a consumer credit report and (ii) provide the name and address of the reporting agency that will furnish a copy of the report upon

- request made either in writing or, for employment purposes, in the same manner as the employment application has been made. *See* NY GBL § 380-b(b).
40. 116 Cong. Record 36,572 (1970).
The United States Senate proposed the Consumer Credit Protection Act Title VI in part “to prevent an undue invasion of the individual’s right of privacy in the collection and dissemination of credit information.” *See* S. Rep. No. 517, 91st Cong., 1st Sess. 1 (1969).
41. Pub. L. No. 21-508, tit. VI, 84 Stat. 1114, 1127-36 (1970) (codified, as amended, at 15 U.S.C. §§ 1681-1681x [2018]).
42. In balancing business need and consumer protection, the 1970 House Conference Report stated:
The purpose of the fair credit reporting bill is to protect consumers from inaccurate or arbitrary information in a consumer report, which is used as a factor in determining an individual’s eligibility for employment.
The new title attempts to balance the need by those who extend . . . employment to know the facts necessary to make a sound decision, and the consumer’s right to know of adverse information being disseminated about him, and the right to correct any erroneous information so disseminated.
116 Cong. Record 36,572 (1970). *See* 15 U.S.C. §§ 1681g, 1681h, and 1681i, and discussion of consumer data confidentiality in 15 U.S.C. 1681g(b).
43. *Id.*
44. 15 U.S.C. § 1681(b)(a); *see also* NY GBL 380-b(a)(3) (“any consumer reporting agency may furnish a consumer report . . . [t]o a person which it has reason to believe . . . intends to use the information for employment purposes”).
45. 15 U.S.C. § 1681(d)(1). New York State has adopted a “consumer report” definition substantially similar to that in the FCRA. *See* NY GBL § 380(c)(1).
46. The FCRA defines “person” to encompass any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity. 15 U.S.C. § 1681a(b).
Although the definition of “person” is sufficiently broad to cover virtually anyone, the FCRA affords consumer reporting agencies their own definition. Accordingly, and depending upon context, “person” as defined in the Fair Credit Reporting Act will not necessarily extend to CRAs when specific duties are assigned to non-CRAs.
47. 15 U.S.C. § 1681a(f). The New York State definition of “consumer reporting agency” is similar to that in the FCRA. *See* NY GBL § 380-a(e).
48. *See, e.g.*, 15 U.S.C. §§ 1681b(b) and 1681e.
49. *See, e.g.*, NY GBL §§ 380-b(b).
50. *See, e.g.*, Philadelphia Fair Practices Ordinance § 91130.
51. 15 U.S.C. § 1681(b).
52. *See* L.1977, c. 867 § 1(e), eff. Jan. 1, 1978:
It is the purpose of this [New York state credit reporting] act . . . to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit . . . and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy and proper utilization of such information in accordance with the requirements of this act.
53. *See* Pub. L. No. 115-174, 132 Stat. 1296 (2018). We cite the public law version of the EGA to show how the EGA amends the FCRA to strengthen private consumer data protection. This addition to the FCRA permits consumers, free of charge, to freeze third-party access to their credit information for any reason. Additionally, reporting agencies must notify the consumer in writing prior to removing a security freeze. *Id.*
See also NY GBL 380-t(n) (requiring CRAs to have reasonable procedures in place to prevent consumer identity theft) and NY GBL § 899-aa (identifying specific categories of consumer information protected under the New York consumer privacy laws). An in-depth discussion of federal and New York State data security legislation appears *infra* at notes 350-59 and associated text. A review of the 2017 Equifax data breach and its consequences appears *infra* at notes 322-52 and associated text.
54. *See, e.g.*, 15 U.S.C. § 1681e and NY GBL § 380-k.
55. *See n. 2, supra.*
56. 15 U.S.C. § 1681a(f).
The NY FCRA, unlike the federal credit reporting law, identifies a separate category in which a CRA is designated a consumer *credit* reporting agency (CCRA). New York applies the designation based on the type of reports an organization provides and the frequency with which it does so. Accordingly, New York defines CCRA as:
a consumer reporting agency that regularly engages in the practice of assembling or evaluating and maintaining, for the purpose of furnishing consumer *credit reports* to third parties bearing on a consumer’s *credit worthiness, credit standing, or credit capacity, public record information and credit account information from persons who furnish that information regularly and in the ordinary course of business.*
NY GBL § 380-a(k) (emphasis added). The italicized text does not appear in the more basic New York State definition of “consumer reporting agency.” *See* NY GBL § 380-a(e).
Pursuant to N.Y. Fin. Serv. § 301(c), the New York State Department of Financial Services (DFS) has promulgated its own regulations applicable to CRAs and CCRAs. However, terms defined in the DFS rules and regulations are the same as those appearing in the NY FCRA. *See* N.Y. Comp. Codes R. & Regs. tit. 23, § 201.01(d) (2018). Unless context otherwise requires, this article refers to CRAs and CCRAs collectively as CRAs.
57. *Kidd v. Thomson Reuters Corp.*, 925 F.3d 99 (2d Cir. 2019). *See* Martin Flumenbaum and Brad Karp, *Court Defines ‘Consumer Reporting Agency’ Under the FCRA*, N.Y. Law J., June 25, 2019. Available at <https://www.law.com/newyorklawjournal/2019/06/25/court-defines-consumer-reporting-agency-under-the-fcra/?sreturn=20200620221132>.
58. *Id.* at 103.
59. *Kidd*, 925 F.3d at 101.
60. The FCRA more specifically identifies consumer report content as:
information] used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for—(A) credit or insurance to be used primarily for personal, family or household purposes; (B) employment purposes; or (C) any other purpose authorized under section 1681b of this title. 15 U.S.C. § 1681(a) (d)(1); *see Kidd*, 925 F.3d at 104.
61. *See Kidd*, 925 F.3d at 105.
62. *Id.* at 102.
63. *See Kidd*, 925 F.3d at 105.
64. *Id.* at 102.
65. *Id.* at 105.
66. *Id.* at 105-07. The Second Circuit in *Kidd* stated:
An entity may not escape regulation as a “consumer reporting agency” by merely disclaiming an intent to furnish “consumer reports.” *For the purposes of the FCRA, indeed for any scienter determination, the totality*

of a defendant's actions is the determining factor, not the defendant's mere disclaimer of the requisite intent.

. . . For example, if the issuer of such reports were aware of the substantial use of the information it supplied as "consumer reports" and did not take adequate measures to stop such use, or did not adequately monitor the actual uses of its information, a fact finder could infer the requisite intent to satisfy the definition of "consumer reporting agency."

Id. at 107. (Emphasis added).

The FCRA imposes separate duties on non-CRA information providers. *See, e.g.*, 15 U.S.C. § 1681m(b)(2) (addressing non-CRA information provider disclosure obligations).

67. *Zabriskie v. Fannie Mae*, 940 F.3d 1022, 1029 (9th Cir. 2019).

68. *Id.*

69. *Id.* at 1035. (*See Zabriskie* dissent noting that in *Kidd* the Second Circuit found Reuters "specifically prohibit[ed] its subscribers from using its software for any purpose covered by the FCRA. . . .")

70. *See Zabriskie, supra*.

71. *See* Thomson Reuters, <https://legal.thomsonreuters.com/en/products/people-map/whats-new>.

Reuters provides the following detailed disclaimer. *See* Thompson Reuters Real Time Arrest Records, available on PeopleMap and covering "40 states + D.C.":

Thomson Reuters is not a consumer reporting agency and none of its services or the data contained therein constitute a 'consumer report' as such term is defined in the Federal Fair Credit Reporting Act (FCRA), 15 U.S.C. sec. 1681 *et seq.* The data provided to you may not be used as a factor in consumer debt collection decisioning, establishing a consumer's eligibility for credit, insurance, employment, government benefits, or housing, or for any other purpose authorized under the FCRA. By accessing one of our services, you agree not to use the service or data for any purpose authorized under the FCRA or in relation to taking an adverse action relating to a consumer application. *Id.*

72. *See* 15 U.S.C. § 1681c(b)(3).

73. *See* 15 U.S.C. § 1681c(a)(1)-(5). The FCRA does not identify adverse information that may come within the "catch all" category of § 1681c(a)(5).

74. When an annual salary "may reasonably be expected" to be less than \$25,000 (*see* NY GBL § 380-j[f][2][iii]), the NY FCRA sets timelines limiting disclosure of bankruptcies (older than 14 years), satisfied judgments (five years from entry), records of criminal convictions (more than seven years), and drug addiction or confinement in a mental institution (more than seven years). *See* NY GBL § 380-j(f)(1).

75. New York precludes CRAs from maintaining any of the following information in their files:

(1) relative to an arrest or a criminal charge unless there has been a criminal conviction . . . or . . . charges are still pending; (2) relative to a consumer's race, religion, color, ancestry or ethnic origin; or (3) which it has reason to know is inaccurate. NY GBL § 380-j(a)(1)-(3).

76. *See* NY GBL § 380-j(g).

77. 15 U.S.C. § 1681b(g); *see also* NY GBL § 380q ("Whenever any provision of this article requires disclosure of medical information, or the disclosure of a reason for adverse action which involves medical information, such information or reason shall be disclosed only to a physician designated by the consumer for such purpose.").

78. *See, e.g.*, Lawrence D. Bernfeld, *New City Law Limits Use of Criminal Background in Employment Process*, N.Y.L.J., January 8, 2016 at 4.

79. *See* Beth Avery and Michelle Natividad Rodriguez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, National Employment Law Project, April 2019. Available at: <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide>. (Last accessed March 14, 2021).

[nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide](http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide). (Last accessed March 14, 2021).

Avery and Rodriguez identify 31 jurisdictions that ban private employers from requiring job applicants to disclose criminal history in an initial application form. These jurisdictions include California, Connecticut, Colorado, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, Austin (Texas), Baltimore (Md.), Buffalo (N.Y.), Chicago (Ill.), Columbia (Mo.), the District of Columbia, Kansas City (Missouri), Los Angeles (Calif.), Montgomery County (Md.), New York (N.Y.), Philadelphia (Pa.), Portland (Ore.), Prince George's County (Md.), Rochester (N.Y.), San Francisco (Calif.), Seattle (Wash.), Spokane (Wash.), and Westchester County (N.Y.). *Id.*

80. Jurisdictions that more recently have adopted ban-the-box legislation include Maryland (enacted January 30, 2020; effective February 29, 2020), and St. Louis (enacted January 10, 2020; effective January 1, 2021). *See* Md. Code Ann., Lab. & Empl. § 3-1503, and St. Louis City Ordinance 71074. A total of 33 jurisdictions as of March 14, 2021 have "ban the box" laws in place.

81. *See, e.g.*, FINRA Rules 3110(e) and 3110.15.

82. 15 U.S.C. § 78s(a).

83. *See, e.g.*, FINRA Press Release, FINRA Fines Citigroup Global Markets Inc. \$1.25 Million for Failing to Appropriately Fingerprint or Screen Employees Over Seven-Year Period, July 29, 2019, <https://www.finra.org/media-center/newsreleases/2019/finra-fines-citigroup-global-markets-inc-125-million-employee-screening>.

84. *See* FINRA Rule 3110(e):

Each member shall ascertain by investigation the good character, business reputation, qualifications and experience of an applicant before the member applies to register that applicant with FINRA and before making a representation to that effect on the application for registration.

85. *See* New York City Human Rights Commission *Legal Enforcement Guidance*. The NYC Guidance interprets the New York City Credit Check Law, N.Y.C. Admin. Code §§ 8102(29), 8107(9)(d), (24) (2015).

86. 15 U.S.C. § 1681(c) addresses the FCRA duties of non-CRA information furnishers.

87. 15 U.S.C. § 1681g(a)(1)-(5).

88. 15 U.S.C. § 1681h(b).

89. 15 U.S.C. § 1681h(a). *See, e.g.*, 15 U.S.C. §§ 1681h(a)(2) and 1681h(b).

90. 15 U.S.C. § 1681b(c). CRAs must accurately and clearly provide all information (with limited exceptions) they maintain in regard to a consumer upon receiving a valid disclosure request. 15 U.S.C. § 1681g(a)(1). At the same time, the FCRA permits consumers to require reporting agencies to eliminate: "[the] first 5 digits of the social security number (or similar identification number) . . . [and] the consumer report agency shall so truncate such number in such disclosure. . . ." 15 U.S.C. § 1681b(c).

91. CRAs and report recipients, in several circumstances, must provide consumers with what the FCRA refers to as a Summary of Rights. 15 U.S.C. § 1681d(a)(1) (identifying each occasion on which a report recipient must provide a Summary of Rights to the consumer; *see* 15 U.S.C. § 1681g[c][1][C][2] [CRAs must provide the Summary in response to consumer requests for their credit score or credit report]).

The Summary of Rights is publicly available on the Consumer Financial Protection Bureau website. *See* Model Forms and Disclosures, Consumer Financial Protection Bureau, <https://www.consumerfinance.gov/policy-compliance/guidance/other-applicable-requirements/fair-credit-reporting-act/model-forms-and-disclosures/>. [last accessed March 14, 2021].

92. *See id.*

93. 15 U.S.C. § 1681 *et al.*; *see also* NY GBL § 380-a *et al.* The U.S.C.A. codification of the FCRA in Westlaw, together with the NY FCRA as

- it appears McKinney's Consolidated Laws of New York, total more than one hundred pages of text, including statutory notes.
94. See 15 U.S.C. § 1681h(a)(1).
 95. 15 U.S.C. §1681g(a)(1)-(5). Except for credit score information, the FCRA requires reporting agencies in the first instance to disclose all file information to a consumer who has requested a copy of his or her report. *Id.*
 96. 15 U.S.C. § 1681g(a)(2); *but see* discussion of investigative reports *infra*, 145-59.
 97. See 15 U.S.C. § 1681e(e)(1). The statute does not define "end user."
 98. 15 U.S.C. § 1681g(a)(3)(A).
 99. 15 U.S.C. § 1681g(a)(6). The FCRA also requires CRAs to disclose inquiries concerning (iv) credit or insurance transactions the consumer did not initiate (15 U.S.C. § 1681g[a][5]), and (v) information regarding "checks" to the extent such instruments form a basis to characterize the consumer in an adverse manner. See 15 U.S.C. § 1681g(a)(4).
 100. The FCRA defines "credit score" as:
 - a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain behaviors, including default (and the numerical value or the categorization derived from such analysis may also be referred to as a "risk predictor or "risk score"). U.S.C. § 1681g(f)(2)(A)(i).
 101. 15 U.S.C. § 1681g(f)(1).
 102. The number of "key factors" referenced in § 1681g(f)(1)(C) "shall not exceed 4" (except in a single circumstance that itself identifies a possible fifth factor). See 15 U.S.C. §§ 1681g(f)(1)(C) and (f)(9).
 103. 15 U.S.C. §1681g(f)(1)(E). The CRA must provide "the most recent credit score of the consumer that was previously *calculated by the credit reporting agency* for a purpose related to the extension of credit." 15 U.S.C. §1681g(f)(1)(A) (emphasis added).
 104. 15 U.S.C. § 1681g(f)(1) (explaining that CRA credit scores may be different than scores that lenders may use). See also 15 U.S.C. § 1681g(f)(1)(B) (the credit scoring model may be different than that which a lender may use). The CRA notice must disclose the "current credit score of the consumer," or the most recent credit score the CRA previously calculated "for a purpose related to the extension of credit." 15 U.S.C. § 1681g(f)(1)(A).
 105. See, e.g., Experian Sample Report, <https://www.experian.com/assets/consumer-products/credit-educator/experian-sample-report.pdf>; Equifax Disclosure of Rights, <https://www.equifax.com/privacy/fcra/>.
 106. See 15 U.S.C. § 1681i(a)(1)(A),
 107. See 15 U.S.C. § 1681i(a)(1)(A), (2)(A), and (2)(B). The FCRA requires reporting agencies promptly to notify information furnishers of all modifications or deletions. *But see* 15 U.S.C. § 1681g(a)(1)(B)(2) (regarding an investigative report source exception).
 108. See 15 U.S.C. § 1681i(a)(1).
 109. See 15 U.S.C. § 1681i(a)(5)(A)(i) and (ii).
 110. See generally 15 U.S.C. § 1681s-2.
 111. *Gonzalez-Bencon v. Doral Bank*, 759 F. Supp. 2d 229, 233 n.1 (D.P.R.2010) (quoting *Martell v. Am. Express Co.*, 598 F. Supp. 2d 177, 184 [D.P.R. 2008]).
 112. *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1153 n.7 (9th Cir. 2009) (quoting H.R. Rep. No. 108-263, at 24 [2003]). A Seventh Circuit district court sitting in the Northern District of Illinois has provided a less fulsome description. See *Rodriguez v. Lynch Ford, Inc.*, No. 03 C 7727, 2004 WL 2958772, at *8 (N.D. Ill. Nov. 18, 2004) (defining "a "non-CRA source" as an entity such as a bank or other lender).
 113. See, e.g., *Ostreicher v. Chase Bank United States, N.A.*, No. 19-CV-8175 (CS), 2020 U.S. Dist. LEXIS 217024 (S.D.N.Y. Nov. 19, 2020), at *7.
 114. 15 U.S.C. § 1681c(b)(1).
 115. See 15 U.S.C. § 1681s-2(b).
 116. 15 U.S.C. § 1681s-2(c).
 117. 15 U.S.C. § 1681s-2(d), providing that 15 U.S.C. § 1681s-2(a) exclusively shall be enforced under 15 U.S.C. § 1681(s) "by the Federal agencies and officials and the State officials identified in 15 U.S.C. § 1681(s)."
 118. See *Chiang v. Verizon New England Inc.*, 595 F.3d 26, 36 (1st Cir. 2010), concluding individual consumers may pursue a civil action under 15 U.S.C. §1681s-2(b) when a furnisher breaches its duty to investigate. The plaintiff must demonstrate the furnisher failed to conduct a reasonable investigation, and show the furnished information contained inaccuracies that would have been discovered had the furnisher conducted a reasonable investigation.
 119. See *Saunders v. Branch Banking & Trust Co.*, 526 F.3d 142, 149 (4th Cir. 2008), holding the FCRA explicitly bars private suits based on a violation of 15 U.S.C. § 1681s-2(a), but permits such suits based on a violation of § 1681s-2(b). *Saunders* does not expressly state a consumer may sue an information furnisher. However, the court observed consumers may recover compensatory damages from any "person" who willfully fails to comply with the FCRA. The FCRA definition of "person" includes information furnishers and consumers. Accordingly, the case suggests the First and Fourth Circuits agree that when a plaintiff makes the required showing (identified more fully in *Chiang*), and a furnisher breaches its duty to investigate, an injured consumer may pursue a civil action against the furnisher under 15 U.S.C. § 1681s(2)(b).
 120. NY GBL § 380-d(a) and -d(a)(1).
 121. NY GBL § 380-d(a)(1)-(3)(ii).
 122. NY GBL § 380-d(a)(1)-(3)(i); see also CRA consumer disclosure in an employment context at 127-38, *infra*, and in associated article text.
 123. See NY GBL § 380-d(a) and -d(a)(1) and compare 15 U.S.C. § 1681g(a) (when responding to an information request made pursuant to the FCRA, reporting agencies must disclose all file information, other than credit scores, together with the sources of such information). 15 U.S.C. § 1681g(a)(2) provides an exception covering investigative sources.
 124. NY GBL § 380f(a).
 125. See NY GBL § 380f.
 126. 15 U.S.C. § 1681g(a)(1).
 127. 15 U.S.C. § 1681g(h)(1).
 128. NY GBL §380-d; NY GBL §380-d(a)(3)(i).
 129. 15 U.S.C. § 1681g(a)(3)(i).
 130. 15 U.S.C. § 1681g(a)(3)(i); NY GBL §380-d(a)(3)(i).
 131. See 15 U.S.C. § 1681b(b)(2)(A).
 132. .15 U.S.C. § 1681d(a)(1).
 133. See NY GBL § 380-b(b).
 134. NY GBL § 380-b(b). A leading New York appellate court has held the NY FCRA "is not, by its terms, restricted to [New York] State [residents]. Thus, [NY GBL 380-b(b)] applies to . . . a New York business that requested consumer credit reports . . . on non-New Yorkers." [citations omitted].
Aldrich v. Northern Leasing Systems, Inc., 168 A.D.2d 452, 453, 91 N.Y.S.3d 401, 403 (1st Dep't 2019).
 135. See 15 U.S.C. § 1681b(b)(2)(A).
 136. See *40 Years of Experience with the Fair Credit Reporting Act, An FTC Staff Report with Summary of Interpretations* ("FTC Staff Report"), July 2011. The *FTC Staff Report* is available at: <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf>.

- The FTC staff has indicated an employer notice may include “minor additional items” beyond a statement of intent. Such items could include “a brief description of the nature of the consumer reports covered” but must not “confuse the consumer or detract from the mandated disclosure.” FTC Staff Report at 51 (citing Informal FTC staff opinion letter).
137. See *Syed v. M-I, Ltd. Liab. Co.*, 853 F.3d 492 (9th Cir. 2017).
The *Syed* employer filed a petition with the United States Supreme Court for a writ of certiorari to review the Ninth Circuit decision. The employer observed that outside of the Ninth Circuit courts have held bare technical violations fail to satisfy the *Spokeo* test of “concreteness” and “injury.” See *Syed* petition at 14 (citing *Dreher v. Experian Info. Solutions, Inc.*, 856 F.3d 337, 340 [4th Cir. 2017]). The employer in *Syed* asked the Supreme Court to conclude plaintiff lacked standing and the Ninth Circuit made an improper finding of willfulness. See Petition in *Syed* at 34. The Supreme Court denied the plaintiff’s petition. *MI LLC v Syed*, 138 U.S. 447 (2017).
138. See *Luna v. Hansen & Adkins Auto Transp., Inc.*, 313 F. Supp. 3d 1151 (C.D. Cal. 2018), *aff’d*, 956 F.3d 1151 (9th Cir. 2020).
139. The FCRA does not expressly recite employers may ask consumers for permission to obtain future updates at the time they obtain initial consumer consent. However, the FTC staff informally has advised employers may use a one-time blanket consent request and “obtain permission from applicants or current employees to procure consumer reports, at any time during the application process or during the employee’s tenure.” FTC Staff Report at 51.
140. NY GBL § 380b(b) and b(c). The NY GBL evergreen authorization does not extend to investigative consumer reports:
Where the notice provided . . . further indicates that subsequent consumer reports, *other than investigative consumer reports*, may be requested or utilized in connection with an update, renewal, or extension of the . . . employment . . . for which application was made, no additional notice to the consumer shall be required at the time such subsequent report is requested.*Id.* (Emphasis added).
141. See NY GBL § 380-h(a), which precludes CRAs from providing:
adverse information . . . other than information which is a matter of public record . . . in a subsequent investigative consumer report, unless such adverse information has been verified in the process of making [the] subsequent consumer report, [or] unless the adverse information was received within three month[s] [of] the date upon which the subsequent report is furnished. (Emphasis added.)
142. Congress enacted the Electronic Records in Global and National Commerce Act (“ESign”) in 2000. Subject to certain exceptions, ESign covers electronic transactions conducted in or that affect interstate or foreign commerce. See 15 U.S.C. § 7001 *et seq.*
143. See *Miller v. Quest Diagnostics*, 85 F. Supp. 3d 1058, 1063 (W.D. Mo. 2015). An informal FTC opinion states electronic signatures may be used to satisfy FCRA disclosure and authorization requirements. See FTC Informal Staff Opinion Letter, Clarke W. Brinckerhoff to Walter Zalenski, Esq., May 24, 2001 (“electronic signatures . . . are not unenforceable or invalid solely based on their electronic format”); see also UETA § 7 and N.Y. Comp. Codes R. & Regs. tit. 9, § 540.4(a) (“The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand”).
144. All states but Illinois, New York, and Washington have adopted a form of the Model Uniform Electronic Transaction Act (UETA) published by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1999. The UETA is available at <https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034>. [last accessed May 11, 2021].
145. 15 U.S.C. § 1681a(e).
146. 15 U.S.C. § 1681d(a)(2)(iii).
147. 15 U.S.C. § 1681d(a)(1).
148. 15 U.S.C. § 1681d(a)(2).
149. See 15 U.S.C. § 1681d(a)(1).
150. The CFPB Summary of Rights form is available on the Model Forms and Disclosures page of the CFPB website at: <https://www.consumerfinance.gov/policy-compliance/guidance/other-applicable-requirements/fair-credit-reporting-act/model-forms-and-disclosures/>. The FCRA requires delivery of the Summary of Rights at different times in the consumer reporting process.
151. See 15 U.S.C. § 1681d(a)(1) and 15 U.S.C. § 1681d(b); see also, FTC Staff Report at 63 (fn. 127 therein) where the FTC has advised:
The report user must provide the consumer with notice that an investigative consumer report “may be made” on the consumer any time up to three days after the report is first requested. At the same time, the user must provide the consumer with the summary of rights required by § 1681d(a)(1) . . . [and must] include a statement informing the consumer of his or her right to request complete and accurate disclosure of the nature and scope of the investigation.
152. See 15 U.S.C. § 1681d(b):
Any person who procures or causes to be prepared an investigative consumer report on any consumer shall, upon written request made by the consumer within a reasonable period of time after the receipt by him of the disclosure required by subsection (a) (1), make a complete and accurate disclosure of the nature and scope of the investigation requested. (Emphasis added).
The FTC staff in a non-authoritative comment has stated that when a consumer report recipient describes the “nature” of adverse information, such notice involves a lower degree of disclosure than would be required to reveal the “substance” of such information. F.T.C. Comment, Federal Trade Commission Analysis and Recommendations to H.R. 1015, WL 700035, at *5 (1994).
153. 15 U.S.C. § 1681d(a)(1) provides:
A person may not procure or cause to be prepared an investigative consumer report on any consumer unless it is clearly and accurately disclosed to the consumer that an investigative consumer report . . . may be made, and such disclosure is made in a writing mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested. (Emphasis added.)
154. See 15 U.S.C. § 1681d(d).
155. See NY GBL § 380 c(b)(2).
156. See NY GBL § 380 c(a)(1), 380 c(b), and 380 c(b)(2). The NY FCRA does not indicate whether an employer must make article 23-A disclosure when requesting an investigative report to consider an employee for promotion.
157. See NY GBL § 380c(b)(2) (referencing NY Corr. Law § 752).
158. NY GBL § 380-c(a)(2) recites:
No person may procure or cause to be prepared an investigative consumer report on any consumer unless such person: (1) has first provided the consumer with notice of the procurement . . . and (2) has first received from the consumer an authorization for preparation or procurement of such investigative consumer report as described in subdivision (c) of this section.
159. N.Y. Corr. Law § 752.

160. 15 U.S.C. § 1681d(a)(1). Persons other than employers may also obtain investigative consumer reports. *Id.*
161. NY GBL 380-c(a)(2).
162. See NY GBL § 380-c(a) ; cf. 15 U.S.C. § 1681d(a)(1).
163. NY GBL 380-c(a)(2).
164. NY GBL § 380-c(d).
165. See N.Y.C. Admin. Code §§ 8-102(29).
166. See N.Y.C. Admin. Code §§ 8-102(29) and n.35, *supra*.
167. 15 U.S.C. § 1681g(a)(2); see *Retail Credit Company v. Dade County, Florida*, 393 F. Supp. 577, 581-82 (S.D. Fla. 1975) and FCRA legislative history upon which the court relied.
168. NY GBL § 380 d(a)(2).
169. 15 U.S.C. § 1681b(b)(3)(A) (adverse action disclosure requirements for employment purposes).
170. See 15 U.S.C. § 1681m(a); see also NY GBL § 380i.
171. See 15 U.S.C. § 1681m(a) (adverse action disclosure requirements for non-employment purposes), and compare 15 U.S.C. § 1681b(b)(3) (A) (specifying employers must provide advance disclosure to the consumer of any intended adverse action). See also NY GBL § 380i.
172. 15 U.S.C. § 1681b(b)(3)(A).
173. See FTC Informal Staff Opinion Letter, Clarke W. Brinckerhoff to Eric J. Weisberg, Esq. (June 27, 1997). In a non-authoritative comment, the FTC staff has advised that job candidates and employees may wait beyond the FTC-recommended five-day “no action” period. *Id.* However, the consumer in doing so may find any opportunity to challenge report contents has become moot.
174. 15 U.S.C. § 1681a(k)(1)(B)(ii).
175. See 15 U.S.C. § 1681b(b)(3)(A)(i).
176. 15 U.S.C. § 1681b(b)(3)(A)(ii).
177. 15 U.S.C. § 1681b(3)(B)(i).
178. See 15 U.S.C. § 1681i(a)(1)(A). Congress in 1996 amended the FCRA. See *Consumer Credit Reporting Reform Act of 1996*, Pub. L. 104-208, § 2403, 110 Stat. 3009-426, 3009-431. Legislative history shows the Senate has recognized CRA reports may include a “significant amount of inaccurate information,” and consumers face considerable difficulty when seeking to have such errors corrected. See S. Rep. No. 108-166 at 5-6 (2003). The 2003 Report references the 1996 FCRA amendments since they were set to expire in 2004. This prompted the Senate to freshly consider the impact of the 1996 amendments on credit markets. Congress updated the 1996 amendments to include additional protections relating to identity theft and otherwise renewed the amendments.
179. See 15 U.S.C. § 1681m(a)(2)(A).
180. See 15 U.S.C. § 1681m(a)(2)(B) [incorporating the FCRA definition of credit score appearing in 15 U.S.C. § 1681g(f)(1)].
181. See 15 U.S.C. § 1681(b)(3)(A).
182. *Id.*
183. See NY GBL § 380i(a).
184. See 15 U.S.C. § 1681m(b)(1). The sole exception requiring report recipients to provide a reason for adverse action arises in a non-employment context when, within sixty days of adverse action, a consumer requests an explanation. The exception applies only when adverse action is based “either wholly or partly because of information obtained from a person *other than a consumer reporting agency.*” *Id.* (emphasis added).
185. See 15 U.S.C. § 1681m(a); see also NY GBL § 380i. However, relying on a separate statute, the NY FCRA in one instance requires report recipients to furnish a reason for adverse action. See NY GBL § 380i(b) (incorporating the Federal Equal Credit Opportunity Act, 15 U.S.C. § § 1691, *et seq.*).
186. See 15 U.S.C. § 1681m(b)(2)(ii); see also n.152 the difference between the “nature” and “substance” of disclosure.
187. *But see* notes 8-15, *supra*, and associated article text regarding efforts in Congress and in the New York State Legislature to alter the current balance of business need and consumer protection in an employment context.
188. CRAs must meet the following standard of reasonableness: “Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.” 15 U.S.C. § 1681e(a).
189. 15 U.S.C. § 1681k(a)(2).
190. 15 U.S.C. § 1681e(a), 15 U.S.C. § 1681e(b).
191. 15 U.S.C. § 1681e(a).
192. The FCRA requires reporting agencies to:
 make a *reasonable effort* to verify the identity of a new prospective [report] user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title. (Emphasis added.) 15 U.S.C. § 1681e(b).
193. *Erikson v. First Advantage Background Servs. Corp.*, 981 F.3d 1246, 1252 (11th Cir. 2020) (“to reach ‘maximum possible accuracy,’ information must be factually true and unlikely to lead to a misunderstanding.” To violate the maximum accuracy standard, “a report must be factually incorrect, objectively likely to mislead its intended user, or both. . . .”). *Id.*
194. See *Podell v. Citicorp Diners Club*, 914 F. Supp. 1025, 1032 (S.D.N.Y. 1996), *aff’d*, 112 F.3d 98 (2d Cir. 1997).
195. CRAs must follow reasonable procedures in New York to avoid violating:
 sections three hundred eighty-b [permissible dissemination of reports], three hundred eighty-j [prohibited information] and three hundred eighty-t [security freeze] of this article and to limit the furnishing of consumer reports to the purposes listed under said section three hundred eighty-b. See NY GBL § 380-k.
196. See *Wright v. Experian Info. Sols., Inc.*, 805 F.3d 1232, 1240 (10th Cir. 2015) (citing *Henson v. CSC Credit Servs.*, 29 F.3d 280, 285 [7th Cir. 1994]).
197. See *Wenning v. On-Site Manager, Inc.*, 141 F. Supp. 3d 256 (S.D.N.Y. 2015) (suggesting a higher threshold of “reasonable procedure” when reporting agencies have strong revenues and profitability).
 The *Wenning* court observed:
 overall costs incurred and revenues received by a credit reporter . . . and the consequent profitability of such a company’s relevant operations may well be relevant to § 1681e(b) claims insofar as a benefit/burden balancing may be required as part of an inquiry into “reasonable procedures.” [internal citations omitted] *Id.* at 257.
198. Should a CRA include public record information in a report to be used for employment purposes, the CRA must: “maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer’s ability to obtain employment is reported it is complete and up to date.” See 15 U.S.C. § 1681k(a)(2).
199. See 15 U.S.C. § 1681m(c), which provides:
 No person [including information furnishers] shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section. See also 15 U.S.C. § 1681s-2(a)(6)

- (A) (requiring non-CRA furnishers of information to employ reasonable procedures when responding to identity theft-related inaccuracies).
200. See 12 U.S.C. § 5511 and Pub. L. 111-203, title X, § 1022, July 21, 2011 (explaining an FCRA amendment that transfers interpretive responsibility from the FTC to the CFPB).
201. See 12 U.S.C. § 5512(b)(4)(A) and (B).
202. See 1681s(a).
203. See 15 U.S.C. § 1681s(b)(1)(H).
204. *Id.*
205. See 12 U.S.C. §5514(c)(3)(A) (requiring the CFPB and the FTC to enter into a memorandum of understanding to coordinate their law enforcement activities); see also *infra*. 226-228 and associated article text.
206. See 15 U.S.C. § 1681s(a)(1).
207. *Id.*
208. 15 U.S.C. 45(a). FCRA violators also may be subject to enforcement under section 5(b) of the FTC Act. See 15 U.S.C. § 45(b).
209. Through such administrative process, the FTC may challenge “unfair or deceptive act[s] or practice[s],” “unfair methods of competition,” or “violations of other laws” within its jurisdiction. 15 U.S.C. 45(a). When pursuing an FCRA breach, the statute gives to the FTC the same authority as it has under section 45 of the FTC Act. See 15 U.S.C. § 1681s(a)(1).
210. Congress has instructed:
- Whenever the Commission shall have reason to believe . . . any . . . person . . . has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, if it shall appear to the Commission that a proceeding . . . would be to the interest of the public, [the Commission] shall issue and serve upon such person . . . a complaint stating its charges in that respect and containing a notice of a hearing. . . . 15 U.S.C. § 45(b).
211. *Id.*
212. See *id.*
213. 15 U.S.C. § 45(b). The FTC conducts adjudicatory proceedings. *Id.*; see generally FTC Rules of Practice, 16 C.F.R. §§ 3.1-3.56 (2020).
214. See generally 12 U.S.C. § 5510 *et seq.*
215. See Public Law 111–203: Consumer Financial Protection Act of 2010 (124 Stat. 1955), Subtitle H, § 1088; see also 15 U.S.C. § 1681s(a). (We cite the Public Law, rather than the CFPA, because the statute as codified does not include pertinent legislative history).
216. See 15 U.S.C. § 1681s(a) and 15 U.S.C. § 1681s(b)(H).
217. See 15 U.S.C. § 1681s(b)(1)(H).
218. See 15 U.S.C. § 1681s(a)(1):
- The Federal Trade Commission shall be authorized to enforce compliance with the requirements imposed by this subchapter . . . with respect to consumer reporting agencies and all other persons subject thereto. 15 U.S.C. § 1681s(a)(1) gives to the FTC in pursuing a FCRA breach the same authority it has for other purposes under Section 45(b) of the FTC Act.
219. See 15 U.S.C. § 1681s(b); 12 U.S.C. §5512(b).
220. See 15 U.S.C. § 1681s(c).
221. See FTC Rules of Practice, 16 C.F.R. §§ 3.1-3.56 (2020).
222. See 15 U.S.C. § 1681s(a)(2).
223. 12 U.S.C. §5512(b). The Consumer Financial Protection Act permits the CFPB to:
- prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.
224. See 12 U.S.C. §5565(c) [the Consumer Financial Protection Act]; see also 12 C.F.R. § 1002.16(b)(1) in which the CFPB identifies penalties. See additional discussion *infra* at 236-242 and associated article text). The FCRA does not indicate the extent of penalties the CFPB may pursue. However, 12 U.S.C. § 5565 [the Consumer Financial Protection Act of 2010] applies to determine its penalties the CFPB may seek when a person breaches a federal law or rule the CFPB has authority to enforce.
225. 15 U.S.C. § 1681s(a).
226. See 12 U.S.C. §5514(c)(3)(A) (requiring the CFPB and the FTC to enter into an agreement “with respect to enforcement actions by each agency regarding the offering or provision of consumer financial products or services.”)
227. The statute requires the bureau and the Commission to enter into an agreement coordinating their law enforcement activities. *Id.*
- The MOU, last renewed in 2019, is available at https://www.ftc.gov/system/files/documents/cooperation_agreements/ftc-cfpb_mou_225_0.pdf. [last accessed March 14, 2021].
- The inter-agency MOU requires that:
- With respect to agency policy statements and interpretive rules to be published in the Federal Register, agency bulletins, and . . . advisory opinions by either [the CFPB or the FTC] address[ing] unfair, deceptive, or abusive acts or practices regarding MOU Covered Persons in connection with the offering or provision of Consumer Financial Products or Services, *the issuing agency shall notify the other agency no later than thirty (30) days prior to issuing such a document.* (Emphasis added.) *Inter-Agency MOU*, at 9. [Last accessed March 14, 2021.]
228. *Id.*
229. See *GAO Report* at 17-18 [internal citations omitted]. The full report is available at: <https://www.gao.gov/assets/710/700637.pdf>.
- The GAO Report identifies larger CRAs as those that generate more than seven million dollars in consumer reporting-related annual receipts. The GAO estimates such entities comprise about 30 of 410 CRAs in the United States, and the six largest generate 85% of all annual CRA credit report receipts. See *id.*; see also 15 U.S.C. §§ 1681s(a)(1) and 1681s(b).
230. *Id.* at 38.
231. *GAO Report* at 39 [internal citations omitted].
232. *Id.* at 38.
233. *Id.*
234. See *supra* n. 57.
235. See *supra* n. 67; see also text associated with notes 57-71 for discussion addressing when the Second and Ninth Circuits will deem an information provider to be a CRA.
236. 12 U.S.C. § 5512 (delegating certain powers to the CFPB); see also section 1081 of the CFPB Rules (establishing administrative processes).
237. See 12 C.F.R. § 1002.16(b)(1); see also 12 U.S.C. § 5565(c). Through its adjudicatory process the CFPB may enforce the FCRA against violators and pursue “penalties.” See article text associated with notes 202-37 for discussion of FTC supervisory and enforcement powers.
238. See 12 C.F.R. § 1081; see also 12 U.S.C. § 5512.
239. See 12 C.F.R. § 1081(a).
240. See 12 C.F.R. § 1081(e).

241. See 12 C.F.R. § 1002.16(b)(1). CFPB rules do not specify who may bring a class action. Rather, the rules provide that persons found to violate the FCRA or CFPB are “subject to civil liability for actual and punitive damages in individual or class actions.” *Id.*
242. *Id.*
243. 15 U.S.C. § 1681s(a)(2)(A).
244. See 15 U.S.C. § 1681s(a)(2).
The FCRA originally limited to \$2,500 per violation the administrative penalty the FTC could pursue in proceedings that challenged willful FCRA violations. See 15 U.S.C. § 1681s(a)(2). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Congress in 2009 increased to \$3,500 the maximum penalty the FTC may impose for acts that constitute FCRA violations. See 74 Fed. Reg. 857 (Jan. 9, 2009). This provision has appeared in FCRA section 1681s(a)(1) since January 9, 2009.
Congress further amended the Federal Civil Penalties Inflation Adjustment Act in 2015 to provide an inflation “catch up.” When an actor knowingly violates the FCRA, the FTC now may impose a maximum penalty of \$3,756 per violation. See 81 Fed. Reg. 126 (June 30, 2016). [last accessed March 14, 2021].
245. *Consumer Fin. Prot. Bureau v. Seila Law LLC*, 200 U.S. 331, 337 (2020).
246. *Id.* at 341.
247. See 15 U.S.C. § 1681s(c)(1).
248. 15 U.S.C. § 1681s(c)(2).
249. See 15 U.S.C. § 1681s(c)(1)(A).
250. 15 U.S.C. § 1681s(c)(2)(B).
251. See 15 U.S.C. § 1681s(c)(2).
252. See 15 U.S.C. § 1681s(c)(1)(B)(iii).
253. See 15 U.S.C. §§ 1681s(c)(1)(A) and 1681s(c)(1)(B)(i).
254. 15 U.S.C. § 1681s(c)(1)(C).
255. See 15 U.S.C. § 1681s(c)(1):
In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated this subchapter . . . the state may bring an action in federal district court . . . on behalf of the residents of the State to recover: (i) damages for which the person is liable to such residents . . . as a result of the violation; or (ii) damages of not more than \$1,000 for each willful or negligent violation. (Emphasis added.)
256. See, e.g., New York Dept. of Fin. Services Industry Guidance on FCRA Amendments, https://www.dfs.ny.gov/industry_guidance/industry_letters/il20200617_cra_consumer_support_covid-19. [last accessed March 14, 2021.]
257. See GBL § 380-n; see also New York Attorney General’s Office (“Our Office Page”) <https://ag.ny.gov/ouoffice#:~:text=As%20head%20of%20the%20Department,the%20State’s%20chief%20legal%20officer> (confirming the NY Attorney General is the chief law enforcement officer in the state) [last accessed March 14, 2021]. 15 U.S.C. § 1681s(c)(1) (specifying a state’s “chief law enforcement officer” may enforce the FCRA on behalf of state residents).
258. NYC has authorized its Human Rights Commission to pursue fines of up to \$125,000 for negligent breach and up to \$250,000 for willful violations of the City Credit Reporting Law. See N.Y.C. Admin. Code §§ 8-102(29), 8-107(9)(d), (24); Local L. No. 37 (2015), available at <https://www1.nyc.gov/site/cchr/law/stop-credit-discrimination-employment-act.page> (last accessed March 14, 2021); N.Y.C. Admin. Code at § 8126.
When HRC receives a complaint alleging willful violation of the NYC Credit Check Law, its Law Enforcement Bureau determines probable cause exists to find a violation has occurred. The case then proceeds either to (i) mediation before the HRC Office of Mediation and Conflict Resolution, or (iii) an administrative court where an ALJ will oversee a trial, and issue a report that could recommend a penalty. After taking into account the ALJ report and recommendations, the Office of the HRC General Counsel will issue a final order. See Enforcement Procedure, New York City Human Rights Commission, <https://www1.nyc.gov/site/cchr/enforcement/enforcement.page> [last accessed March 14, 2021].
259. See, e.g., the extraordinary \$125,000 maximum penalty New York City permits its Human Rights Commission to pursue should the Commission believe an employer negligently has breached the NYC Credit Check Law. See N.Y.C. Admin. Code §§ 8-102(29).
260. See 15 U.S.C. § 1681t(a).
261. We more fully address federal and state preemption principles in a subsequent article as well as potential preemption risk when state or local law provisions are materially inconsistent with the FCRA or an FCRA-consistent state law.
262. See 15 U.S.C. § 1681n(a)(1):
Any person who *willfully* fails to comply with any requirement imposed under this subchapter with respect to any consumer *is liable to that consumer* in an amount equal to the sum of any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000 . . . [and] in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney’s fees as determined by the court. (Emphasis added.)
263. See 15 U.S.C. § 1681o(a)(i):
Any person who is *negligent* in failing to comply with any requirement imposed under this subchapter with respect to any consumer *is liable to that consumer* in an amount equal to the sum of any actual damages sustained by the consumer as a result of the failure; and in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney’s fees as determined by the court. (Emphasis added.)
264. See *Williams v. First Advantage LNS Screening Sols., Inc.*, 947 F.3d 735 (11th Cir. 2020); see also *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991): “The FCRA does not make consumer reporting agencies strictly liable for all inaccuracies, but instead creates a private right of action for negligent or willful violations of the FCRA.” *Williams*, 947 F.3d at 745 (quoting *Safeco v. Burr*, *infra*). See 15 U.S.C. § 1681n(a), 15 U.S.C. § 1681o(a).
265. *Pedro v. Equifax, Inc.*, 868 F.3d 1275 (11th Cir. 2017).
266. *Id.* at 1280
267. *Williams*, 947 F.3d at 745 (quoting *Safeco v. Burr*, *infra*).
268. NY GBL § 380-m, § 380-o.
269. *Robins v. Spokeo*, 136 U.S. 1540 (2016).
270. *Spokeo*, 136 U.S. at 1545. In *Spokeo*, plaintiff contended defendant employer falsely reported information regarding plaintiff’s marital status, age, employment, education, and level of wealth. 136 U.S. at 1546. The Ninth Circuit on remand took the concreteness standard into account and found the employer relied on incorrectly reported information. The Ninth Circuit held that in failing to provide advance notice of intent to take adverse action, the employer created a risk of harm sufficient to give plaintiff standing to pursue his claim. *Robins v. Spokeo, Inc.* (“*Spokeo II*”), 867 F.3d 1108, 1118 (9th Cir. 2017). *Spokeo* has generated considerable commentary. The full implications of the case are beyond the scope of this article.
271. *Dutta*, 895 F.3d 1166 (9th Cir. 2018). The district court in *Dutta* noted plaintiff did not dispute the accuracy of reported information but only how State Farm used the information. See *Dutta*, 895 F.3d 1166, 1167 (9th Cir. 2018) (citing *Spokeo I*, 136 U.S. at 1550).
272. *Robertson*, 902 F.3d 690, 697 (7th Cir. 2018).

273. See *Robertson*, 902 F.3d 690, 697 (7th Cir. 2018).
274. Joseph F. Yenouskas and Tierney E. Smith, *Fair Credit Reporting Act Litigation Developments on Standing*, 76 Bus. Law. 713, 713–18 (2021).
275. In an automobile financing context, the Third Circuit in *Cortez* stated the following elements should be considered in determining whether a CRA through negligence failed to meet FCRA 15 U.S.C. § 1681e(b) accuracy standards:
- (1) inaccurate information was included in a consumer’s credit report; (2) the inaccuracy was due to defendant’s failure to follow reasonable procedures to assure maximum possible accuracy; (3) the consumer suffered injury; and (4) the consumer’s injury was caused by the inclusion of the inaccurate entry. *Cortez v. Trans Union, LLC*, 617 F.3d 688, 708 (3d Cir. 2010) (quoting *Philbin v. Trans Union Corp.*, 101 F.3d 957, 963 [3d. Cir.1996]).
276. *Long v. Se. Pa. Transp. Authority*, 903 F.3d 312, 325 (3d Cir. 2020); see also *Davis v. C&D Sec. Mgmt.*, 2020 U.S. Dist. LEXIS 132294; 2020 WL 4284379.
277. *Felts v. Wells Fargo Bank, N.A.*, 893 F.3d 1305, 1315-16 (11th Cir. 2018) (mortgage loan application).
278. See *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 340 (4th Cir. 2017):
- We conclude [in a delinquent credit card context] that where an individual fails to allege a concrete injury stemming from allegedly incomplete or incorrect information listed on a credit report, he or she cannot satisfy the threshold requirements of constitutional standing.
279. See *Hauser v. Equifax, Inc.*, 602 F.2d 811, 816 (8th Cir. 1979) holding plaintiff could not establish injury-in-fact due to a lack of proximate cause between (i) inaccurate information and (ii) the denial of plaintiff’s disability claim. The Court observed the FCRA: “does not provide for comprehensive regulation of the consumer reporting industry. Rather it establishes the broad minimum standard of ‘reasonable procedures’ and requires consumer reporting agencies to adopt procedures which meet that minimum standard.” See 15 U.S.C. § 1681(b).
280. *Shaw v. Experian Information Solutions, Inc.*, 891 F.3d 749, 757 (9th Cir. 2018) (mortgage loan application).
281. *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1175-76 (9th Cir. 2018) (observing State Farm violated its duty to [i] provide advance notice of potentially adverse action and [ii] permit the consumer to correct reporting inaccuracies before taking adverse action; State Farm waited three days after rejecting the application to provide notice to the consumer).
282. *Id.*
283. *Id.*
284. *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1175-76 (9th Cir. 2018).
285. See *supra* notes 78-80 for jurisdictions that have enacted ban-the-box legislation.
286. *Id.*
287. 15 U.S.C. § 1681p.
288. *Id.*
289. *Id.*
290. NY GBL § 380-n.
291. *Id.*
292. See, e.g., *Brown v. Delhaize America, LLC and Food Lion, LLC*, Case No. 1:14-CV-00195, 2015 WL 12780911 (M.D.N.C. July 20, 2015) (confirming a settlement that awarded damages to 59,000 absent members in a class action based on employer failure either to provide [i] necessary consumer disclosure prior to obtaining consumer background reports or [ii] pre-action notice before to taking adverse action).
293. See *infra* 324-39 and associated article text.
294. See, e.g., *In re U.S. Office of Personnel Management Data Security Breach Litigation*, 2109 WL 2552955 (D.C. Cir. June 21, 2019); see also *Michael W. Tilleman v. Leafilter North LLC*, 2019 WL 2347577 (W.D. Tex. May 31, 2019).
295. *Safeco v. Burr*, 551 U.S. 47, 56-57 (2007).
296. See 15 U.S.C. § 1681n.
297. *Syed v. M-I, LLC*, 853 F.3d 492, 496 (9th Cir. 2017).
298. The *Syed* Court stated:
- A party does not act in reckless disregard of the FCRA “unless the action is not only a violation under a reasonable reading of the statute’s terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading [of the statute] that was merely careless.”
- 853 F.3d at 503 (quoting *Safeco*, 551 U.S. at 69).
- The Ninth Circuit in *Syed* observed that plaintiff “did not seek actual damages, which would have required proof of actual harm [citation omitted].” 853 F.3d at 498 (citing *Crabill v. Trans Union LLC*, 259 F.3d 662, 664 [7th Cir. 2001]).
299. See 15 U.S.C. § 1681o(a) and 15 U.S.C. § 1681n(a).
300. See *Guimond v. Transunion Credit Info. Corp.*, 45 F.3d 1329, 1333 (9th Cir. 1995); see also *Drew v. Equifax Info. Sys., LLC*, 690 F.3d 1100, 1109 (9th Cir. 2012) and *Moran v. The Screening Pros, LLC*, 2020 U.S. Dist. LEXIS 148171*; 2020 WL 4724307.
301. 15 U.S.C. § 1681n(a)(2).
302. The NY FCRA does not define willful or negligent non-compliance. See GBL §§ 380l and 380-m.
303. See GBL §§ 380l(a) and (c); 380-m(a)-(b).
304. GBL § 380l(b).
305. See, e.g., 15 U.S.C. § 1681e and NY GBL § 380-k.
306. See, e.g., Stacey Cowley, *Your Credit Score May Soon Look Better*, N.Y. Times, June 27, 2017 (“Better Credit Score”). Available at: See also Ohio Attorney General News Release, *Attorney General DeWine Announces Major National Settlement with Credit Reporting Agencies*, July 20, 2015, <https://www.ohioattorneygeneral.gov/Media/News-Releases/May-2015/Attorney-General-DeWine-Announces-Major-National-S>.
307. The New York State Attorney General in March 2015 entered into a separate settlement (“NYAG Settlement”) with the three major credit bureaus. The NYAG Settlement is available at <https://ag.ny.gov/pdfs/CRA%20Agreement%20Fully%20Executed%203.8.15.pdf>.
- See Tara Siegel Bernard, *TransUnion, Equifax, and Experian Agree to Overhaul Credit Reporting Practices*, N.Y. Times, March 9, 2015. Available at <https://www.nytimes.com/2015/03/10/business/big-credit-reporting-agencies-to-overhaul-error-fixing-process.html>.
308. See Ohio Attorney General Press Release, *supra* 305.
309. See National Consumer Action Plan, News Release, June 9, 2016, <http://www.nationalconsumerassistanceplan.com/news/news-release/>.
310. NYAG Settlement, *supra*, at 306; see CFPB Quarterly Consumer Credit Trends Report, February 2018, at 3.
311. See CFPB Quarterly Consumer Credit Trends Report, February 2018, at 3.
312. The joint National Consumer Assistance Plan fleshes out the statutory “strict procedures” duty credit reporting agencies must follow. TransUnion, Equifax, and Experian operate a joint website offering updates regarding plan implementation and related rules.

- <http://www.nationalconsumerassistanceplan.com/news/news-release/>.
313. See *supra* n.198 and related article text reciting the “strict procedures” standard applicable to all CRAs providing public record information relating to a consumer.
314. *Better Credit Score* (note 305), *supra*, reports: “Around 7 percent of the 220 million people in the United States [who have] credit reports will have a judgment or lien stripped from their [report] file, according to an analysis by Fair Isaac. . . .” Fair Isaac is the company that supplies the formula used to generate the credit score known as FICO. See <https://www.fico.com/independent/independence>.
315. Tom Quinn, *Are Medical Collections Being Removed? Yes—See Which Ones*, Fair Isaac Corp., September 28, 2017, <https://www.myfico.com/credit-education/blog/medical-collections-removed> [last accessed March 14, 2021].
316. See NYAG Settlement (*supra* note 306, at 32 therein), signed in 2015. The settlement explains that corrective action under a reasonably necessary standard could require the nationwide bureaus to:
- (i) work[] with a furnisher to remediate the root cause of the problem when the furnisher initially fails to meet certain benchmarks . . . (ii) suppress[] certain items of the furnisher’s data during the remediation process, (iii) issu[e] warnings to furnishers who continue to fail to meet certain benchmarks despite being retrained by the CRAs with respect to the identified problem, and (iv) refus[e] to accept certain information from furnishers that repeatedly fail to remediate identified problems or that demonstrate a disregard for their statutory and contractual obligations.
317. See *supra* 306 and 11-12 within the NYAG Settlement.
318. *Ramirez v. Trans Union, LLC*, 2017 WL 5153280, *1 (N.D. Cal., Nov. 17, 2017).
319. See *Better Credit Score*, note 305, *supra*.
320. See *Ramirez v. Trans Union, LLC*, 2017 WL 5153280, *1 (N.D. Cal., Nov. 17, 2017).
321. *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020).
322. *Id.*
323. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 972 (2020).
324. See generally *Ramirez v. TransUnion LLC* 141 S.Ct. 972 (2020). Or. Transcr. 20-297, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/20-297_3ea4.pdf.
325. See *Better Credit Score*, note 305, *supra*.
326. See 15 U.S.C. § 1681g(a)(1)(A):
- [I]f the consumer to whom the file relates requests that the first 5 digits of [their] social security number . . . not be included in the disclosure and the consumer reporting agency has received appropriate proof of the identity of the requester, the consumer reporting agency shall so truncate such number in such disclosure.
327. See *supra* 90 and associated article text.
328. See, e.g., 15 U.S.C. § 1681e; NY GBL § 380-k (procedures required for CRAs to protect consumer data).
329. Tara Siegel Bernard, Tiffany Hsu, Nicole Perloth, and Ron Lieber, *Equifax Says Cyberattack May Have Affected 143 Million in the U.S.*, N.Y. Times, Sept. 7, 2017 (“*Cyberattack on Equifax*”). <https://www.nytimes.com/2017/09/07/business/equifax-cyberattack.html>.
330. Pamela Dixon, Executive Director of the World Privacy Forum, has stated: “This is about as bad as it gets. . . . If [a consumer] ha[s] a credit report, chances are [they] may be in this breach. The chances are much better than 50 percent.” See *Cyberattack on Equifax*, 324 *supra*.
331. *Id.*
332. See R. Dipshan, *Equifax’s Liabilities Pile on After Discovery of New Compromised Data*, Legaltech News (March 7, 2018).
333. See *Securities and Exchange Commission v. Jun Ying*, 2018 WL 1321979 (N.D. Ga.) (Complaint).
334. Stacy Cowley, *Former Equifax Executive Charged With Insider Trading in 2017 Breach*, N.Y. Times, Mar. 15, 2018, at B5.
335. See *United States v. Jun Ying*, No. 1:18-CR-74-AT, 2018 WL 6322308 (N.D. Ga. Dec. 4, 2018) Criminal Indictment; see also Dept. of Justice Press Release, *Former Equifax Employee Indicted for Insider Trading*, March 14, 2018, <https://www.justice.gov/usao-ndga/pr/former-equifax-employee-indicted-insider-trading>.
336. See U.S. Attorney Press Release, *Former Equifax Employee Sentenced for Insider Trading*, June 27, 2019, <https://www.justice.gov/usao-ndga/pr/former-equifax-employee-sentenced-insider-trading>.
337. See *Federal Trade Commission v. Equifax Inc.*, Settlement Agreement, filed July 22, 2019 (N.D. G.A.), https://www.ftc.gov/system/files/documents/cases/172_3203_equifax_proposed_order_7-22-19.pdf.
338. See *Judge OKs \$77.5M in Legal Fees, Approves Equifax Data Breach Settlement*, law.com, Daily Report, Dec. 19, 2019, available at <https://www.law.com/dailyreportonline/2019/12/19/judge-oks-77-5-million-in-legals-fees-approves-equifax-data-breach-settlement/>: “The global settlement also resolves separate claims and enforcement actions by the U.S. Federal Trade Commission, the Consumer Financial Protection Bureau and a multistate group of attorneys general from 48 of the nation’s 50 states, the District of Columbia and Puerto Rico.”
339. *Id.* Equifax committed to pay to 48 states (other than Indiana and Massachusetts), the District of Columbia, and Puerto Rico fines totaling \$175 million, as well as \$100 million to the CFPB in civil penalties. See FTC Press Release, *Equifax to Pay \$575 Million as Part of Settlement with FTC, CFPB, and States Related to 2017 Data Breach*, July 22, 2019, <https://www.ftc.gov/news-events/press-releases/2019/07/equifax-pay-575-million-part-settlement-ftc-cfpb-states-related>.
340. See Josefa Velasquez, *Equifax Says It Will Hand Over NY Data Breach Info*, N.Y.L.J., Jan. 5, 2018 (“*Velasquez NY Data Breach Info*”) See also New York Attorney General Press Release, *A.G. Schneiderman Launches Formal Investigation Into Equifax Breach, Issues Consumer Alert*, Sept. 8 2017, <https://ag.ny.gov/press-release/ag-schneiderman-launches-formal-investigation-equifax-breach-issues-consumer-alert>.
341. See *Velasquez NY Data Breach Info*.
342. See *Velasquez NY Data Breach Info*; see also, <https://images.law.com/contrib/content/uploads/documents/292/23664/Equifax-Demand-Letter.pdf>; Pressroom of Governor Andrew M. Cuomo, *Governor Cuomo Announces Action to Protect New Yorkers’ Private Information Held by Credit Reporting Companies*, June 25, 2018, <https://www.governor.ny.gov/news/governor-cuomo-announces-action-protect-new-yorkers-private-information-held-credit-reporting>.
343. *Id.*
344. The Office of the Secretary of State in a May 7, 2020 email reported that, on January 11, 2018, Equifax responded to the Secretary’s inquiry. New York has deemed the specifics of the Equifax response confidential. Accordingly, whether Equifax provided the requested details in the Secretary remains unknown to the public.
- The Office of the Secretary designated the Equifax response confidential pursuant to Public Officers Law § 87(2)(d) and § 89(5). The Public Officers Law provides that any New York public agency may deny access to the details of an investigation the agency deems “confidential.” See Public Officers Law § 87(2)(b). A private citizen denied access to such information may appeal the denial through the New York State Courts. See Public Officers Law § 87(4)(a).
345. N.Y. Comp. Codes R. & Regs. tit. 23, § 201.02 (2018).
346. § 201.00.
347. See *id.* at § 201.02(c)-(d).

348. § 201.03(a).
349. § 201.03(c).
350. § 201.06(e).
351. § 201.02(e)-(f).
352. § 201.04(a)-(b). The Superintendent may require CCRA to document they have an acceptable cybersecurity rule in place. *See* New York State DFS cybersecurity rule, § 201.07.
353. *Id.* § 201.07; *see* N.Y. Comp. Codes R. & Regs. tit. 23, pt. 500 (2018); N.Y. Comp. Codes R. & Regs. tit. 23, § 500.02(a) (2018).
354. *Id.* at § 500.02(a), § 500.02(d).
355. *See* Pressroom of Governor Andrew M. Cuomo, *Governor Cuomo Signs Legislation Protecting New Yorkers Against Data Security Breaches*, dated July 25, 2019, <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-protecting-new-yorkers-against-data-security-breaches>.
356. *See* NY GBL § 899-aa.
357. *See* NY GBL 380-t(n).
358. *See* Pub. L. No. 115-174, 132 Stat. 1296 (2018), a.k.a. the EGA.
359. *See* EGA § 301(a) [codified at 15 U.S.C. § 1681c-1(i)]. The EGA defines “security freeze” as “a restriction that prohibits a consumer report agency from disclosing the contents of a consumer report that is subject to such security freeze to any person requesting the consumer report.” 15 U.S.C. § 1681c-1(h)(i)(1)(c).
360. *See* GAO Report (*supra* 24) at 15 [internal citations omitted]:
Consumers can prevent certain users from accessing their consumer reports by placing a security freeze on their consumer reports, which generally prevents the opening of new lines of credit in the consumer’s name (provided the creditor checks the consumer’s credit). *Id.*; *see also* Andrew Soukup, David A. Stein, and Lucille C. Bartholomew, *Fair Credit Reporting Act and Financial Privacy Update—2018*, 74 Bus. Law. 495 (2018).
361. *See* 15 U.S.C. § 1681c-1(i) (an FCRA amendment originally appearing in the EGA).
362. *Id.*
363. *See* GAO Report (*supra* 24) at 15; 15 U.S.C. §§ 1681n and 1681o.
364. 15 U.S.C. § 1681c-1 (a)(1)(a).
365. *See* EGA § 602(b)(1)(A).
366. *Id.*
367. *Id.*
368. *See* EGA § 308. The Comptroller General heads the General Government Accountability Office (GAO). The GAO on March 26, 2019 submitted a preliminary report to the Subcommittee on Economic and Consumer Policy, Committee on Oversight and Reform, House of Representatives. The GAO preliminary report addressed proposed changes in FTC and CFPB oversight efforts to enhance consumer data protection. The March 2019 report advocated implementing stronger oversight measures. *See* <https://www.gao.gov/products/GAO-19-469T>.
369. The final GAO report includes results of an audit of CFPB supervisory activity conducted from July 2018 to July 2019. *See* GAO Report at 4. The full report is available at: <https://www.gao.gov/assets/710/700637.pdf>.
370. The Comptroller General noted the CFPB historically did not require CRAs to maintain formal written policies and procedures intended to assure accuracy of consumer data in their files. The CFPB also previously did not instruct CRAs to directly conduct independent investigations of reported information that consumers have disputed. The Comptroller General observed the CFPB often relied on third-party information furnishers to perform such investigations. GAO Report at 35.
371. GAO Report at 2.
372. *See* General Data Protection Regulation Full Text, EUROPEAN PARLIAMENT, <https://gdpr-info.eu/>.
373. European Commission Regulation 2016/679 (General Data Protection Regulation), art. 83-4, 2016 O.J. (L 119), 1. (2016).
374. *Id.*
375. Adam Satariano, *British Airways Faces Record Fine for Breach*, N.Y. Times, July 9, 2019, at B3. Available at <https://www.nytimes.com/2019/07/08/business/british-airways-data-breach-fine.html>.
376. The New York Times reported that, as of July 8, 2019, the British regulators’ decision to impose a \$230 million fine was “not final.” *Id.* The U.K. Information Commissioner’s Office website has not yet reported that the fine has been made final. *See* Information Commissioner’s Office, *Intention to Fine British Airways £183.39m Under GDPR for Data Breach*, July 8, 2019, <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2019/07/ico-announces-intention-to-fine-british-airways/>. [last accessed March 14, 2021]. Shannon Keith of the UK Information Commissioner’s Office (ICO) in a July 10, 2020 email confirmed no final monetary penalty has as yet been imposed on British Airways, and the ICO continues to review the BA response to the \$230 million interim fine. The ICO advises it will publish the fine in final form when the Commissioner’s Office considers it “appropriate to do so.”
377. A portion of the 2019 Equifax settlement proceeds represents a penalty equaling \$275 million. That sum approximates 0.9 percent of Equifax annual revenue for fiscal year 2017, and 0.8 percent of its 2018 fiscal revenue. Published terms of the settlement do not indicate whether U.S. regulators formulated the \$275 million fine based on a percentage of Equifax revenues.
378. *See supra* text associated with note 241. The CFPB rule predates the GDPR. CFPB rule 1002 (12 C.F.R. § 1002.16[b][1]), identifying penalties the Bureau may pursue, came into effect in 2011. The GDPR took effect in May 2018.
379. 15 U.S.C. 1681t(a). *See* NY GBL § 380-c(d) (the right of New York employers not to hire an applicant who refuses to authorize an investigative consumer report) and *compare* NYC Credit Check Law (precluding most private employers from obtaining or making any use of consumer credit reports investigative or otherwise). N.Y.C. Admin. Code §§ 8-102(29).
380. *See* NY GBL § 380-c(d).
381. *See, e.g.*, N.Y.C. Admin. Code §§ 8-107(9)(b),(d). *Compare* 15 U.S.C. § 1681t(a).
382. *See generally* 15 U.S.C. § 1681t and NY GBL § 380-n.
383. *See*:
(i) Kristle Cortés, Andrew Glover, and Murat Tasci, *The Unintended Consequences of Employer Credit Check Bans for Labor Markets*, Federal Reserve Bank of Kansas City RWP 20-04 (July 2020). [https://www.kansascityfed.org/~media/files/publicat/reswkpap/pdf/rwp20-04.pdf](https://www.kansascityfed.org/~/media/files/publicat/reswkpap/pdf/rwp20-04.pdf));
(ii) Joshua Ballance, Robert Clifford, and Daniel Shoag, “No more credit score” – *Employer credit check bans and signal substitution*, LABOUR ECONOMICS, Elsevier, vol. 63 (April 2020). The authors report the article also is available at (<http://www.bostonfed.org/economic/wp/index.htm>); and
(iii) Alexander W. Bartik and Scott T. Nelson, *Deleting a Signal: Evidence from Pre-Employment Credit Checks* (December 2019). Available at https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_2019137.pdf.
384. *See id.*
385. *Id.*
386. *See* Leora Friedberg, Richard M. Hynes, and Nathaniel Pattison, *Who Benefits from Bans on Employer Credit Checks?* (July 2019). https://pattison-nate.github.io/files/CreditReportBans_07262019.pdf.
387. *Id.*
388. *Id.*