

CFPB Settlement Shows Common FCRA Compliance Flaws

By **David Anthony, Alan Wingfield and Sarah Crandall** (November 30, 2020)

A new settlement obtained by the Consumer Financial Protection Bureau with debt collector Afni Inc. under the Fair Credit Reporting Act not only illustrates continuing focus by regulators on FCRA compliance, but also hones in on recurring compliance issues.

These problems concern: accurate reporting of the date of first delinquency; technical glitches resulting in mass misreporting of data; records used in completing investigation of consumer disputes; meeting of dispute response deadlines; handling of frivolous consumer disputes; and a lack of adequate policies and procedures.

Under the consent order, entered on Nov. 12, Afni, a telecommunications debt collector, agreed to implement additional safeguards against inaccurate reporting and pay a \$500,000 civil penalty. The consent order concluded a CFPB investigation into Afni's FCRA violations.

Background

Afni is an Illinois corporation that collects defaulted debts on behalf of telecommunications companies. It then furnishes information about consumer accounts to credit reporting agencies, or CRAs. Afni uses an automated system that applies furnishing logic to translate account files to report information to the nationwide CRAs.

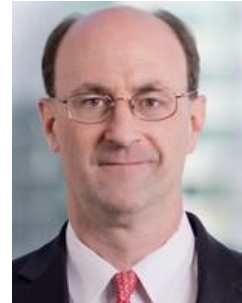
The CFPB initiated an investigation into Afni's credit reporting practices between 2016 and 2018, following allegations that Afni had been reporting incorrect account information without taking sufficient care to prevent those inaccuracies or providing debtors an opportunity to correct the errors. The investigation centered on Afni's compliance with the FCRA and its implementing rule, Regulation V.

The CFPB's Findings

The CFPB's investigation concluded that Afni had violated the FCRA in several ways. While the CFPB found a lengthy list of violations, the CFPB's findings highlight certain recurring areas of FCRA regulatory focus.

First, the CFPB found that a technical problem had resulted in mass misreporting of information. It held Afni had violated Section 623(a)(1)(A) of the FCRA, which prohibits reporting information when it knew or had "reasonable cause to believe that the information was inaccurate."

It found that between March 2016 and July 2017, the furnishing logic in Afni's automated system had mistranslated account files for reporting to nationwide CRAs. As a result, Afni had reported that consumers had paid zero dollars on roughly 165,000 accounts, even though they had in fact made payments.



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It also erroneously reported that 72,000 accounts had current balances and amounts past due, even though those accounts were actually settled in full. Since the information furnished was different from the information in Afni's records, the CFPB concluded that Afni knew or had reason to believe the reports were inaccurate.

Second, the CFPB found that Afni had not accurately reported the date of first delinquency, a data point expressly required by the FCRA and one that drives obsolescence and hence aging-off of derogatory tradelines. The CFPB determined that Afni had violated Section 623(a)(5) of the FCRA, by failing to furnish the date of an account's first delinquency.

It found that Afni's creditor clients did not furnish accounts to CRAs before sending accounts to collection and often did not provide Afni with a date of first delinquency. Rather than setting a policy of following up with its creditor clients, Afni would furnish to CRAs one of the other dates provided by creditors, such as the service disconnection date or the debt charge-off date. Since these dates usually occur well after the date of first delinquency, the CFPB determined that Afni's reporting was inaccurate.

Third, the CFPB found that Afni had not conducted reasonable investigations of disputes because it limited its reviews to a limited set of inadequate documentation in its own files, rather than reaching out, as needed, to original creditors. It held that Afni violated Section 623(b)(1) of the FCRA, which governs a collector's response to consumer reporting disputes reported first to the CRA and then by the CRA to the collector.

The CFPB found that on multiple occasions, Afni had received detailed disputes, but rather than reaching out to the creditor for more information, had relied on the inadequate information in its own files. The CFPB added: "A reasonable investigation must be responsive to the specific allegations in the consumer's dispute; the more specific a dispute is, the more thorough the investigation should be."

Additionally, Afni uses automated software to handle some disputes, but the program only considered information Afni already had, did not access any of the clients' files, and did not refer the disputes to the clients for investigation. Therefore, the CFPB held that Afni had not conducted reasonable investigations upon receiving notice of a dispute from a CRA.

Another aspect of Afni's processes was also found to result in inadequate investigations. Afni also failed to conduct reasonable investigations of disputes reported directly to it by consumers, violating Section 623(a)(8)(E)(i) of the FCRA and Section 1022.43(e)(1) of Regulation V. The CFPB found that Afni had "systematically treated direct disputes under FCRA and disputes under the Fair Debt Collection Practices Act (FDCPA) as indistinguishable."

The FDCPA requires that collectors respond to written consumer disputes merely by sending validation in the form of a bill or other proof of the debt. However, validation of a debt is insufficient to satisfy the FCRA's reasonable investigation requirements.

Afni often failed to forward disputes to the originating client and sometimes simply checked its own records. Between January and June 2017, Afni could not access its client's system files but did not investigate further.

In other disputes relating to paid accounts between April 2016 and June 2017, Afni only responded to a consumer's first two dispute submissions and ignored the rest. In still other instances between March 2016 and May 2018, Afni would simply delete tradelines from credit reports rather than investigate the dispute. Therefore, the CFPB held that Afni had

not satisfied the FCRA and Regulation V's investigation requirements for direct disputes.

Fourth, the CFPB focused on Afni's process for handling frivolous disputes. The FCRA allows creditors to close disputes without an investigation if the creditor determines that they are frivolous or irrelevant.

However, the CFPB found that Afni failed to notify consumers when it had deemed their disputes frivolous or irrelevant and did not have written policies in place to standardize those determinations. Thus, the CFPB concluded that Afni had violated the response requirements in Section 623(a)(8)(E)(iii) of the FCRA and Section 1022.43(e)(3) of Regulation V.

Fifth, the CFPB determined that Afni had also violated Section 623(a)(8)(E)(iii) of the FCRA and Section 1022.43(e)(3) of Regulation V by neglecting to respond to disputes within the required 30-day window. According to the CFPB, Afni's noncompliance resulted from its conflation of time-sensitive FCRA responses with open-ended FDCPA responses, internal backlogs, and Afni's failure to respond to disputes once the account had been recalled by the originating client.

Sixth, the CFPB concluded that Afni's existing policies and procedures were insufficient to comply with Section 1022.42(E) of Regulation V. It pointed to the laissez faire policy for responding to indirect disputes, the lack of written policies governing its automated dispute resolution system, its conflation of FDCPA and FCRA duties, its lack of policies governing dispute investigations under the FCRA, and its lack of policies for determining which disputes were frivolous and notifying consumers accordingly.

The CFPB also found that Afni did not regularly review what policies it did have, despite knowing that its employees were not complying with those policies or the FCRA, and had not incorporated Regulation V's policy guidelines.

As a result, the CFPB held that Afni had also violated the Consumer Financial Protection Act, Section 1036(a)(1)(A), by violating a federal consumer financial law.

Terms of the Consent Order

To remedy these violations, the CFPB issued a consent order under Sections 1053 and 1055 of the CFPA.

Under the consent order,[1] Afni agreed to review samples of the account information it supplies to credit reporting agencies for accuracy and proper file conversion, as well as review its handling of consumer disputes for FCRA compliance, on a monthly basis. It also agreed to review and update its policies to address deficiencies and ensure compliance annually and to provide sufficient staffing and systems to accurately respond to disputes in a timely fashion.

The consent order also requires Afni to retain an independent consultant, specializing in FCRA and Regulation V compliance and approved by the CFPB's regional director, to independently review Afni's credit reporting policies and procedures. The consultant will provide a report to Afni's compliance committee within 180 days of the order's entry.

The compliance committee in turn will review it and develop any necessary compliance plans before submitting the report to the CFPB regional director within 20 days of its receipt. Afni's board must review all submissions prior to submission to the CFPB and is

responsible for ensuring future compliance.

In particular, Afni must submit two compliance progress reports, one 180 days after the order's entry and the other one year after the order. The order also includes various ongoing notice, acknowledgement, and record preservation and production provisions.

As an additional deterrent to future noncompliance, Afni agreed to pay \$500,000 to the CFPB as a civil money penalty under Section 1055(c) of the CFPA.

Looking Forward

This investigation confirms the CFPB's ongoing interest in credit reporting issues. Credit reporting complaints outstripped those relating to debt collection in the first four months of 2020 and increased in the wake of the COVID-19 pandemic.

Between Jan. 1 and Nov. 20, the CFPB logged over 235,000 complaints tagged by the complainant as relating to credit reporting, compared to 46,000 related to debt collection. Of the 235,000 complaints, nearly 165,000 involved claims of incorrect reporting, and over 50,000 cited problems with a CRA's investigation into the problem.[2]

If this trend continues, debt collectors can expect to see increased scrutiny of their tradeline reporting practices.

Furthermore, the lessons here affect furnishers of all types, not merely debt collectors, as the FCRA compliance issues addressed by this consent order are recurring ones in CFPB investigations. For example, the CFPB has engaged in multiple significant enforcement actions based on technical glitches.

In 2014, the CFPB fined DriveTime Automotive Group Inc. \$8 million and implemented additional compliance measures, in part because of DriveTime's use of third-party skip-tracing databases that resulted in calls to wrong numbers and in part due to reporting errors caused by DriveTime's transition to a third-party loan servicing platform.

It also engaged in another 2014 enforcement action involving both technical flaws in a computer reporting system and misreporting of the date of first delinquency, fining First Investors Financial Services Group Inc., an auto finance company, \$2.75 million and ordering it to change its business practices.

Additionally, a medical debt collector, Syndicated Office Systems LLC, was investigated for missing dispute response deadlines in 2015 and fined \$500,000. This consistent pattern of investigations, reinforced by the Afni order, demonstrates that regulators continue to focus on computer error, response deadline and first delinquency date issues.

Beyond signaling the continued CFPB focus on FCRA compliance, the consent order with Afni also signals a lack of taste by companies to dispute charges through costly litigation, particularly given that courts may not allow the company to recover its legal fees, even if it successfully defends against the allegations.[3] If Afni's actions are any indicator, debt collectors and other furnishers may find ongoing compliance measures less costly than a lawsuit.

Furnishers should take steps to ensure that their internal and third-party vendor systems and policies do not expose them to CFPB scrutiny, particularly in the hot-button areas highlighted in this most recent consent order.

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[1] Consent Order, CFPB v. Afni, Inc., No. 2020-BCFP-0021 (Nov. 12, 2020).

[2] Consumer Financial Protection Bureau, Consumer Complaint Database, https://www.consumerfinance.gov/data-research/consumer-complaints/search/?dataNormalization=None&date_received_max=2020-11-20&date_received_min=2020-01-01&searchField=all&tab=Map (accessed Nov. 20, 2020).

[3] See, e.g. CFPB v. Weltman, Weinberg, & Reis, No. 1:17-cv-00817, 2018 U.S. Dist. LEXIS 181062, at *6 (N.D. Ohio 2018) (denying defendants' motion to recover their attorneys' fees despite prevailing on the merits).