

***THE CONSUMER FINANCE PODCAST***  
**CFPB Advisory Opinion on Name-Only Matching Under FCRA**  
**S01EP10**  
**HOST: CHRIS WILLIS**  
**GUESTS: ALAN WINGFIELD AND NOAH DIPASQUALE**

**[CHRIS WILLIS]**

Welcome to *The Consumer Finance Podcast*.

I'm Chris Willis, the co-practice leader of Troutman Pepper's Consumer Financial Services Regulatory Group, and we have a great topic for you today about the CFPB's advisory opinion on name-only matching for consumer reporting. But before we get into that topic, let me remind you to visit and subscribe to our blog:

[ConsumerFinancialServicesLawMonitor.com](http://ConsumerFinancialServicesLawMonitor.com), where you're going to see daily updates about everything happening in the consumer finance industry. And don't forget to check out our other podcast, *FCRA Focus*, which is released monthly on all popular podcast platforms. And finally, if you like our podcast, let us know. Leave us a review on your podcast platform of choice.

Now, as I said, today we're going to be talking about that recent CFPB advisory opinion on name-only matching for certain types of consumer reporting, and I'm joined by two of my Troutman Pepper colleagues to talk about that. I've got Alan Wingfield and Noah DiPasquale both to talk about that. So, Alan, Noah, welcome to the podcast.

**[ALAN WINGFIELD]**

Thank you, Chris. I'm happy to be here.

**[NOAH DIPASQUALE]**

Thanks, Chris. Glad to be here.

**[CHRIS WILLIS]**

Well, thank you both for being here. And let me just introduce the topic a little bit. A little bit earlier this year, the CFPB released an advisory opinion criticizing what it perceived to be the practice of matching consumer reporting information by certain types of CRAs to individual consumers by what the bureau referred to as name-only matching. And so that's what we're going to be talking about today. So, Noah, let me start off with you. Can you just give us a little bit more detail about the advisory opinion? What was it and what did it say?

**[NOAH DIPASQUALE]**

Thanks, Chris. So, as you mentioned, we're talking about the advisory opinion that the CFPB issued regarding name-only matching under the Fair Credit Reporting Act. So, we should start with the problem that the CFPB says it's trying to address with this advisory opinion which is the practice of name-only matching by consumer reporting agencies and whether that complies with requirements of the Fair Credit Reporting Act. So, as many of your listeners may know, the Fair Credit Reporting Act requires that whenever a consumer reporting agency prepares a report, it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates. But the

advisory opinion that the CFPB released focuses on a very specific type of matching that comes up in the context of preparing consumer reports and that is preparing consumer report and matching information to a specific consumer based only on the consumer's name. Now a problem arises with this because there's an issue with there being limited unique and distinct identifiers available for consumer reporting agencies to use when they're looking at certain public records and other sources for consumer information. In fact, there are very few truly distinct and unique identifiers, but even among the records that are available, oftentimes the types of identifiers are limited -- you only have a name or perhaps a name and a date of birth. One example might be state sex offender records, which often are published only with a year of birth and not a full date of birth. Other issues are caused by public records such as the State of Michigan recently their supreme court adopted a rule that would redact date of birth information from court records. So, you see this problem of having limited identifiers available that then requires consumer reporting agencies to have a challenge when it comes to if they are trying to match specific information to a specific consumer, how to do that. At the same time, there's a demand from a lot of companies, whether they are in the credit or leasing or employment context, where they need to make proper decisions. So that problem can create attention and the advisory opinion takes aim at attaching or matching information to a specific consumer based only on a name.

A quick word about what this advisory opinion actually is. It's not an official regulation by the CFPB. It's an interpretive guidance or an interpretive rule as the CFPB refers to it, that's issued underneath the CFPB's advisory opinion policy, which allows it to issue these kinds of interpretive guidance for the purpose of providing additional clarity for the regulations that they administer. Now in the past, this advisory opinion policy has actually only been used three times to address some very narrow and discrete questions that were left open, for instance, under the Truth in Lending Act or the Equal Credit Opportunity Act, define the applicability of certain definitions to very specific factual circumstances. This advisory opinion to many seems much broader than that, as it's addressing kind of a wider fact intensive inquiry as to what is a reasonable procedure. Nevertheless, the CFPB issued this advisory opinion. Practically speaking, it's not binding, as it's not an official regulation, but it does reflect the position of the CFPB that it will take in its investigations, its enforcement actions, and courts are supposed to defer to an agency's interpretation of the laws that it administers. So, it does have some teeth and it's not completely inert.

**[CHRIS WILLIS]**

Thanks, Noah. And so, Alan, I know that the consumer reporting industry has some concerns about the content of the advisory opinion. Could you share those with us?

**[ALAN WINGFIELD]**

Yes, thank you, Chris. We've talked about three major concerns with the substance of this advisory opinion. First, the advisory opinion creates a real source of confusion on a really important part of how consumer reporting agencies operate in the areas of reporting public records in particular. And the confusion interjects is on not addressing, not acknowledging the difference between a consumer reporting agency that's reporting a match. That is, it's saying this record does, in fact, apply to a specific consumer, versus the consumer reporting agencies who report records as a response or hit, in response to a user's request records meeting certain criteria. So, the difference is a little bit nuanced but critical, as I'll explain in a minute. So, let's talk about the distinction to make sure we're straight on that. So, a match is where a consumer reporting agency is actually telling the user, here is a record that we

believe applies to this specific consumer that you're interested in. A hit is when the consumer reporting agency says here are records that meet the search criteria that you have given us user. And we're not telling you this actually applies to any specific human being. So, in that latter scenario, the user could say please give me all records for a person with a specific name and the consumer reporting agency return the records meeting a specific name, but the consumer reporting agency is not saying those records are germane to any specific person. It is lawful under established case law for consumer reporting agency to return records that are unmatched. That are just hit responses. And that was firmly established in a quite important decision issued by the Eleventh Circuit Court of Appeals in 2020, *Erickson v. First Advantage* case, the case citation is 981 F.3d. 1246, where the Eleventh Circuit said it was lawful and accurate for a consumer reporting agency to return a record on a consumer when their consumer reporting agency is not representing it actually applies to any specific consumer. CFPB in its advisory opinion did not address this issue. Did not even cite the *Erickson* decision, and so it creates this potential for confusion where—you can see it coming, guys – 35 years of litigation experience, you can see how things are going to develop. A plaintiff's lawyer is going to into court saying that this advisory opinion says that you can't report an unmatched record on consumers. Basically, reporting hits is illegal, but consumer reporting recording agencies can only transmit information that the consumer reporting agency does sufficient steps to match a record actually to a specific individual, basically implicitly reversing *Erickson* case. And so, the first big concern is the potential for confusion when that happens. When people try to use this advisory opinion to attack the lawful activity reporting hits by consumer reporting agencies, unmatched records.

The second big concern here is there was really no consideration given by the CFPB to the problem of false negatives. What they're concerned about here is solely about false positives. That is the possibility a record might be attributed to somebody when the record does not apply to that person. That can cause harm to the individual consumer as the CFPB indicates. But the CFPB doesn't understand, they gave no weight to whatsoever, is the problem when a record that should be reported as to a consumer is not, and a mistake is made by a decisionmaker as a result. So, people are not getting these consumer reports for background screening purposes. They're doing it to mitigate real risks: non-payment on a credit, the risk of someone who might be a hazard to an employer in terms of potential theft, misconduct, or even on the job violence, and risk in housing context of someone who has a history of property or criminal bent behavior that you don't want in your premises. Those can be risks not only to the employer, the housing provider, or the credit grantor, but these are risks that others would absorb as well, like neighbors in housing project, or other employees or customers at an employer's place of business. So, there's a lot of interest in aborting false negatives as well, and CFPB knows well, as Noah indicated, that there are problems in certain types of records and identifiers not being available, in fact there's been a crackdown on providing good identifiers among the states, yet no weight was given whatsoever to that in their analysis.

And finally, there's a conceptual problem that Noah mentioned as well. The test here, reasonable procedures to assure maximum possible accuracy is obviously a very contextually driven fact intensive inquiry that requires you to look at individual facts and circumstances of a given situation, yet the CFPB barges in and attempts to give a black letter rule to apply to all circumstances when the actual inquiry by the very nature of it requires you look at the facts and circumstances of an individual situation. So really there's a pretty strong backlash against this opinion on the substance in the industry. These are serious concerns and how they'll play out is to be seen.

**[CHRIS WILLIS]**

Well, thanks, Alan. It sounds like there's a lot of reason for legitimate concern about this opinion in terms of its content. But Noah, let me ask you, I think I also have heard that there are concerns about the process followed by the CFPB in issuing the advisory opinion. Can you tell us a little bit about that?

**[NOAH DIPASQUALE]**

Yeah, Chris, that's right. Again, as I mentioned a little bit earlier, this was issued under the CFPB's advisory opinion policy, so it's technically legal and according to the guidelines in that policy, but that policy provides some loose standards or factors for consideration for the CFPB in issuing these types of interpretive guidance on requests submitted by interested parties, is the way it's phrased. But it also has kind of a catchall at the end that says it may also issue opinions based on questions received "from the public or through other channels." And it seems that's what happened here specifically. So, there's really two problems with the process here that is kind of an example of a poor process leading to the poor results that Alan was describing in the content.

Number one, so we see that this advisory opinion was initiated and really kind of instigated by one side of the equation of the argument so to speak. So, it was initiated by plaintiffs' lawyers, specifically the National Consumer Law Center is specifically mentioned in the advisory opinion in that it acknowledges that the NCLC and other consumer and civil rights groups recently requested that the bureau provide guidance that name-only matching is a practice that fails to comply with the FCRA. So that's right there in the advisory opinion. We know that's where they received the request from. Troutman also sent a FOIA request to the CFPB to get a little bit more background on where this came from and what the CFPB considered and whether there was any other input from other sources. And really that just confirmed what the advisory opinion says is accurate. That the only sources consulted was pretty much the NCLC and other consumer advocate groups, which in and of itself, there's nothing wrong obviously with the NCLC requesting an advisory opinion and wanting a seat at the table. But the problem is that it seems to have been a very one-sided process. There was no consultation with the industry, with the consumer reporting agencies and trade organizations that represent the voice of that industry. There was no notice and comment part of this because it is not an actual, not an official regulation. But the result of that means that there was no opportunity really for any comment from the industry side of the equation. So, what you see it is a result that came about without any kind of adversarial process to test and to kind of pull against and create a tension on the content of this opinion and whether or not the legal analysis stands up and whether it would be practically something that could be employed in the real world. It didn't benefit from any of that rigorous testing.

Another issue is that although it is within the limits of what the advisory opinion policy allows for, it is arguably not a proper subject for an advisory opinion under that policy. The policy, if you look at it, specifically states that where a regulation or statute establishes a general standard that can only be applied through a highly fact intensive analysis, in those instances the bureau would not intend to replace that analysis with a bright line standard that eliminates all the required analysis. That's what the policy itself states. It seems like this falls more towards that kind of a category, especially given the very general standard that Congress created under the Fair Credit Reporting Act regarding following reasonable procedures to assure a maximum possible accuracy. It's a very fact intensive type inquiry and the case law obviously bears that out. So, at least with regard to consumer reporting agencies that match

specific information to specific consumers as Alan was discussing, this would seem to replace that fact intensive application of a general standard with a bright line rule that doesn't look to the specific fact context, as Alan describes. So, it at least arguably, is not in line with the statements given in the advisory opinion policy as to what that policy is made for.

**[CHRIS WILLIS]**

That's very disappointing to hear all that, that the CFPB adopted this advisory opinion under those circumstances. But you know, now we've got it and it's on the books, so to speak, as informal as it may be. So, Alan, now that it's out there, what do you think the potential impact of the advisory opinion may be on consumer reporting agencies?

**[ALAN WINGFIELD]**

Well consumer reporting agencies are going to need to take a look at their compliance strategies reporting records when the identifiers that they have are non-definitive. So, with the exception of credit trade line reporting, most records that have been out there do not have attached to them unique identifiers, such as social security numbers or driver's license numbers. Many, many records out there don't have perfect identifiers. So CRAs are doubtlessly going to be looking at their policy procedures, see how they align with this opinion and perhaps adjusting compliance strategies. Frankly, it may yet turn out that one of the biggest impacts are number one, some incremental reduction in the amount of records that are reported by CRAs and then increased litigation in court as plaintiffs' lawyers attempt to leverage the opinion to call into question quality, well accepted practices, simply because the CFPB says so. I think the industry is going to have to look at its compliance strategies and may turn the dial back on what's getting reported as a result.

**[CHRIS WILLIS]**

Yeah, and so Alan, I mean staying with you, we've talked about the potential impact on the CRAs that might provide information. What about the potential impact of this advisory opinion on users of consumer reports, the kinds of users that you were talking about earlier in the program.

**[ALAN WINGFIELD]**

Well, the CFPB is certainly trying, attempting to create, and there's a real possibility what will happen is reduced transmittal through the consumer reporting industry of records about people. Just cutting back records. Typically, the records we're talking about are potentially derogatory about consumers—arrest records, incarceration records, eviction records, traffic records, etc. And so, the amount of that that's going to be flowing through the consumer reporting system will be reduced, and decision makers are making eligibility determinations. Users of information will have less information. Less information leads to more mistakes being made in decisions with impacts both on employer, housing providers, credit grantors, but also on the third parties I mentioned. So, more costs, more risks for users because they have less information to make good decisions.

**[CHRIS WILLIS]**

And Alan, you mentioned private litigation earlier in the podcast, and of course there's a private right of action under the FCRA and it's one of the most frequently litigated federal statutes out there. What do you think a court will do in reacting to this advisory opinion? Do we think that it will just be given deference because it's the word of the CFPB, or what might a court do with this?

**[ALAN WINGFIELD]**

Well, as Noah says, law is currently written indicates that statements of a regulatory agency on statutes that have regulatory authority over, are due some degree of deference in court. Certainly, plaintiffs' lawyers and probably the regulators as well, when they go into court will cite this advisory opinion as authority and say that the court should defer to it. As a practical matter, for the reasons we've gone over here, one hopes the court system recognizes that this advisory opinion is coming into court under a cloud. The bad process, bad legal analysis, it doesn't even address the key issues of reporting hits versus reporting matches. So, I guess I would say ultimately this would become part of the toolbox for plaintiffs' lawyers and regulators in court, but one can hope that the court system will see through this for what it is and give it the amount of deference that's due, which quite frankly is probably not much. We shall see and cross our fingers.

**[CHRIS WILLIS]**

Okay. Well Alan and Noah, I want to thank you both for being on today's podcast and sharing your perspective on this name-only matching opinion. Sounds like another controversial thing that the CFPB has done and this time probably one that will be evaluated by a number of federal courts in private litigation as you just mentioned, Alan.

And I'd also like to thank our audience for tuning into to today's episode. Don't forget to visit our blog at [ConsumerFinancialServicesLawMonitor.com](http://ConsumerFinancialServicesLawMonitor.com) and hit that subscribe button so that you can get all of our updates on what's going on in the consumer finance industry. And head over to [Troutman.com](http://Troutman.com) and add yourself to our consumer financial services email list so that you can get our alerts and get notice of our industry webinars. And of course, stay tuned every Thursday afternoon for a great new episode of this podcast. Thank you all for listening.

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